

1998

Some Effectual Power: The Quantity and Quality of Decisionmaking Required of Article III Courts

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"SOME EFFECTUAL POWER": THE QUANTITY AND QUALITY OF DECISIONMAKING REQUIRED OF ARTICLE III COURTS

James S. Liebman and William F. Ryan***

Did the Framers attempt to establish an effectual power in the national judiciary to void state law that is contrary to federal law, yet permit Congress to decide whether or not to confer federal jurisdiction over cases arising under federal law? Does the Constitution, then, authorize its own destruction? This Article answers "yes" to the first question, and "no" to the second. Based on a new study of the meticulously negotiated compromises that produced the texts of Article III and the Supremacy Clause, and a new synthesis of several classic Federal Courts cases, the Article shows that, by self-conscious constitutional design, and by dint of a consistent pattern of constitutional interpretation by the Supreme Court, the principal mechanism for keeping federal law supreme over contrary state law is not an assured "quantity" of federal "arising under" jurisdiction but, instead, an assured "quality" of federal judging in cases in which Congress confers jurisdiction. Encompassed within "[t]he judicial Power" are five qualitative means to the overriding structural objective of national legal supremacy: An Article III court must decide (1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme law and neutralizes contrary law. Applying these principles, the Article explains why the qualified immunity and Teague v. Lane doctrines, and one reading of amended section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act, are constitutional, and why the Fifth, Seventh, and Eleventh Circuits' reading of section 2254(d)(1) is unconstitutional.

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INTRODUCTION: A CONSTITUTIONAL CONUNDRUM AND ITS
RESOLUTION THROUGH "THE JUDICIAL POWER" AND
THE SUPREMACY CLAUSE

The irregular and mutable legislation is not more an evil in itself than it is odious to the people . . . of this country . . . [who] will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations.

*The Federalist No. 37 (James Madison)*¹

To correct vices [of the Articles of Confederation] is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?

*James Wilson*²

No man of sense will believe that such [constitutional] prohibitions [of actions by state legislatures] would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.

*The Federalist No. 80 (Alexander Hamilton)*³

To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?

*John Marshall*⁴

The state courts. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction . . . then we really would be sunk.⁵

[T]he difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but [tries to] put[] strings on it. . . . When the way of exercising jurisdiction is in question, rather than its denial, the constitutional tests are different.⁶

1. *The Federalist No. 37*, at 243 (James Madison) (Isaac Kramnick ed., 1987).

2. 1 *The Records of the Federal Convention of 1787*, at 167 (Max Farrand ed., 1911) (June 8, 1787) [hereinafter Farrand].

3. *The Federalist No. 80*, at 445 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

4. 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (1866) (statement of John Marshall at Virginia ratifying convention) (June 20, 1788).

5. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953).

6. *Id.* at 1372.

[J]urisdiction always is jurisdiction only to decide constitutionally.⁷

Henry Hart

In 1953, Professor Henry Hart noted that "[t]he reports are full of what may be thought to be injudiciously unqualified statements of the power of Congress to regulate the jurisdiction of the federal courts."⁸ So, arguably, is Article III of the United States Constitution.⁹ Indeed, the combination of Congress's seemingly "plenary"¹⁰ "Exceptions, and . . . Regulations" power regarding the Supreme Court's appellate jurisdiction and its "may [or may not] . . . ordain and establish" power regarding the lower federal courts,¹¹ and its equally broad power to withhold consent to lawsuits against the United States,¹² creates (in Hart's phrase) "a double reason . . . why Congress has an absolute power over legal relations between the Government and private persons."¹³ Similarly, although not discussed by Hart, the combination of Congress's power to limit federal jurisdiction, and the Eleventh Amendment and common law immunity of the states and their officers,¹⁴ creates a "double reason" why federal judicial review of state law and action is unprotected and unstable. "How," Professor Hart asked, posing the central conundrum of federal

7. Id. at 1402.

8. Id. at 1362; see, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); Hart, *supra* note 5, at 1363-66 (citing cases); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671, 675-77 & nn.10, 12, 13 & 16, 681 n.42, 704 n.162, 712 n.195, 748 n.363 (1997).

9. See, e.g., *infra* notes 125-133, 203-208, 223-226, 267, 273-277, 287-289, 298 and accompanying text (discussing Article III's apparent grant to Congress of the power to decide (1) whether or not to "ordain and establish" inferior federal courts, (2) which cases or controversies the entire federal judiciary's jurisdiction "shall extend to," and (3) what "Exceptions, and . . . Regulations [it] shall make" in regard to the Supreme Court's appellate jurisdiction). For the majority view that "the plan of the Constitution . . . was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts," Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965), see, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 901, 906 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 207-08, 216-20, 243-47 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1569 (1990); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. Rev. 143, 145-46 (1982). But see articles cited *infra* notes 17-22.

10. William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 Ariz. L. Rev. 229, 260 (1973).

11. U.S. Const. art. III, §§ 1, 2.

12. See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

13. Hart, *supra* note 5, at 1370.

14. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122-32 (1996) (discussing states' Eleventh Amendment immunity); *Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984) (extending a qualified immunity to state officials sued for damages in their personal capacities for actions taken under color of state law).

jurisdiction and of this Article, can Congress's powers and these official immunities "be reconciled with the basic presuppositions of a regime of law and of constitutional government?"¹⁵

Insofar as the consistency of state law and behavior with federal law is concerned, the answer Professor Hart gave was that "state courts . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."¹⁶ That answer has not proved satisfactory to many commentators. In Professor Amar's representative statement of the problem, the Constitution's habitual reliance on "structural mechanisms to harness the interplay of competing self-interest" makes it "grossly out of character"—indeed, "naively blind" and "unthinkable"—"for the framers to have committed 'ultimate' trusteeship of the Constitution to state judges, whose appointment, tenure and removal were nowhere even mentioned in, much less prescribed by, the [Constitution]."¹⁷ This view has led some commentators to read Article III to mandate federal (or, perhaps, only Supreme Court appellate)¹⁸ jurisdiction over all cases¹⁹ (or, at least, all legal as opposed to factual questions presented by all cases)²⁰ falling within the nine heads of jurisdiction listed in Section 2 of that article, or at least over all cases insofar as they present federal (or, perhaps, only constitutional)²¹ questions.²²

Letting state action escape federal review also troubles prominent scholars who read the Constitution to *allow* Congress to make state courts

15. Hart, *supra* note 5, at 1363.

16. *Id.* at 1401; see *id.* at 1363–64 ("Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.").

17. Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 237–38 & n.112, 250 (1985); see, e.g., Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 522 (1974); Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 64, 68 (1981).

18. See Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 160–61 (1960).

19. See William Winslow Crosskey, Politics and the Constitution in the History of the United States 610–20 (1953); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 212, 239–47 (1971); 3 Joseph Story, Commentaries on the Constitution § 1696 (1833); Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 844–55 (1984).

20. See Raoul Berger, Congress v. The Supreme Court 285–96 (1969) (later repudiated in favor of broad congressional power over federal jurisdiction, see Raoul Berger, Michael Perry's Functional Justification for Judicial Activism, 8 U. Dayton L. Rev. 465, 512–27 (1983)); Irving Brant, Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause, 53 Or. L. Rev. 3, 27–28 (1973); Henry J. Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53, 54 & n.6 (1962).

21. See, e.g., Eisenberg, *supra* note 17, at 522, 527; Sager, *supra* note 17, at 42–68.

22. See Amar, *supra* note 17, at 229–30, 238–59 (arguing that federal jurisdiction is mandatory in federal question, admiralty, and ambassadorial cases).

the ultimate arbiters of most questions of federal constitutional law. Particularly poignant are two statements by Professor Bator:

The "states' rights" argument at the Constitutional Convention was that there was no need for lower federal courts precisely because the appellate jurisdiction of the Supreme Court would provide sufficient assurance of the supremacy and uniformity of federal law in cases decided by the state courts. It was the premise of this argument that the Supreme Court *would* have the power to review cases originating in the state courts concerning issues of federal law. It was plainly not contemplated that the system could work effectively with the state courts as courts of *last resort* on issues of federal law.²³

If the Constitution means what it says, it means that Congress can make the state courts . . . the ultimate authority for the decision of any category of case to which the federal judicial power extends.²⁴

A similar unease underlies a third school of thought, that the Framers deliberately obscured the answer to the question of how much jurisdiction the federal courts must have, to let Congress and the Court work out a solution to a problem the Framers could not solve.²⁵

This Article argues that the Framers not only saw the problem but solved it. They did so, to be sure, by compromising in favor of an "untried and untested" experiment in which Madison, for one, initially had little faith.²⁶ But in the process of agreeing on that experiment, they endeavored with exquisite care to draft constitutional language that precisely embodied the experiment's protocols and made them enforceable against both Congress and the courts. Moreover, the solution the Framers embedded in the much-negotiated texts of Article III and, crucially, Article VI's Supremacy Clause is nearly the opposite of the one that subsequent commentary has thought to be necessary, even if (e.g., in Bator's view)²⁷ textually impossible. The Framers did not assume that the quality of state judicial review of state law for consistency with federal law was so low that large quantities of mandatory federal question jurisdiction were required. Rather, the Framers invited Congress to place the vast quantity of federal question jurisdiction in the hands of "the Judges in

23. Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 *Vill. L. Rev.* 1030, 1038-39 (1982).

24. *Id.* at 1039; accord Gunther, *supra* note 9, at 901, 906; Hart, *supra* note 5, at 1401-02; Velasco, *supra* note 8, at 713.

25. See Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 *Nw. U. L. Rev.* 442, 452-53 (1991); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 *Const. Commentary* 89, 96 (1990); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 *Nw. U. L. Rev.* 1, 50-51 (1990).

26. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1048-50 (1997); see *infra* notes 354-355 and accompanying text.

27. See Bator, *supra* note 23, at 1038-39.

every State"²⁸—constituting what amounts to a distinct structural agency of government lying between the state and federal spheres—while relying upon the constitutionally fortified quality of federal judicial review (insofar as Congress was compelled for practical reasons to authorize it) to assure that state judges performed their constitutionally crucial function.

The Framers thus relied on review by "the Judges in every State" as a check on (or, better, a filter for) state law inconsistent with "the supreme Law of the Land."²⁹ The Framers then designed the qualitatively, not quantitatively, defined "judicial Power" to decide "Cases . . . [and] Controversies"³⁰ *independently, comprehensively, lawfully, finally, and effectually* as a check on state judges (or, better, as a way to "spot-check" state judges' decisions to see if they fulfilled the judges' structurally crucial duties).³¹ The Framers then designed Congress's "Exceptions, and . . . Regulations" and "may . . . ordain and establish" powers to check the federal judiciary. Finally, the Framers used the ambitions of a Congress naturally disposed to aggrandize its sphere of influence at the expense of the states to check its temptation, *in league* with the states, to aggrandize their respective powers at the expense of the national judiciary's spot-checking function.

The Framers' solution to the problem of the fidelity of state law to federal law is important not only because it is a central structural feature of the Constitution but also because, as we show, it supplies the organizing principle for large swaths of American constitutional law. In addition, the solution has bite even today. A key provision of the Antiterrorism and Effective Death Penalty Act of 1996—amended section 2254(d)(1)—requires federal habeas courts adjudicating the legality of a state conviction to limit themselves to considering "clearly established Federal law, as determined by the Supreme Court of the United States" at the time the state high court affirmed the conviction on direct appeal.³² The Fifth, Seventh, and Eleventh Circuits read section 2254(d)(1) to go even further. They would require a federal judge, upon independently reviewing a state decision upholding a conviction on direct appeal, and upon finding the decision inconsistent with clearly established federal law, to effectuate the decision anyway and deny relief unless the decision's legal error is "grave" or "more than clear[]".³³ As we show, the

28. U.S. Const. art. VI, cl. 2.

29. *Id.*

30. *Id.* art. III, §§ 1, 2.

31. The ingredients of "[t]he judicial Power" are defined *infra* text accompanying notes 350–351; see *infra* notes 330–349 and accompanying text.

32. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996) (codified as amended at 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998)).

33. *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997) (following *Lindh v. Murphy*, 96 F.3d 856, 876–77 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997)); see *Neelley v. Nagle*, 138 F.3d 917, 923–25 (11th Cir. 1998); *Drinkard v. Johnson*, 97 F.3d 751, 767–68 (5th Cir. 1996), overruled on other grounds, *United States v. Carter*, 117 F.3d 262, 264 (5th Cir. 1997).

Framers' conception of "[t]he judicial Power,"³⁴ and of the supremacy-maintaining function that underlies that "Power," is consistent with section 2254(d)(1)'s narrower reading (and with the *Teague v. Lane*³⁵ and qualified immunity doctrines that the reading partly mimics), but cannot tolerate the kinds of deference that, on the broader Fifth, Seventh, and Eleventh Circuit reading, section 2254(d)(1) would oblige federal courts to give to state decisions found to violate federal law.

Part I lays out our thesis in a play-by-play rebroadcast of the Constitutional Convention and the carefully negotiated texts of Article III and the Supremacy Clause. Part II then points out how little attention the Supreme Court has given since the framing period to the *quantity* of its and the lower federal courts' jurisdiction to review state law for consistency with federal law and how much attention it has given to preserving the *quality* of its and the lower federal courts' review of state law when Congress confers jurisdiction. The Court, we conclude, has sought to preserve precisely the independence, "whole case," "whole supreme law," finality, and effectualness qualities that the Framers intended to constitute "[t]he judicial Power." As did the Framers, moreover, the Court has understood those qualities and that "Power" as principally designed to maintain—and to ensure that "the Judges in every State" maintain—"the] Constitution, and the Laws of the United States, . . . and all Treaties . . . [as] the supreme Law of the Land[,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³⁶ Only by reference to the Supremacy Clause, that is, can the nature of "[t]he judicial Power" be understood. Making these points enables us to provide a fresh perspective on a number of Federal Courts doctrines by revealing a unifying, "qualitative" explanation for them that has not previously been identified.

Part III applies what we have learned to show why the Supreme Court's qualified immunity and *Teague* doctrines, and the narrower of the two readings of section 2254(d)(1), all of which deny relief to individuals harmed by state action in violation of subsequently adopted readings of the Constitution, are consistent with "[t]he judicial Power" as we define it. It then explains why the Fifth, Seventh, and Eleventh Circuits' broader reading of section 2254(d)(1) to forbid habeas relief from state decisions reached in violation of *preexisting* understandings of the Constitution is not consistent with that "Power." In identifying a limit that Article III and the Supremacy Clause place on the capacity of federal courts, on their own or at Congress's behest, to withhold all relief in cases within their jurisdiction, we identify an important "effectualness" qualification of the standard view of Article III courts' remedial discretion.³⁷

34. U.S. Const. art. III, § 1.

35. 489 U.S. 288 (1989).

36. U.S. Const. art. VI, cl. 2.

37. Compare Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 379, 849–54 (4th ed. 1996) [hereinafter *Hart & Wechsler*] (standard

1. THE CONSTITUTIONAL CONVENTION

The extent of Congress's power to define the shape and authority of the federal judiciary has remained a riddle for more than 200 years. Scholars have looked for a solution in selected words and phrases in Article III, which in relevant part reads as follows:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁸

For some, the solution to Article III's riddle lies in the reference in its first sentence to "[t]he judicial Power," although there is sharp disagreement over the phrase's meaning and its interchangeability, or not, with the word "jurisdiction."³⁹ This debate has shaded into another over

view, following Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1736 (1991)), with *infra* note 399, and *infra* notes 674, 774–799 and accompanying text.

38. U.S. Const. art. III.

39. Some commentators assume that Section 1's phrase "[t]he judicial Power" is defined exclusively by the cases and controversies to which Section 2, Clause 1 says that power "shall extend," i.e., as if the terms "[t]he judicial Power" and "jurisdiction" are interchangeable (notwithstanding that the text seems to distinguish the two concepts, treating the former in Section 1 and Section 2, Clause 1 and the latter in Section 2, Clause 2). See, e.g., Clinton, *supra* note 19, at 749–50, 791, 796; Gunther, *supra* note 9, at 899; Ratner, *supra* note 18, at 172–73. Others contend that "[t]he judicial Power" and "jurisdiction" are related but not synonymous. See, e.g., Amar, *supra* note 17, at 233; Harrison, *supra* note 9, at 214–18; Velasco, *supra* note 8, at 711. Still others distinguish "[t]he judicial Power" from "jurisdiction," without defining the former term. See, e.g.,

the meaning of Section 2, Clause 1, which provides that "[t]he judicial Power shall extend to" three categories of "Cases" and six categories of "Controversies," with "all" modifying only the first three "Cases" categories. Most importantly, does "extend to" mean "reach," in essence establishing a ceiling on the cases and controversies federal courts can hear,⁴⁰ or "be," establishing a floor as well as a ceiling?⁴¹ Are "Cases" (meaning, for example, criminal and civil actions, thus perhaps explaining the use of "all" with "Cases")⁴² different from "Controversies" (meaning, for example, only civil suits)?⁴³ Or does the use of the word "all" before "Cases" require that some federal court have authority to "decide finally" every lawsuit coming within that category of disputes?⁴⁴

Also hotly contested is the meaning of the second clause of Article III, Section 2, which lists categories of "Cases" in which the Supreme Court "shall have original Jurisdiction" and provides that, "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Does the Exceptions and Regulations Clause grant Congress plenary power over the scope of the Supreme Court's appellate jurisdiction,⁴⁵ or limit that power only by the proviso that the "Exceptions" not swallow the rule that the Court generally has jurisdiction in such cases?⁴⁶ Or is Congress's power to "except" limited to questions of fact,⁴⁷ or simply an authorization to Congress to reallocate "excepted" cases to the Supreme Court's original jurisdic-

Edward S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* 16 (1914); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1176-77 (1992).

40. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997) ("The grant of federal judicial power is cast in terms of its *reach* . . ." (emphasis added)); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 374 (1816) (Johnson, J., concurring) ("The words are, 'shall extend to;' now that which extends *to*, does not necessarily include *in*, so that the circle may enlarge, until it reaches the objects that limit it, and yet not take them in."); Harrison, *supra* note 9, at 212-16; Velasco, *supra* note 8, at 702-04; *infra* notes 129, 132, 267, 298.

41. See Amar, *supra* note 17, at 229, 239-40; Clinton, *supra* note 19, at 749-50.

42. See Harrison, *supra* note 9, at 230-34.

43. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J., dissenting); Casto, *supra* note 25, at 90; Meltzer, *supra* note 9, at 1575-76.

44. Amar, *supra* note 17, at 229; see *Martin*, 14 U.S. (1 Wheat.) at 333-37 (dicta); *supra* notes 17-22 and accompanying text.

45. See authorities cited *supra* notes 9, 24 and accompanying text.

46. See, e.g., Hart, *supra* note 5, at 1365; Sager, *supra* note 17, at 44; Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 135 (1981).

47. See authorities cited *supra* note 20.

tion,⁴⁸ or to the lower federal courts' original or appellate jurisdiction,⁴⁹ while still requiring some federal judicial say in "all" such cases?

These "words and phrases" disputes pose a more fundamental question: To what source should we look for help in discerning the meaning of the disputed terms? References in the ratification debates—the preferred source of the Constitution's original meaning—are sparse and rarely interesting,⁵⁰ while mainly normative arguments reveal little more than how much is at stake in the debate. We accordingly turn to a different, surprisingly underutilized, source—the records of the Constitutional Convention. In using these records, we do not ignore the preference for original understanding over intent nor the risk posed by records meant to be kept secret,⁵¹ nor do we even claim that the proceedings always provide a useful guide when no other is available. We do, however, conclude that the recorded deliberative process that produced the texts of Article III and the Supremacy Clause is an unusually authoritative (i.e., accurate and legitimate) source of the meaning of those texts.

We reach this conclusion for several reasons that are documented below: (1) Article III and the Supremacy Clause emerged from a painstaking series of drafts and redrafts, accepted and rejected amendments, and renegotiations of agreed-to texts over a period of months. (2) This meticulous process was necessary because (a) the judiciary played a central role in all of the contending forces' initial conceptions of the new government's federal structure, (b) those conceptions—typified by Madison's and Rutledge's—and the roles they assigned the judiciary were sharply incongruent, and (c) no initial conception commanded a majority. (3) Madison (the author of many of the records) and at least some of his allies and opponents evidently understood the intricate process of forging a compromise as aimed at producing not only a majority but also a conception of the new government's federal structure that, although different from their own initial conceptions, was equally intelligible and coherent as a matter of the accepted "checks and balances" political science of the day. (4) The contending forces' proposals so consistently pulled (albeit in different ways and to different degrees) in the same contending directions that the participants almost certainly understood the process and its product in the same way—i.e., as carefully calibrating (a) the risk of abusive law and power that the state and national governments

48. See Corwin, *supra* note 39, at 5–6; Clinton, *supra* note 19, at 778. But see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–75 (1803).

49. See Amar, *supra* note 17, at 255–57 (applying this interpretation to "Cases" but not to "Controversies" delineated in Article III, Section 2, Clause 1); Clinton, *supra* note 19, at 778.

50. See Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. Pa. L. Rev. 1651, 1664 (1990); cf. *infra* notes 208, 298, 305–311, 317–320, 322–323, 329–335, 342, 350, 353–355 (discussing pertinent aspects of the ratification debates).

51. See I Farrand, *supra* note 2, at xi. The Convention's Journal was printed in 1819 pursuant to a joint resolution of Congress, and Madison's notes were published in 1840 after his death. See *id.* at xi–xii, xv.

were expected to pose, (b) the degree to which judicial as opposed to other mechanisms would be used to curb those abuses, (c) the respective roles of federal and state judges insofar as courts were given that task, and (d) the relative contribution of quantities and qualities of judging insofar as *federal* judges bore the task. (5) The drafting process that produced Article III and the Supremacy Clause thus was sufficiently central to the overall enterprise, committed to conceptual coherence, and transparent that it not only provides evidence of, but actually seems by design to have *generated*, a shared understanding of the meaning of the two crucial provisions among the participants in the process. Moreover, the most active of those participants (e.g., Madison, Wilson, Randolph, Hamilton, Rutledge, Sherman, and Martin) also were central players in the ratification process in which they assumedly (and, via *The Federalist*, quite explicitly)⁵² shared their own understanding with the other ratifiers, with at least this much success: The set of questions that had riven the Convention for months, until the compromise texts of Article III and the Supremacy Clause resolved the dispute, did not loom nearly as large in the ratification debates.

(6) Most importantly, the conveners labored long and hard not only to develop a coherent and shared understanding of the functions of the two relevant clauses but also to draft language that plainly and precisely expressed that understanding—thus warranting even more confidence than usual in the text as the best evidence of the original meaning. We can confidently report, for example, that (a) when Article III says “judicial Power,” its drafters meant just that and not, e.g., “jurisdiction”; (b) “shall *extend* to” meant that and not “shall *be*”; (c) “shall be vested in one supreme Court *and* in such inferior courts . . .” meant that and not “shall be vested in one supreme Court *or* in such inferior courts”; (d) Congress was meant to “Regulat[e]” the Court’s “jurisdiction” but not to control the “manner” in which jurisdiction would be exercised; (e) the parallel language of the “Arising Under” and Supremacy Clauses was intentional and structurally crucial; and (f) the latter clause meant “the *Judges* in every state” and not, e.g., the *Courts* of each state. (7) Finally, one crucial aspect of the forging of a shared understanding among the drafters and the enshrinement of that understanding in the text is *not* visible from the language, and can only be gleaned from the Convention records, namely, a raft of important proposals that the Framers carefully considered but rejected.

Just as it required a painstaking process at the Convention to produce the text and generate the conveners’ shared understanding of it, it requires a painstaking process here to recover that understanding. This is especially so because shared meaning arises *not* from what little was said and recorded about the various proposals and counterproposals, drafts and redrafts, but from the consistent patterns that the contending texts

52. See *infra* notes 298, 305–311, 317–318, 320, 322, 327, 329, 332–335, 342, 350, 353.

reveal—most notably, the subtle but steady shift from reliance on the quantity to the quality of federal judging to maintain federal legal supremacy. Sections A–H below detail the drafting process. Section I summarizes our conclusions.

A. *Preparing for the Convention: Madison's Proposed Reforms*

For James Madison, at least, the well-known failings and weaknesses of the central government under the Articles of Confederation played only a supporting role in the onset of the Federal Convention of 1787. The principal part was played by the states—actually, as Madison and his allies consistently particularized the problem, by the excesses and mischiefs of *state legislators* and the *laws* they enacted⁵³—their lack of support for the federal government, their outright encroachments on federal authority, and their susceptibility to passing whims, hoped for private "gain," and "populist, parochial passions."⁵⁴ As Madison wrote in a letter to Jefferson summing up the Convention:

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform therefore which does not make

53. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 76–107 (1995) (noting Madison's "alarm about abuses in the states . . . [which he] traced to the debilities of the Confederation"); Jack N. Rakove, *James Madison and the Creation of the American Republic* 44–52 (1990) (discussing the ineffectualness of the Articles of Confederation in controlling the "vicious character of state governments").

54. Rakove, *supra* note 26, at 1044–45; see, e.g., James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 *The Papers of James Madison* 9 Apr. 1786–24 May 1787, at 348, 353–58 (Robert A. Rutland et al. eds., 1975) [hereinafter 9 *Madison Papers*]; Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 *Madison Papers*, *supra*, at 317, 318; Letter from James Madison to George Washington (Apr. 16, 1787), in 9 *Madison Papers*, *supra*, at 382, 383–84; 2 Farrand, *supra* note 2, at 288 (Aug. 14, 1787) (statement of John Mercer) ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States."); *The Federalist* No. 37, *supra* note 1, at 243 (James Madison) (quoted *supra* text accompanying note 1); *The Federalist* No. 46, at 299 (James Madison) (Isaac Kramnick ed., 1987); *The Federalist* No. 48, at 310 (James Madison) (Isaac Kramnick ed., 1987); see also Corwin, *supra* note 39, at 62 ("[What] brought the Convention together was a general disgust at the recent antics of the State legislatures [and a desire to] curtail legislative power as it existed in the State constitutions in the interest . . . of an adequate national power and . . . of private rights . . ."); Rakove, *supra* note 53, at 45 ("At the heart of Madison's thinking lay a deep concern with the process by which laws were enacted, enforced, and obeyed, and an overriding conviction that the legislatures created by the state constitutions of 1776 had failed to discharge their duties fairly or responsibly."); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 46–56 (1996) (similar).

provision for private rights [as against the States] must be materially defective.⁵⁵

Madison's solution to the "injustice" and "mutability of the laws of the States" lay in five specific reforms, all of which at his instance found their way into Edmund Randolph's "Virginia Plan," introduced at the outset of the Convention.⁵⁶ The cornerstone of Madison's scheme was a "national negative," i.e., a national legislative power to veto any state law found to contravene the national interest. Armed with the negative, Congress could prevent state legislatures from encroaching on the central government's prerogatives, from "thwarting and molesting . . . other [states], and even from oppressing the minority within themselves by . . . unrighteous measures which favor the interest of the majority."⁵⁷ Madison's goal, in short, was an effective mechanism for "securing the general government's supremacy within a system where the overwhelming burden of political responsibilities would still be carried by the states."⁵⁸

The second and third prongs of Madison's scheme for controlling the abuses of state law relied on judges, both state and federal. Madison thought that the supremacy of federal law would be at risk if state judges beholden to state legislatures and having no allegiance to the national government were left the task of interpreting and applying the law. Accordingly, he wanted state judges to take an oath of fidelity to federal law and wanted a system of national tribunals available at the least to hear appeals in cases involving the national interest.⁵⁹

Fourth, and often overlooked, Madison initially favored authorizing the federal government to use military force to bring recalcitrant states, and particularly state legislatures, into line with national law.⁶⁰ Finally, Madison advocated the creation of a council of revision, composed of "the great ministerial officers" of the federal executive and a number of federal judges. Subject to override by a legislative supermajority, this body would have the authority, not only to veto "every [affirmative] act of

55. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 *The Papers of James Madison* 27 May 1787-3 Mar. 1788, at 206, 212 (Robert A. Rutland et al. eds., 1977) [hereinafter 10 *Madison Papers*].

56. 1 *Farrand*, supra note 2, at 20-22 (May 29, 1787); see Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 *Madison Papers*, supra note 54, at 368, 369-70.

57. Letter from James Madison to Thomas Jefferson, supra note 54, at 318; see Letter from James Madison to Edmund Randolph, supra note 56, at 370; Letter from James Madison to George Washington, supra note 54, at 383-84.

58. Banning, supra note 53, at 117-18 (emphasis omitted); see Rakove, supra note 53, at 51.

59. See, e.g., Letter from James Madison to George Washington, supra note 54, at 384 (advocating oath and federal appeals because "[i]f those who are to expound & apply the laws, are connected by their interests & their oaths with the particular States wholly, and not with the Union, the participation of the Union in the making of the laws may be possibly rendered unavailing"); Letter from James Madison to Edmund Randolph, supra note 56, at 370.

60. See Letter from James Madison to George Washington, supra note 54, at 385.

the National Legislature before it shall operate," but also to overturn the national legislature's exercise of its power to "negative" state legislation.⁶¹ In this way, the national legislature's check on state laws would itself be checked by the other two branches of the federal government.⁶²

For Madison, the course of the Convention was one of defeat, frustration, and finally compromise. Three of the five prongs of his scheme to regulate state law did not survive July—force (which Madison himself quickly abandoned),⁶³ the national veto,⁶⁴ and the council of revision.⁶⁵ Only the weakest prong—the oath requirement—was accepted in full.⁶⁶ Although judicial review remained, and became the focal point of efforts to control state law, it did so only after the early defeat of the judiciary provision Madison preferred.⁶⁷ What followed was, for Madison, a painful series of compromises and adjustments (of which the so-called Madisonian Compromise was only the first and by no means the most decisive) designed to keep judicial review powerful enough to satisfy the nationalists' desire to constrain the states, yet modulated enough to satisfy the confederationists' desire to preserve state sovereignty.⁶⁸ Central to these compromises, though largely overlooked in recent academic debates, were three issues: (1) the presumptions the national legislature would be expected to apply in the exercise of a power to allocate jurisdiction between the state and federal courts; (2) the scope of the state courts' responsibilities for keeping state legislation within the bounds of national law; and (3) the quality of review federal courts would be required to exercise in cases over which they did have jurisdiction—particularly appeals of state court decisions—so as to maintain the supremacy of federal law. We explore these neglected issues below by carefully examining their treatment throughout the Federal Convention.

61. 1 Farrand, *supra* note 2, at 21 (May 29, 1787) (Resolution 8 of the Virginia Plan); see Letter from James Madison to George Washington, *supra* note 54, at 384–85; Letter from James Madison to Edmund Randolph, *supra* note 56, at 370.

62. See Rakove, *supra* note 26, at 1057 (discussing respects in which "Madison's argument for the Council tracked his argument for the negative on state laws").

63. See *infra* note 83 and accompanying text.

64. See *infra* notes 156–164 and accompanying text.

65. See *infra* notes 84–85, 104–108 and accompanying text.

66. See *infra* notes 119–122, 191–193, 284 and accompanying text.

67. See *infra* notes 86, 90–98 and accompanying text.

68. By "nationalists" we mean delegates who viewed abusive state law as the fundamental problem to be solved by the Constitution. Madison, Randolph, James Wilson, Alexander Hamilton, Gouverneur Morris, and, to a lesser extent, Charles Pinckney were leaders of this group. By "confederationists" we mean delegates who had more faith in the states and envisioned a broader and less constrained role for them in the new government. The latter category covers moderate proponents of state power such as John Rutledge and Roger Sherman as well as ardent state sovereignty advocates such as Luther Martin. Cf. Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress 7–8* (1993) (dividing the delegates into three groups: nationalists, state federalists, and localist state-sovereignty advocates—the latter two groups constituting our confederationist category).

B. *Commencing the Convention*

The Convention began with the introduction of two plans for a reformed government, one drafted by Madison and other members of the Virginia delegation and the other drafted by Charles Pinckney of South Carolina.

1. *The Virginia Plan*. — In Philadelphia in advance of a quorum of delegates from the other states, the Virginia delegation—Madison, Randolph, John Blair, George Mason, James McClurg, George Washington, and George Wythe—met daily to develop the fifteen resolutions that Randolph would introduce to the Convention on May 29, 1787 as the Virginia Plan.⁶⁹ All five prongs of Madison's conception for reining in abusive state law were included in some form.⁷⁰

The crown jewel of Madison's scheme, the national negative, appeared along with a force provision in resolution 6.⁷¹ The legislature's proposed power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union" was a watered-down version of the unrestricted negative that Madison had advocated before the Convention and that he later advanced as an amendment to the Virginia Plan.⁷²

Although Madison's national negative was diminished, his suggested federal judiciary was augmented. Instead of providing for a mainly appellate national judiciary, the Plan's ninth resolution called for the establishment of trial as well as appellate federal courts:

Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.⁷³

69. See Banning, *supra* note 53, at 113–15; Rakove, *supra* note 53, at 54.

70. See *supra* notes 56–62 and accompanying text.

71. See 1 Farrand, *supra* note 2, at 21 (May 29, 1787). The force provision authorized the national legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof." *Id.*

72. *Id.*; see *supra* note 57 and accompanying text; *infra* notes 109–117 and accompanying text.

73. 1 Farrand, *supra* note 2, at 21–22 (May 29, 1787).

The Plan's judiciary resolution provides a baseline for consideration of later revisions and alterations in four respects: (1) By mandating "a National Judiciary" composed "of one or more supreme tribunals, and of inferior tribunals," it left the legislature discretion as to only the number of supreme and inferior tribunals and the number and selection of judges to sit on each. (2) It included two provisions to assure the independence of federal judges—life tenure during good behavior and an undiminishable (and unincreasable) salary. The premium that the Framers placed on judicial independence is reflected by the fact that these two provisions went virtually unchallenged throughout the Convention, in confederationist as well as nationalist proposals,⁷⁴ and prompted debate exclusively on the question of how best to insure independence—by denying Congress the potentially compromising power to raise judicial salaries, or by preserving that power so that judges would not become financially dependent in inflationary times.⁷⁵ (3) By (a) expressly allocating original jurisdiction to the inferior courts and appellate ("dernier resort") jurisdiction to the supreme court(s), (b) dictating precisely what those courts' "jurisdiction . . . shall be,"⁷⁶ and (c) using the word "all" before the list of jurisdictional categories, the document evidently called for exclusive federal jurisdiction over all the listed classes of cases. Certainly, the federal courts' jurisdiction included "all" admiralty and maritime claims, diversity suits, national revenue cases, and impeachments, leaving the legislature at most with some role in identifying "cases . . . which may involve the national peace and harmony." (4) The federal courts' duty was to "hear & determine . . . cases," not to resolve abstract legal issues (a distinction that will become clearer when we compare competing provisions).

Finally, the Virginia Plan incorporated Madison's council of revision—to be composed of "the Executive and a convenient number of the

74. See Rakove, *supra* note 26, at 1060–64 (discussing the dramatic late eighteenth-century shift in the American conception of the judicial role towards one in which judicial independence from the political branches was considered both a realistic possibility and a worthy complement to, or substitute for, jury decisionmaking).

75. See, e.g., 2 Farrand, *supra* note 2, at 45 (July 18, 1787) (statement of James Madison) ("Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter . . . which ought not to [be] suffered . . ."). The opposition to federal judicial independence that Mr. Scheidegger expresses in his response to this Article contrasts with the delegates' unanimous support for that core qualitative attribute of the federal judiciary and reveals a preference on Mr. Scheidegger's part for a constitutional arrangement substantially more confederal than that advocated by even the most ardent confederationists at the Convention. See Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 895, 943–44, 948 (1998).

76. For a discussion of the distinction between "jurisdiction . . . shall be" and "jurisdiction [or judicial Power] . . . shall extend to," see *supra* notes 40–41 and accompanying text; *infra* notes 129, 267, 298 and accompanying text.

National Judiciary"⁷⁷—and an oath requirement binding all state officers "to support the articles of Union."⁷⁸

2. *The Pinckney Plan.* — On the same day as Randolph introduced the Virginia Plan, Pinckney brought forward his own, somewhat more confederationist, proposal.⁷⁹ In particular, Pinckney's plan contained a considerably more limited judiciary provision, which left to Congress the "Power" to establish—or apparently not establish—a single "federal judicial Court" with tenure protections and with jurisdiction over "all Causes wherein Questions shall arise on the Construction of Treaties made by U.S.—or on the law of Nations—or on the Regulations of U.S. concerning Trade & Revenue—or wherein U.S. shall be a Party."⁸⁰ The Randolph and Pinckney Plans thus agreed on the potential need for tenured federal judges to review state court decisions "constru[ing]"—if not clearly, in the Pinckney version, *applying*—important federal law. The plans disagreed over whether judicial constraints were sufficient and, if so, how constraining they should be.⁸¹

C. *The Virginia Plan in the Committee of the Whole*

During the first several weeks of the Convention, the Virginia Plan was the focal point of debate in the Committee of the Whole (made up of the entire membership of the Convention). Aside from the national negative, which was expanded slightly, Madison's proposals for curbing the excesses of state legislation came under significant attack, prompting, among other important consequences, the first so-called Madisonian Compromise on the judiciary.

I. *May 31: The Expansion of the National Negative and the Abandonment of Force.* — Deliberations began propitiously for Madison when, on the second day of debates, without discussion or dissent, the national negative was agreed to after being expanded to permit vetoes of state laws contravening "any treaties," as well as the articles, "of the Union."⁸² Madison thereafter successfully moved to table the force provision, expressing the hope, fortified by the veto's initial success, that sufficient

77. 1 Farrand, *supra* note 2, at 21 (May 29, 1787) (quoted *supra* text accompanying note 61).

78. *Id.* at 22.

79. See *id.* at 16, 23. Farrand includes three versions of the Pinckney Plan—one outlined in James Wilson's contemporaneous notes and used in the Committee of Detail's deliberations, see 2 *id.* at 134–37 & n.3, and two that apparently were reconstructed much later, see 3 *id.* at 595–601, 604–09. We use the version the Committee of Detail used.

80. 2 *id.* at 136. Congress also had "the exclusive Right of instituting in each State" an admiralty court and appointing its members. *Id.*

81. Pinckney's proposal failed to include a national veto or oath clause, more narrowly limited the availability of force against the states, and excluded judges from the council of revision. See *id.* at 135–36.

82. 1 *id.* at 47, 54 (May 31, 1787) (Benjamin Franklin moved to expand the negative).

structural protections against errant state legislation would be framed to render force unnecessary.⁸³

2. *June 4: The Demise of the Council of Revision.* — Madison's scheme for constraining state law began to unravel on June 4. It did so following a pattern, presaged by Pinckney's alternative draft, that persisted throughout the Convention—the dilution of Madison's nonjudicial constraints in favor of some form of review by federal judges whose independence from political influences and other "judicial" qualities were strictly protected. Madison's desire to include federal judges on the council of revision was the first casualty. Elbridge Gerry argued that judicial participation was both unnecessary, because of the power already possessed by "Judges . . . [to] set aside laws as being agst. the Constitution," and unwise, because "[i]t was quite foreign from the nature of [the judicial] office to make" judges arbiters of "the policy of public measures."⁸⁴ The other conveners agreed, adopting Gerry's motions (1) to table the council of revision and (2) to substitute an executive-only veto of legislative acts and, apparently, national vetoes of state legislation.⁸⁵

The Committee next turned its attention directly to the Virginia Plan's judiciary proposal. After accepting the Plan's first clause establishing a national judiciary, the Committee unanimously agreed to scale back the original Madisonian conception by altering the succeeding clause to read: "to consist of One supreme tribunal [as opposed to one or more supreme tribunals], and of one or more inferior tribunals."⁸⁶ With the possibility of multiple supreme tribunals eliminated, commencing a trend towards diminished federal judicial capacity, the confederationists set to work the next day on eliminating the lower federal courts. The result was the Madisonian Compromise, letting Congress decide whether to appoint inferior tribunals.

3. *June 5: The First Madisonian Compromise.* — The confederationist attack on lower federal courts began during the first of many inconclusive debates over the method of appointing judges when John Rutledge of South Carolina spoke "against establishing any national tribunal except a single supreme one" because "State Tribunals <are most proper> to decide in all cases in the first instance."⁸⁷ After Wilson spoke in favor of "inferior tribunals,"⁸⁸ the Committee turned to the judiciary resolution's tenure and salary provisions, which it quickly accepted.⁸⁹

83. See *id.* at 54.

84. *Id.* at 97–98 (June 4, 1787).

85. *Id.* at 94, 98.

86. *Id.* at 95, 104–05 (June 4, 1787); see *id.* at 116, 119 (June 5, 1787) (amending "one or more inferior tribunals" to read, simply, "inferior tribunals").

87. *Id.* at 119. Angle brackets indicate changes Madison made in his notes when preparing them for publication. See *id.* at xviii–xix.

88. *Id.* at 120.

89. See *id.* at 116, 121.

Then came the *coup de main*, as Rutledge, seconded by Roger Sherman of Connecticut, moved to delete the reference to inferior tribunals from the opening sentence of the judiciary resolution.⁹⁰ In Rutledge's view, "the State Tribunals might and ought to be left in all cases to decide in the first instance," with "the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts" while avoiding "an unnecessary encroachment on the jurisdiction <of the States []>."⁹¹

Rutledge's motion was consistent with both trends noted so far—favoring judicial over other constraints on state law, and favoring less over more comprehensively *federal* judicial constraints. Notably, however, confederationists like Rutledge did not oppose federal judicial mechanisms as a class. Instead, they opposed a federal *original* judicial mechanism, preferring a *state* original mechanism *backstopped* by a federal *appellate* mechanism when "the national rights & uniformity of Judgmts" were at stake.⁹² For confederationists like Rutledge, the state courts would provide the filter through which state law would flow so that supremacy-threatening impurities could in theory be removed. But a federal appellate court also was understood to be necessary to check up on the filtration process and on state decisional law made in that process. Moreover, by leaving intact the supreme court's (at this point entirely) appellate jurisdiction, and by explicitly volunteering the "State Tribunals . . . in *all* [those] cases to decide in the *first* instance,"⁹³ the confederationists evidently assumed that the federal government could command state courts to hear all cases affecting the national interest⁹⁴ and that all of the resulting state court decisions would be subject to appeal to a single national tribunal.

Wilson and Madison vigorously opposed Rutledge's motion. Doubting the supreme tribunal's capacity by itself to preserve national legal primacy, particularly if forced to hear all possible appeals, Madison for the first time proposed *abandoning* mandatory supreme court appellate jurisdiction in exchange for more, and more locally available, lower courts—a position that eventually would prevail.⁹⁵ Madison worried that, unless "inferior tribunals . . . [had] final jurisdiction in many cases," the supreme court (1) would be inundated with appeals "to a most oppressive degree" and (2) would be unable to effectuate its judgements, thus in

90. See *id.* at 124.

91. *Id.*; see *id.* at 125 (statement of Roger Sherman).

92. See Bator, *supra* note 23, at 1038–39 (quoted *supra* text accompanying note 23).

93. 1 Farrand, *supra* note 2, at 124 (June 5, 1787) (statement of John Rutledge) (emphasis added); see *id.* at 119.

94. See Amar, *supra* note 17, at 256 n.165.

95. See 1 Farrand, *supra* note 2, at 124; 2 *id.* at 27 (July 17, 1787) (statement of James Madison); *id.* at 46 (July 18, 1787) (statement of Edmund Randolph); *infra* notes 129–133, 162–163, 181, 226 and accompanying text.

practice leaving national legal supremacy at the mercy of politically dependent state judges.⁹⁶

[A]n appeal [to the supreme tribunal] would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court.⁹⁷

Despite these arguments and a proposal by John Dickinson of Delaware to let the legislature decide whether to "institute" lower federal courts, Rutledge's motion to delete inferior tribunals passed, five states to four, with two states divided.⁹⁸

Rutledge's victory proved short-lived, of course. Toning down Dickinson's unheeded suggestion of a legislative power to "institute" lower federal courts, Wilson and Madison moved "[t]hat the national legislature be empowered to *appoint* inferior Tribunals,"⁹⁹ wording that, at the time, carried a clear connotation of formally enlisting *state* courts for national purposes.¹⁰⁰ Rufus King of Massachusetts spoke in favor, echoing Madison's fear of a supreme court deluged with appeals; Pierce

96. 1 Farrand, *supra* note 2, at 124 (June 5, 1787) (emphasis omitted).

97. *Id.*; see also Letter from James Madison to Thomas Jefferson, *supra* note 55, at 211 (worrying that some "individuals . . . may be unable to support an appeal agst. a State to the supreme Judiciary").

98. 1 Farrand, *supra* note 2, at 125. Where, as here, we report votes, the participation of fewer than thirteen states is explained by the New Hampshire delegation's late arrival, see 2 *id.* at 84, Rhode Island's failure to send a delegation, and other states' more occasional absences.

99. 1 *id.* at 118, 125 (emphasis added). The Convention's Journal and the notes of Robert Yates of New York use the word "appoint." *Id.* at 118, 127. Although Madison's June 5 account uses the word "institute," *id.* at 125, his reprise of the Compromise a few days later says "appoint," *id.* at 237 (June 13, 1787).

100. The Articles of Confederation had authorized Congress to, and it did, "appoint" state courts as national tribunals "for the trial of piracies." Articles of Confederation art. IX, para. 1 (1777); see 1 Goebel, *supra* note 19, at 212; Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 120 ("The practice of appointing state courts as federal courts, common at the time of the Convention, may therefore have been understood by some delegates as the natural reference of the Compromise's language . . ."); Wythe Holt, "Federal Courts as the Asylum to Federal Interests": Randolph's Report, The Benson Amendment, and the "Original Understanding" of the Federal Judiciary, 36 Buff. L. Rev. 341, 357 (1987); Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2019 (1993); see also 2 Farrand, *supra* note 2, at 45-46 (July 18, 1787) (statement of Nathaniel Gorham) (arguing that the existence "in the States already" of state courts appointed to serve as federal courts "for trial of piracies"—as to which "no complaints have been made by the States or the Courts of the States"—refuted the claim that inferior tribunals "will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere").

Butler of South Carolina spoke against, predicting a popular "revolt at such encroachments"; and the "Madisonian Compromise" carried.¹⁰¹

At the end of the day, the Virginia Plan's judiciary resolution, as amended, read:

9. Resd. That a National Judiciary be established to consist of one supreme tribunal to be chosen by , to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the national legislature be empowered to appoint inferior Tribunals; that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.¹⁰²

June 5 thus witnessed the first compromise in the hotly contested battle over how the new government would exert control over the mutable and unjust state legislation that for Madison and his allies was the main "vice" prompting the Convention.¹⁰³ What was not at issue was *whether* the national government should have authority to assure the supremacy of national law over state law. The confederationists conceded that much, not only by willingly supporting mandatory supreme court appellate jurisdiction and grudgingly accepting the possibility of some federal original jurisdiction, but also, as of this moment, by accepting a powerful legislative veto that was the centerpiece of the nationalists' plan and no doubt crucial to their understanding and approval of the initial Compromise. The Compromise, however, did not resolve the deep disagreement that prompted it. A plan of which both the veto and the Compromise were part could hardly assuage confederationist concerns about federal encroachments on state prerogatives. Nor, if the veto were removed, could the plan possibly allay nationalist fears about the insufficiency of a state judicial check—even one backstopped in all cases by a lone and distant supreme national tribunal—on the mutability, injustice, and excessive populism of state law.

4. *June 6: An Attempt to Revive the Council of Revision.* — Commencing yet a third trend in the Convention's deliberations, discussions the next day shifted from the quantity to the quality of federal judging. In support of their motion to restore "a convenient number of the national

101. 1 Farrand, *supra* note 2, at 118, 125, 127 (June 5, 1787).

102. See *supra* note 73 and accompanying text (Judiciary resolution prior to amendment); *supra* notes 86, 89, 99–101 and accompanying text (amendments).

103. See *supra* notes 53–55 and accompanying text.

Judiciary" to the council of revision.¹⁰⁴ Wilson and Madison argued that the judges' independence, "personal merit," and "permanent stake in the public interest" were necessary to fortify the executive against the corrupting influences of factional politics and give its vetoes of state legislation the prestige needed to sustain them.¹⁰⁵ In response, Dickinson, Gerry, and King again decried an "improper mixture" of judicial and political functions that would bias and corrupt the judges¹⁰⁶ and undermine the responsibility of the executive.¹⁰⁷ The motion failed.¹⁰⁸

5. *June 8: The Rejection of an Absolute Negative.* — With the abandonment of force, the dilution of the judicial check, and the defeat of the council of revision, Madison joined Pinckney in an effort to expand the national negative of state legislation to cover "all laws which to [the national legislature] shall appear improper."¹⁰⁹ Pinckney asserted that an absolute negative was "indispensably necessary to render [the veto] effectual," and was, in fact, "the corner stone of an efficient national Govt."¹¹⁰ Madison agreed that the national negative was "the great pervading principle that must controul the centrifugal tendency of the States."¹¹¹ "[W]ithout it," Madison argued, the states would use their law to "infringe the rights & interests of each other[,] . . . oppress the weaker party within their respective jurisdictions," and "continually fly out of their proper orbits and destroy the order & harmony of the political system."¹¹² Wilson agreed:

To correct [the] vices [of the Articles of Confederation] is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?¹¹³

Madison and Pinckney's motion unleashed a barrage of criticism that, though aimed at the mechanism's expansion, could not help but wound the concept itself. Gerry thought an unbounded negative would

104. 1 Farrand, *supra* note 2, at 131, 138 (June 6, 1787).

105. *Id.* at 138–39 (statements of James Madison); see *id.* at 140 (statement of James Wilson).

106. *Id.* at 140 (statement of John Dickinson); see *supra* note 84 and accompanying text.

107. See 1 Farrand, *supra* note 2, at 139 (June 6, 1787) (statements of Elbridge Gerry and Rufus King).

108. See *id.* at 131, 140.

109. *Id.* at 162 (June 8, 1787); see *id.* at 164.

110. *Id.* at 164.

111. *Id.* at 165.

112. *Id.* at 164–65; see *id.* at 168.

113. *Id.* at 167; accord *id.* (statement of John Dickinson).

permit the central government to "enslave the States."¹¹⁴ Butler "was vehement agst. the Negative in the proposed extent, as cutting off all hope of equal justice to the distant States. The people there would not he was sure give it a hearing."¹¹⁵ Gunning Bedford of Delaware protested that larger states would employ the negative to dominate smaller ones and wondered how the veto could work in practice without destabilizing all new state law pending the verdict of the national legislature.¹¹⁶ The motion was defeated seven states to three, with Delaware, remarkably, divided.¹¹⁷

6. *June 11 & 12: The Acceptance of the Oath and a Refinement of Federal Jurisdiction.* — On June 11, the Committee took up the oath requirement. Because the Madisonian Compromise had weakened the federal judiciary's role as an external constraint on the states, creating the distinct possibility of state original cognizance of federal questions, the oath's importance as an internal constraint on state judges—in Randolph's phrase an additional "sinew[]" to "support[]" a "supreme national government"—became magnified.¹¹⁸

When Hugh Williamson of North Carolina deemed the oath "unnecessary, as the union will become the law of the land,"¹¹⁹ Randolph countered that merely implied supremacy was insufficient "to prevent . . . competition between the National Constitution & laws & those of the particular States," especially given state judges' disposition and oaths to support their internal laws and their political dependence on the legislatures that adopted those laws.¹²⁰ Ironically, Williamson's anti-oath allies undermined his, and made Randolph's, point by arguing that binding state officials to oaths contrary to ones already made to the officials' own states would improperly divide their loyalties and "intrud[e] into the State jurisdictions."¹²¹ The oath was accepted, six states to five.¹²²

Returning to the judiciary resolution toward the end of the session on June 12, the Committee of the Whole considered but did not act on a motion to delete the Virginia Plan's delineation of what the "jurisdiction" of the now-optional lower federal courts "shall be."¹²³ By thus maintaining the "shall be" jurisdiction-conferring language for courts that might

114. *Id.* at 165; see *id.* (raising fear of hampering a state's right to call out its militia, "a matter on which the existence of a State might depend"); *id.* (statement of Hugh Williamson of North Carolina).

115. *Id.* at 168.

116. See *id.* at 167–68.

117. See *id.* at 162–63, 168. Only populous states—Massachusetts, Pennsylvania, and Virginia—voted to expand the negative. See *id.* at 163.

118. *Id.* at 207.

119. *Id.* (June 11, 1787).

120. *Id.* at 203.

121. *Id.* (statement of Roger Sherman); see *id.* (statements of Luther Martin and Elbridge Gerry).

122. See *id.* at 194, 204.

123. *Id.* at 211, 220 (June 12, 1787).

never be created, the delegates may have understood the legislative decision whether to appoint lower federal courts as all or nothing. If the legislature created lower federal courts, their "jurisdiction . . . shall be" *all* the enumerated jurisdiction. This understanding actually might have appealed to confederationists, because it reduced the likelihood that the legislature, constrained by the all or nothing nature of its choice, would create lower federal courts at all. Also possibly suggesting an anti-judiciary impulse, the delegates ended the day by deleting the supreme tribunal's appellate jurisdiction over admiralty and maritime cases.¹²⁴

7. *June 13: The Randolph-Madison Substitute: From "Shall Be" to "Shall Extend to."* — Perhaps chastened by the events at the end of the previous day, Randolph began proceedings on June 13 by proposing that the Committee not continue working its way through the Virginia Plan's heads of jurisdiction and, instead, given the difficulty of the task, lay down some general principles on the basis of which a smaller group of delegates could flesh out the details.¹²⁵ Seconded by Madison, he moved to strike the existing jurisdictional provision and add: "That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony."¹²⁶ The Committee unanimously agreed.¹²⁷

The "Randolph-Madison Substitute" had three important effects that subsequent commentary has overlooked. First, installing "the national Judiciary," rather than "the supreme tribunal," as the subject of the provision subtly emphasized the availability of lower federal courts to exercise

124. See *id.*

125. See *id.* at 238 (June 13, 1787).

126. *Id.* at 223–24; see *id.* at 232, 238.

127. See *id.* at 238. Encompassing Randolph and Madison's substitute language, the judiciary resolutions in the Report of the Committee of the Whole, issued the same day (June 13), read as follows:

11. Resolved. that a national Judiciary be established to consist of One supreme Tribunal The Judges of which to be appointed by the second Branch of the National Legislature. to hold their offices during good behaviour to receive, punctually, at stated times, a fixed compensation for their services: in which no encrease or diminution shall be made so as to affect the persons actually in office at the time of such encrease or diminution
12. Resolved. That the national Legislature be empowered to appoint inferior Tribunals.
13. Resolved. that the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue: impeachments of any national Officers: and questions which involve the national peace and harmony.

Id. at 230–31. In some but not all versions (and not in the official version) of Resolution 13, the word "all" appears before "cases." Compare *id.* at 231 (Journal), and *id.* at 232 (Madison's notes) ("all" omitted), with *id.* at 237 (Madison's notes), and *id.* at 238 (Robert Yates's notes) ("all" included).

the full panoply of federal jurisdiction.¹²⁸ More importantly, by eliminating the original Plan's limitation of "inferior tribunals" to "first instance" jurisdiction and "the supreme tribunal to . . . dernier [final appellate] resort," the Substitute significantly altered the effects of the Madisonian Compromise by creating two new possibilities: that the supreme court would exercise original as well as appellate jurisdiction and that lower federal courts would relieve the supreme court of some of its otherwise potentially overwhelming appellate jurisdiction over state decisions.

Most consequentially, by shifting from "the jurisdiction of the inferior tribunals [and the supreme tribunal] *shall be*" to "the jurisdiction of the national Judiciary *shall extend to*," the Substitute removed the constitutional floor on federal jurisdiction, leaving the floor-setting duty to the legislature.¹²⁹ This change—which, among other things, is the source of Congress's unquestioned, but (to some minds) textually unconfirmed, control of lower federal court jurisdiction¹³⁰—had attractions for

128. Before the change, the jurisdictional clause had begun: "that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort." *Id.* at 22 (May 29, 1787).

129. Two years later, discussing Article III's "shall extend to" language on the floor of the House of Representatives in support of what became the 1789 Judiciary Act, Representative Stone encapsulated the phrase's significance:

It is not said . . . that you shall exercise the judicial power over all those cases, but that the judicial power shall extend to those cases. If the convention [had meant] that its Judiciary should extend so as positively to have taken in all these cases, they would have so declared it . . . [;] they have given you a power to extend your jurisdiction . . . , but have not compelled you to that extension.

1 *Annals of Cong.* 854–55 (Joseph Gales ed., 1789); accord *supra* note 40; see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 *Nw. U. L. Rev.* 1377, 1380–81 & n.14 (1994) (demonstrating that the accepted meaning of "extend" from the eighteenth century to today has been to reach or to "stretch out towards any part" (quoting Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan 1755) [hereinafter Johnson, Strahan]) (citing *The American Heritage Dictionary* (2d College ed. 1991))); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 573 (1994) (noting that extend "derives from the Latin 'extendere,' meaning 'to stretch [*tendere*] out [*ex*]' " (quoting 1 Samuel Johnson, *A Dictionary of the English Language* 696 (Librairie du Liban ed. 1978) (4th ed. 1773))); Velasco, *supra* note 8, at 703–04 & n.159. Compare, e.g., Amar, *supra* note 17, at 212, 215, 239 & n.118 (noting the inflexibly directive nature of "shall [be]"), with, e.g., Bator, *supra* note 23, at 1031 (noting the elasticity connoted by Article III's "shall extend to" language). Given that Randolph and Madison drafted the Virginia Plan, which originated the "jurisdiction . . . shall be" formulation, it is doubtful that their switch to "shall extend to" was accidental, synonymic, or merely cosmetic. Cf. Amar, *supra* note 17, at 229–30, 238–59 (defining "shall extend to" as "shall be" without discussing the Substitute or its apparently deliberate change to one from the other); Clinton, *supra* note 19, at 749–54 (similar). Moreover, a desire to vest all jurisdiction in the national judiciary as a whole, leaving the legislature to allocate jurisdiction between the supreme court and any lower federal courts it chose to create, cf. Amar, *supra* note 17, at 229–30, 238–59, might explain the switch to "national judiciary" but not to "shall extend to."

130. Compare *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (concluding that Congress's greater power to ordain and establish inferior courts impliedly includes the lesser power to determine those courts' jurisdiction), with Bator, *supra* note 23, at 1031

both nationalists and confederationists. On the nationalist side, the flexibility accorded the legislature to determine inferior court jurisdiction removed the disincentive to create courts imposed by the "all or nothing" effect of the "jurisdiction of the inferior tribunals shall be" language.¹³¹ On the confederationist side, the Substitute applied the "shall extend to" language to the entire "national judiciary," thereby replacing mandatory supreme court review with a legislative power to authorize review when appropriate. This latter concession evidently was palatable, or even attractive, to the nationalists because of their practical doubts about the capacity of parties to get to the supreme tribunal and of that court to handle all appeals indiscriminately, and given their consequent preference for lower federal courts that, *inter alia*, could share the appellate load.¹³²

Overall, therefore, the nationalist thinking apparently motivating the Randolph-Madison Substitute was this: Given the assumed ineffectualness of the confederationists' preferred option of limiting the federal judiciary to a single supreme court with mandatory appellate jurisdiction—even when bolstered by a legislative power to create lower federal courts subject to an "all or nothing" disincentive—the reformulated Compromise jettisoned mandatory supreme court appeals in favor of a flexible legislative power to supplement the supreme tribunal with lower federal courts and to assign either of them original *or* appellate jurisdiction "*extending to*" the enumerated categories. It thus makes sense to give "extend to" its eighteenth-century (and current) meaning of flexibly "reaching" as far as, but not mandatorily including, the entire constitutionally permissible jurisdiction.¹³³

The Randolph-Madison Substitute left many questions unanswered. Not only would the delegates have to hammer out specific jurisdictional categories, but with the jurisdictional floor now removed and with supreme court original and lower court appellate jurisdiction each being possible, they would also have to establish presumptions for the distribution of jurisdiction. Numerous options were available. With respect to both original and appellate jurisdiction (or particular categories of it), and with regard to both the inferior and supreme courts, they could: (1) establish federal court jurisdiction as the rule and let the legislature make exceptions in favor of state courts; (2) establish federal court jurisdiction as a possibility and in some way explicitly invite the legislature to invest

(resisting *Lockerty's* "greater includes the lesser" theory, and arguing that congressional control of lower federal court jurisdiction is implicit in the original Madisonian Compromise). Below we suggest that the Committee of Style's use of two verbs—"ordain and establish"—to describe Congress's power over inferior courts may confirm the legislature's jurisdictional as well as constitutive discretion. See *infra* note 289.

131. See *supra* text following note 123.

132. See *supra* notes 95–97 and accompanying text; *infra* notes 162–163, 181, 226 and accompanying text.

133. See *supra* notes 40, 129 and accompanying text; *infra* notes 267, 298 and accompanying text.

the federal courts with it; (3) establish federal court jurisdiction as a possibility over which the legislature would have complete discretion; or (4) establish *state* court jurisdiction as the rule and let the legislature make exceptions in favor of federal courts. As we will see, the delegates spent much of the remainder of the Convention deciding among these options.

* * * * *

At the end of the day on June 13, the Committee of the Whole issued a report reprinting the Virginia Plan as revised.¹³⁴ Surveying the report, Madison may have felt moderate satisfaction with its relatively expansive national negative, the inclusion of the oath, and his and his allies' salvage of a legislative power to "appoint" lower federal courts and invest them with original or appellate jurisdiction. Or he might have felt moderate disappointment with the Committee's disapproval of an absolute negative, a council of revision, and constitutionally mandated lower federal courts. Whatever Madison's assessment on the 13th, it no doubt turned more pessimistic the next day when William Paterson of New Jersey secured a postponement of debates so that New Jersey and several other delegations might "digest . . . a purely federal" (in our terms "confederal") plan to submit in opposition to the Virginia Plan.¹³⁵

D. *The New Jersey Plan*

The following day Paterson placed before the Convention nine resolutions that have come to be known as the New Jersey Plan.¹³⁶ The conveners intensively debated the plan as a whole over the next several days then rejected it.

1. *June 15: Introduction of the Plan.* — Paterson's plan vested the national government with more strictly defined powers than did the Virginia Plan and displayed little interest in controlling state legislative mischiefs. Of Madison's five measures for influencing state lawmakers, it contained only one (that Madison had abandoned) and a half—force and an extremely limited federal judiciary.¹³⁷

134. See 1 Farrand, *supra* note 2, at 228–32, 235–37.

135. *Id.* at 240 (June 14, 1787).

136. See *id.* at 241, 242 (June 15, 1787).

137. See *id.* at 243–44, 245. The New Jersey Plan's judiciary resolutions were as follows:

2. . . . [P]rovided that all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations [of Congress] shall be adjudged by the Common law Judiciarys of the State in which any offence contrary to the true intent & meaning of such Acts rules & regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering judgment, to an appeal to the Judiciary of the U. States

....

as some part of it required the "Construction" of national or international law.¹⁴¹

The New Jersey Plan did, however, contain a third mechanism for controlling state law, one that combined in a unique way several of Madison's suggested controls. It was part state-judge-targeted oath (recalling Williamson's view that an oath would be subsumed by a requirement that "the union . . . be[] the law of the land"),¹⁴² part state-judge-effectuated national veto (because it prevented state laws from "[]with-standing" an official determination that they contravened federal law), and part state-focused judiciary plan (insofar as it contemplated and regulated the exercise of federal question jurisdiction by "the Judiciary of the several States"). In the first articulation of a supremacy clause, the New Jersey Plan provided:

6. Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding . . .¹⁴³

The New Jersey Plan's prototype differs significantly from the Supremacy Clause that ultimately emerged from the Convention.¹⁴⁴ It did not subordinate state law to the national Constitution itself, nor did it expressly subordinate state constitutions to federal statutes. Its reference to "the Judiciary of the several States" was more institutional and less personal than the final version's "*Judges in every State.*" And it made federal acts and treaties the "supreme law of the respective States,"¹⁴⁵ not "of the Land." Although subtle, these last two distinctions are important: The New Jersey version brought federal law into the corpus of state law, thereby obliging state institutions to treat federal law as their own. By contrast, the final version pulls the individual "Judges in every State" out of their local institutional roles and presses them into service applying a law that, if not of another sovereign (say, "the law of the United States"), is also not "the law of the respective State[]" but something in-between—the "supreme Law of the Land." In either event, this kind of provision makes explicit what was implicit in the earlier Rutledge conception, namely, that state courts had no choice but to make themselves available

141. 2 *id.* at 136; see *supra* note 80 and accompanying text.

142. 1 Farrand, *supra* note 2, at 207 (June 11, 1787) (discussed *supra* note 119 and accompanying text).

143. *Id.* at 245 (June 15, 1787).

144. See U.S. Const. art. VI, cl. 2.

145. 1 Farrand, *supra* note 2, at 245 (June 15, 1787).

to enforce national law and to entertain federal causes of action.¹⁴⁶ Either way, that is, but particularly in the final Supremacy Clause, state judges were given what amounts to a structural filtering function with regard to state law inconsistent with federal law and, as such, were uniquely "commandeered" (to use the current linguistic fashion) for national purposes.¹⁴⁷

2. *June 16, 18, & 19: Rejection of the Plan.* — In lengthy speeches, Madison, Hamilton, and Randolph vigorously attacked the New Jersey Plan and particularly its reliance on force, arguing that a "coertion of arms" would inevitably lead to "a war between" the national government and the states, whereas a "coertion of laws" would have a centripetal effect.¹⁴⁸ The organizing principle of Madison's speech was the New Jersey Plan's inability to control errant state law, i.e., to meet the central "object of a proper plan . . . , to preserve the Union [and] provide a Government[] that will remedy the evils felt by the States"¹⁴⁹ Because the Plan lacked (1) a national veto of injudicious state laws and (2) original federal judicial cognizance of federal criminal cases (a point that could not distinguish the revised Virginia Plan absent an assumption that the federal legislature would choose to establish inferior federal courts), Madison argued that the New Jersey proposal would not

prevent those violations of the law of nations & of Treaties which . . . must involve us in the calamities of foreign wars[;] . . . prevent encroachments on the federal authority[;] . . . prevent trespasses of the States on each other[;] . . . secure the internal

146. See *supra* note 94 and accompanying text. In reading the Supremacy Clause to make this last point, the Supreme Court has vacillated (sometimes in the same passage) between statements that sound in the New Jersey Plan's installation of federal into state law, and other statements that sound in the final version's extrication of state judges from their local institutional roles and impressment of them into a kind of national service. See, e.g., *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("[T]he Constitution and laws . . . are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure."); *Clafflin v. Houseman*, 93 U.S. 130, 137 (1876) ("[That] a State court derives its existence . . . from the State laws is no reason why it should not afford relief [required by federal law]; . . . it is subject also to the laws of the United States, and is just as much bound to recognize these [as] to recognize state laws.").

147. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997) (noting that the Supremacy Clause "permit[s] imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power"); *New York v. United States*, 505 U.S. 144, 178–79 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."); *infra* notes 499–501 and accompanying text.

148. 1 Farrand, *supra* note 2, at 284–85 (June 18, 1787) (statement of Alexander Hamilton); see *id.* at 255–56 (June 16, 1787) (statement of Edmund Randolph). In his speech, Hamilton proposed a new plan, like the Virginia Plan but more nationalist in every respect. See *id.* at 291–93.

149. *Id.* at 315–16 (June 19, 1787).

tranquility of the States themselves[; and] . . . secure a good internal legislation & administration to the particular States.¹⁵⁰

Seven states to three, with Maryland divided, the Committee of the Whole voted against reporting the New Jersey Plan to the Convention.¹⁵¹ The Convention instead took up the Virginia Plan as reported to it the following day.

E. *The Virginia Plan in the Convention*

Although the New Jersey Plan was defeated, its small-state concerns about representation in the national legislature generated nearly a month of debate. Among the important fallout from the Convention's resolution of this debate were the demise of the legislative veto and its replacement by judiciary-focused supremacy and "arising under" clauses.

1. *July 10: Randolph's Contemplated Compromise.* — While the debate between the large and small states was taking place, Randolph floated, at least privately to Madison, a compromise plan.¹⁵² Several provisions of the "Randolph Compromise" are of particular interest here. They reveal the nationalists' recognition that they would have to constrain even further the "national negative" mechanism for controlling state law.¹⁵³ More importantly, they reveal the nationalists' disposition, borne out by subsequent events, to compensate for such a loss by (1) emphasizing the internal duty of state lawmakers to conform state "law" to national law, and (2) ensuring observance of that duty through federal judicial review.

To begin with, the Randolph Compromise assured "the people of each State" that they "retain the perfect right . . . of making all laws not contrary to the articles of Union," subject only "to the supremacy of the General Government in those instances . . . in which that supremacy shall be expressly declared by the articles of the Union." Next, the proposal authorized national legislative vetoes of state laws, but permitted states to petition "the national Judiciary" to "void" vetoes that were "contrary to the power granted by the articles of the Union," thus enabling federal judges to fulfill something of a "council of revision" function with regard to legislative vetoes without becoming politically entangled. Finally, as a substitute for the weakened veto, the proposal developed a proto-Fourteenth Amendment due process and equal protection clause and a proto-section 1983—both aimed at unjust state "law," but not at other improper state action—which allowed "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particu-

150. *Id.* at 316–19.

151. See *id.* at 313, 322. Delaware, New Jersey, and New York voted to report the Plan to the Convention. See *id.*

152. See Edmund Randolph, Suggestion for Conciliating the Small States (July 10, 1787), reprinted in 3 Farrand, *supra* note 2, at 55–56.

153. See *supra* notes 114–116 and accompanying text.

lar State [to] resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice."¹⁵⁴

2. *July 17: The Fall of the Negative and the Rise of the Supremacy Clause.* — The Convention settled the representation issue on July 16, voting five states to four, with Massachusetts divided, to grant each state an equal voice in the Senate.¹⁵⁵ With large states now vulnerable to coalitions of small states capable of vetoing their internal legislation (as well as vice versa), the national negative immediately encountered new opposition. Although Pennsylvania had been one of the three states to favor expanding the negative on June 8,¹⁵⁶ one of its most prominent delegates and a reliable nationalist, Gouverneur Morris, now attacked the veto as offensive and superfluous. In keeping with his nationalist views, Morris argued that a "negative[]" of offensive state "law" by the federal "judiciary department," backed up by ordinary legislative powers, would suffice in the veto's absence.¹⁵⁷ Confederationist Sherman agreed that the negative was unnecessary but thought that "the Courts of the States" should be relied on to void state laws that "contraven[ed] the Authority of the Union."¹⁵⁸

Responding to these and various practical objections,¹⁵⁹ Madison pronounced "the negative on the laws of the States . . . essential to the efficacy & security of the Genl. Govt."¹⁶⁰ Only through it could "the propensity of the States to pursue their particular interests in opposition to the general interest [be] . . . effectually controuled."¹⁶¹ Federal judicial review would not suffice because it would come too late.¹⁶² Nor could "[c]onfidence . . . be put in the State Tribunals as guardians of the National authority and interests" because they were vulnerable to local politics:

In all the States these are more or less dependt. on the Legislatures. In Georgia they are appointed annually by the Legislature. In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.¹⁶³

154. Randolph, *supra* note 152, at 56.

155. See 2 Farrand, *supra* note 2, at 13–14, 15–16 (July 16, 1787).

156. See 1 *id.* at 163, 168 (June 8, 1787); *supra* note 117 and accompanying text.

157. 2 Farrand, *supra* note 2, at 28 (July 17, 1787); see Rakove, *supra* note 26, at 1047 ("the negative was the first casualty . . . [of the] decision of July 16 giving the states an equal vote in the Senate"); Sager, *supra* note 17, at 47.

158. 2 Farrand, *supra* note 2, at 27 (July 17, 1787) (emphasis added).

159. See, e.g., *id.* (statement of Luther Martin).

160. *Id.*

161. *Id.*

162. See *id.*

163. *Id.* at 27–28 (footnote omitted).

Madison's arguments notwithstanding, the negative fell, seven states to three.¹⁶⁴ Its defeat contributed to two of the trends discussed above: (1) the rejection of other Madisonian mechanisms for "effectually controul[ing]" state legislators' self-interested and centrifugal "propensities" on the ground that *judicial* review of state "law" would suffice; and (2) as revealed by the discrepancies in the Morris and Sherman positions, an ongoing tug-of-war between nationalists and confederationists over whether the reviewing courts should be federal or state. With the demise of Madison's cherished veto, competing nationalist and confederationist efforts to recalibrate the balance struck by the Madisonian Compromise, which the Randolph-Madison Substitute already had shifted subtly in a nationalist direction, became an obsessive preoccupation during the remainder of the Convention.¹⁶⁵

The process began with the Convention's very next act, namely, unanimous acceptance of Luther Martin's motion to adopt a supremacy clause, thereby delegating to judges (state and federal) what previously had been the veto's function of voiding state law contrary to federal law.¹⁶⁶ Martin was perhaps the Convention's most committed confederationist,¹⁶⁷ so it is striking that his motion to revive an important feature of the New Jersey Plan should secure the votes of all the nationalists. But as the abortive Randolph Compromise already had telegraphed,¹⁶⁸ the nationalists recognized that however significant the role of state courts in checking state legislatures, and however significant the role of federal courts in checking up on the state courts, it would be crucial that (as Martin proposed)

the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be

164. See *id.* at 21–22, 28.

165. See *supra* notes 128–133 and accompanying text; see also *supra* notes 87, 93–97, 157–158, 163 and accompanying text; *infra* notes 180–183 and accompanying text (discussing the nationalist tugs and confederationist pulls). Ignoring the most important dynamics of this tug-of-war, prior commentary has tended to argue that there was only one pattern—away from the preferred Madisonian mechanisms and either toward mainly *federal* judicial review, see, e.g., Amar, *supra* note 17, at 248–49; Sager, *supra* note 17, at 46–48 & n.81, or toward mainly *state* judicial review, see, e.g., Harrison, *supra* note 9, at 252–53.

166. See 2 Farrand, *supra* note 2, at 28–29 (July 17, 1787). Linking the negative's defeat and the advent of the supremacy clause are, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 *Colum. L. Rev.* 1001, 1036–37 (1995); Rakove, *supra* note 26, at 1047; Sager, *supra* note 17, at 46–48.

167. See 3 Farrand, *supra* note 2, at 172, 172–232 (reprinting Martin's post-convention writings opposing ratification).

168. See *supra* notes 153–154 and accompanying text.

bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.¹⁶⁹

Martin's position also represents a conversion of sorts. Although previously of the view that "it would be improper" to make state judges take an oath of loyalty to the articles of union insofar as it conflicted with their oaths to uphold state law,¹⁷⁰ he now sponsored a considerably more demanding supremacy clause proposal. He did so, however, with the "wish and hope" that it would encourage the national legislature to permit "all questions arising on treaties and on the laws of the general government . . . [to be] determined in the first instance in the [now appropriately fortified] courts of the respective states."¹⁷¹ Martin's statement also conceded, as had Rutledge and the New Jersey Plan,¹⁷² that the state courts would fulfill only a "first instance" filtration responsibility as to state law contrary to federal law, leaving to an appellate federal court the job of checking the filters and the decisional law the state courts made. Martin's screen was only loosely meshed, however. Tracking the New Jersey Plan's supremacy clause, he intentionally omitted any reference to (1) the supremacy of the articles of union themselves (as opposed to federal acts and treaties) or (2) the subordinate position of state constitutions vis-à-vis federal law—believing, as he did, that state *constitutions* should trump contrary federal law.¹⁷³

3. *July 18: The Advent of "Arising Under" Jurisdiction and a Battle over Jurisdictional Presumptions.* — The allocation of responsibility between state and federal judges remained at the forefront the next day, July 18, when the Convention took up, phrase by phrase, the three judiciary resolutions as reported by the Committee of the Whole.¹⁷⁴ The Convention unanimously agreed, as it had before, "[t]hat a national Judiciary be established"¹⁷⁵ to "consist of One supreme Tribunal"¹⁷⁶ with tenure and salary protections.¹⁷⁷ Deciding who would appoint "supreme" judges again proved controversial and again was put off.¹⁷⁸

169. 2 Farrand, *supra* note 2, at 22 (July 17, 1787); see *id.* at 28–29 (statement of Luther Martin).

170. 1 *id.* at 203 (June 11, 1787); see *supra* note 121 and accompanying text.

171. Luther Martin, *Luther Martin's Reply to the Landholder*, *Maryland Journal*, March 19, 1788, reprinted in 3 Farrand, *supra* note 2, at 286, 287.

172. See *supra* notes 87, 91, 137 and accompanying text.

173. See Martin, *supra* note 171, at 287. In Martin's version, the New Jersey Plan's "Judiciary" of the several States became "Judiciaries," which then became "Judicatures" when the Convention forwarded the resolution to its Committee of Detail a week later. 2 Farrand, *supra* note 2, at 132 (emphasis added).

174. See *supra* note 127.

175. 2 Farrand, *supra* note 2, at 37, 41 (July 18, 1787).

176. *Id.*

177. See *id.* at 38, 45. Before adopting this clause, the Convention deleted the prohibition on *increases* in salary during service. See *id.*; *supra* notes 74–75 and accompanying text.

178. See 2 Farrand, *supra* note 2, at 37–38, 41–44 (July 18, 1787).

The provision empowering "the national Legislature . . . to appoint inferior Tribunals"¹⁷⁹ prompted another debate, but now on *how much*, not *whether*, federal and state review should occur. After Butler and Martin reprised the extreme confederationist position against any authorization of lower federal courts,¹⁸⁰ the other delegates debated presumptions: Arguing in favor of the Compromise, Randolph, Gorham, and Gouverneur Morris presumed that the legislature would exercise the power to create lower federal courts because "the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance."¹⁸¹ Invoking the opposite presumption, Sherman announced that he would accept the Compromise, "but wished [the legislature] to make use of the State Tribunals whenever it could be done"¹⁸² In George Mason's intermediate view, inferior federal courts might not be immediately necessary, but "many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary."¹⁸³ Although the provision passed unanimously,¹⁸⁴ the direction of its presumption remained contentious. What remained constant, however, was the legislature's discretion over lower federal courts, which had been broadened by (1) the Randolph-Madison Substitute's switch from "the jurisdiction of the [*supreme tribunal*] shall be" to "the jurisdiction of the *national Judiciary* shall extend to"¹⁸⁵ and (2) the Substitute's removal of any limitation of the lower and supreme tribunals to, respectively, original and appellate jurisdiction.¹⁸⁶

The Convention next unanimously approved Madison's motion to revise the preexisting jurisdiction clause to read: "That the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony."¹⁸⁷ By replacing "cases which respect the collection of the Natl. revenue" with "cases arising under [all national] laws," this amendment accomplished another important adjustment of the Compromise to compensate somewhat for the loss of the veto—in this

179. 1 *id.* at 231.

180. See 2 *id.* at 45–46 (July 18, 1787) (statement of Luther Martin) ("They will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere."); *id.* at 45 (statement of Pierce Butler).

181. *Id.* at 46 (statement of Edmund Randolph); see *id.* (statement of Nathaniel Gorham) ("Inferior tribunals are essential to render the authority of the Natl. Legislature effectual."); *id.* (statement of Gouverneur Morris).

182. *Id.*

183. *Id.*

184. See *id.* at 38–39, 46.

185. See *supra* notes 129–133 and accompanying text.

186. See *supra* text following note 128.

187. 2 Farrand, *supra* note 2, at 39 (July 18, 1787). Unlike the official version of this resolution, see *id.*, and the version submitted by the Convention to its Committee of Detail for inclusion in a draft Constitution, see *id.* at 132 (undated), Madison's notes include the word "all" before "cases." *Id.* at 46 (July 18, 1787); see *supra* note 127.

case by allowing national judges, as the veto previously had allowed the national legislature, to review state law for consistency with *all* federal statutory law. Of particular importance, moreover, Madison's amendment reiterated the Randolph-Madison Substitute's invitation to the legislature to use the entire "national Judiciary," inferior as well as supreme, to exercise jurisdiction over federal question cases both in original proceedings and on appeal from state courts.¹⁸⁸ The amendment thus made the lower courts available to shoulder not only some of the "original" work that otherwise would have been confined to state courts, but also some of the appeals from state courts that otherwise might have inundated the supreme tribunal.¹⁸⁹

Over the course of the critical July 16–18 period, another true, if provisional, compromise had been reached. In place of federal *legislative* review of state laws for consistency with national law—the structural constraint on state lawmaking that Madison thought "absolutely necessary"¹⁹⁰—the Convention devised a different, *judicial* review device. Using a newly inserted supremacy clause that made federal statutes "the supreme law of the respective States," the "Mid-July Compromise" co-opted the nominally "state Judiciaries," performing a nominally "state law" function, into performing what in fact was a national structural function, namely, filtering state legislation for any that conflicted with national statutes. Using a newly expanded federal question jurisdiction that the national legislature could distribute among an undifferentiated "national Judiciary" with an undifferentiated capacity to exercise original or appellate jurisdiction, the new Compromise also gave the national legislature a broadly available device for supervising the state judicial filtering process and, if necessary, substituting federal first-instance filters. The Mid-July Compromise, however, proved to be no more final than its predecessors had been.

4. *July 23 & 24: The Extension of the Oath Requirement.* — The confederationists' conversion to the cause of constitutionally imposed legal duties on state officials, at least in lieu of the national negative, became clearer on July 23 when the oath requirement applicable to state officials came before the Convention. Elbridge Gerry, who had earlier opposed the requirement as offensive to state sovereignty,¹⁹¹ now embraced it as a useful supplement to the supremacy clause that would end state officers' practice of treating their own governments "as distinct from, not as parts of the [] General System, & . . . [from] giv[ing] a preference to the State

188. See *supra* notes 128–133 and accompanying text; *infra* note 226 and accompanying text.

189. See *supra* notes 95, 128–133 and accompanying text; *infra* note 226 and accompanying text.

190. Letter from James Madison to George Washington, *supra* note 54, at 383; see 2 Farrand, *supra* note 2, at 27–28 (July 17, 1787).

191. See 1 Farrand, *supra* note 2, at 203 (July 11, 1787); *supra* note 121 and accompanying text.

Govts."¹⁹² After extending the oath requirement to federal officials, the Convention unanimously accepted it.¹⁹³ The Convention then and the next morning appointed Ellsworth, Gorham, Randolph, Rutledge, and Wilson to a Committee of Detail charged with reporting a Constitution based on the proceedings thus far, with consideration, as well, of the Pinckney and New Jersey Plans.¹⁹⁴

F. *The Committee of Detail*

No notes of Committee of Detail debates exist, and only two complete Committee drafts of proposed constitutions plus a final report survive. In these three documents, the Committee did five things. First, it developed and refined the qualities that federal courts would be expected to exercise when they had jurisdiction, by (a) for the first time investing all federal courts with a "Judicial Power" that the legislature could not withdraw; (b) giving all federal judges tenure and salary protections; and (c) making inferior courts (if any) independent federal tribunals, not appropriated state courts. Second, the Committee reinforced the legislature's authority over the quantity of federal jurisdiction by retaining the Randolph-Madison Substitute's "shall extend to" language and backstopping it with the first versions of an "Exceptions and Regulations" clause and with an "assignments" clause letting the legislature transfer jurisdiction from the supreme court to lower federal courts. Third, the Committee created a presumption of state court original and supreme court appellate jurisdiction in most matters, subject to legislative override in favor of lower federal court original jurisdiction, or (in the later drafts) lower federal court *appellate* jurisdiction, or no federal appellate jurisdiction at all. Fourth, it expanded federal question jurisdiction. Fifth, it continued expanding and personalizing state judges' supremacy clause duties.

1. *The Randolph-Rutledge Draft.* — The earliest available thorough draft of a Constitution is a Committee of Detail document crafted primarily by nationalist Randolph, with edits by confederationist Rutledge.¹⁹⁵

a. *Federal Judiciary.* — The Randolph-Rutledge judiciary article was as follows:¹⁹⁶

5. The Judiciary

1. shall consist of one supreme tribunal
2. the judges whereof shall be appointed by the senate
3. and of such inferior tribunals, as the legislature may
(appoint) <establish>

192. 2 Farrand, *supra* note 2, at 88 (July 23, 1787).

193. See *id.* at 84, 87, 88.

194. See *id.* at 85–86, 95–97, 106 (July 23–24, 1787).

195. See *id.* at 137–50 (July 24–26, 1787).

196. Words in parentheses were crossed out in the original; italics represent later changes in Randolph's handwriting; angle brackets indicate emendations in Rutledge's handwriting. See *id.* at 137 n.6.

- (4. the judges of which shall be also appointed by the senate—)
 - 5 all the judges shall hold their offices during good behaviour;
 6. and shall receive punctually,
 at stated times
 a (fixed) compensation for their services,
 to be settled by the legislature
 in which no diminution shall be made, so as to affect
 the persons actually in office at the time of such
 diminution.
- and shall swear fidelity to the union.
7. The jurisdiction of the supreme tribunal shall extend
 - 1 to all cases, arising under laws passed by the
 general <Legislature>
 2. to impeachments of officers, and
 3. to *such* other cases, as the national legislature
 may assign, as involving the national
 peace and harmony,
 in the collection of the revenue
 in disputes between citizens
 of different states
 <in disputes between a State & a Citizen or Citizens of another State>
 in disputes between different
 states; and
 in disputes, in which subjects or citi-
 zens of other countries are concerned
 <& in Cases of Admiralty Jurisdn>

But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original. and the legislature shall organize it

8. The whole or a part of the jurisdiction aforesaid
 according to the discretion of the legislature
 may be assigned to the inferior tribunals, as
 original tribunals.¹⁹⁷

The Randolph-Rutledge draft was rife with small but consequential innovations: (1) Using the word "may" with respect to the legislature's power to create lower federal courts gently emphasized the optional character of those courts, and Rutledge's substitution of "establish" for "appoint" removed the previous connotation that the legislature could or should designate existing state courts as federal courts to hear federal disputes.¹⁹⁸ (2) Clinching the latter point, the draft extended tenure and salary protections, which previously had been applicable only to the supreme tribunal, to all federal judges, thus demanding of lower federal judges the independence qualities that Madison and others had criticized

197. Id. at 146–47 (citation omitted).

198. See Collins, *supra* note 100, at 124–26; 1 Goebel, *supra* note 19, at 211–12. But see Holt, *supra* note 100, at 357; Prakash, *supra* note 100, at 2019.

state judges for lacking.¹⁹⁹ (3) The draft then enumerated several categories of "cases" and "disputes" (as well as "impeachments")²⁰⁰ to which "[t]he jurisdiction of the supreme tribunal shall *extend*." It thus mandated that the court decide whole disputes, not abstract issues, while retaining the Randolph-Madison Substitute's innovation of imposing a constitutional ceiling, but not a floor, on the court's jurisdiction.²⁰¹ (4) Enumerated, in addition to impeachments, were (a) the "arising under [national] laws" category drawn almost verbatim from the Convention's July 18 Resolution, with Madison's "*all cases*" language,²⁰² and (b) a revised formulation of the July 18 Resolution's second and final category—referring to "such other cases, as the national legislature may assign, as involving the national peace and harmony"—now fleshed out to include (and apparently capped at) collection of revenue and admiralty cases and three categories of diversity disputes. (5) The last sentence of the jurisdictional categories deviated from the Randolph-Madison Substitute and reverted to the Virginia Plan's express allocation of only *appellate* jurisdiction to the supreme court (except in the case of impeachments), subject, however, to a legislative power to make that jurisdiction original. (6) The final clause let the legislature assign cases or disputes within any of the supreme tribunal's jurisdictional categories (apparently including impeachments) "to the inferior tribunals" but only "as *original tribunals*."

Our fourth through sixth points, covering items 7 and 8 of the Randolph-Rutledge draft, reveal a number of presumptions that the draft established to influence the legislature's power over the judiciary. First, by separately listing "arising under" jurisdiction and impeachments, this draft appears to have emphasized the presumptive need for federal court involvement in those areas and the drafters' expectation that the legislature would confer jurisdiction. No similar expectation attached to the other "peace and harmony" subcategories, thus letting the legislature decide whether to confer jurisdiction, with no constitutional tilt one way or the other.²⁰³ Second, the tribunal to which jurisdiction over the delin-

199. See 2 Farrand, *supra* note 2, at 27–28 (July 17, 1787); *supra* notes 97, 163, 181 and accompanying text. When the possibility of appointing state courts as federal ones was raised in Congress in 1789, Representative James Madison of Virginia opposed it as unconstitutional on the ground that no practical mechanism would be available to assure the tenure and salary protections that Article III requires. 1 *Annals of Cong.* 844 (Joseph Gales ed., 1789).

200. Cf. 2 Farrand, *supra* note 2, at 39, 46 (July 18, 1787) (prior unanimous vote by Convention to delete impeachments as a jurisdictional category).

201. See *supra* notes 80, 129, 139–141 and accompanying text.

202. See *supra* note 187 and accompanying text.

203. By providing that "jurisdiction shall extend to" impeachments and "arising under" cases and to "such other cases as the *national legislature may assign*, as involving the national peace and harmony," the draft might seem to have given the legislature discretion over the "peace and harmony," but not the impeachments and "arising under," categories. That reading, however, ignores the word "other," which suggests (as does the genesis of the "peace and harmony" category up through its July 18 formulation, see *supra* notes 73, 124, 187 and accompanying text) that the impeachments, "arising under," and revenue

eated categories of cases and disputes was "extend[ed]" was "the supreme tribunal"—but only presumptively. If the legislature so desired, clause 8 permitted it to give original jurisdiction over those cases to any "inferior tribunals" it created. Third, the draft's deviation from the Randolph-Madison Substitute, and its reversion to the Virginia Plan's division between original (inferior) and appellate (supreme) jurisdiction, was also by presumption only in one important respect. Thus, the "Exceptions" clause in item 7 of the Randolph-Rutledge draft authorized the legislature to transfer "arising under" and other "peace and harmony" cases from the supreme tribunal's (thus only presumptively) appellate to its original jurisdiction.²⁰⁴ Only the legislature's assignment of appellate (as opposed to original) duties to lower federal courts was entirely forbidden—as in the Virginia Plan, but not in the Randolph-Madison Substitute or in any plan subsequent to the Committee of Detail's first draft.

We hasten to add that reading the Randolph-Rutledge "Exceptions" clause to permit the legislature merely to shift cases from the supreme court's appellate to its original jurisdiction, rather than to eliminate cases from the court's jurisdiction altogether, is less consequential than it at first might seem. This is because of the long-neglected but critically important remainder of the clause, which provided that "the legislature shall organize [the supreme jurisdiction]." Recall Rutledge's central contribution to the judiciary conception as adopted (to this extent) by the Madisonian Compromise, namely, the strong likelihood (indeed, in Rutledge's, Sherman's, and Martin's view, the strong presumption) that there would be appeals from thirteen previously independent judicial systems to a newly established multi-sovereignty system of integrated

collection/diversity/admiralty subcategories all are types of "peace and harmony" matters subject to the legislature's discretion whether to confer jurisdiction—with the draft constitution having determined that all impeachments and "arising under" matters qualify "as involving the national peace and harmony" (thus encouraging the conferral of jurisdiction) while leaving it to the legislature to decide whether disputes in the other categories affect "national peace and harmony" (thus implying no presumption of jurisdiction). Recall that Randolph's own June 13 Substitute already had changed "the jurisdiction [of the supreme tribunal] shall be" to "the jurisdiction of the national Judiciary shall extend to." See *supra* note 129 and accompanying text. That switch, and not, as Clinton and Goebel have argued, the merely confirmatory late-July insertion of the "as the national legislature may assign" language, see Clinton, *supra* note 19, at 773; 1 Goebel, *supra* note 19, at 234, initiated the principle of congressional control of federal jurisdiction.

204. See Clinton, *supra* note 19, at 778 (basing this possible reading of *Article III's* Exceptions Clause on the Clause's antecedent in the Randolph-Rutledge draft). The Randolph-Rutledge "Exceptions" clause apparently served *only* the appellate-to-original function, given that (1) the "extend to" language that began the jurisdictional section already permitted the legislature to remove categories from the supreme court's jurisdiction altogether, as, we conclude, did the "organize" (and later the "Regulations") provision, see *infra* notes 206–208, 223 and accompanying text, and (2) the assignments clause already allowed the legislature to shift categories from the supreme court's to the inferior courts' jurisdiction.

courts.²⁰⁵ Conjoining one new and thirteen existing judiciaries into a single integrated court system would require an intricate body of rules to permit—and at times to compel—the movement of records, judgments, and orders of enforcement between sovereigns.²⁰⁶ By giving the legislature the power (or recognizing that only it would have the practical capacity) to formulate those rules and thereby “organize” the new system and prescribe when and how cases could cross the previously unbridged state-federal divide, the Randolph-Rutledge draft expressly granted the legislature (1) all the authority that the “extend to” revision already had implied as to the supreme tribunal’s appellate jurisdiction,²⁰⁷ and (2) at least as much authority as is entailed by the traditional reading of the Exceptions Clause as ultimately adopted.²⁰⁸

The effect of clauses 7 and 8 (together with the legislature’s clause 3 power to forgo inferior tribunals) thus was to create two broad inter-sovereign presumptions. With respect to original jurisdiction, except in cases of impeachment, state judicial responsibility would be the default rule. With respect to appellate jurisdiction, the supreme tribunal presumptively would hear appeals in the “arising under” category and also in

205. See *supra* notes 87, 91–94, 137, 171–172 and accompanying text.

206. See Harrison, *supra* note 9, at 242–43 & n.115 (noting that “[i]t can take a while to work out the implications of such an innovative, not to mention complicated, system [of dual federalism]”).

207. By creating a fully self-contained federal system of inferior (original) and supreme (appellate) courts, the Virginia Plan would have avoided the organizational and regulatory challenges posed by the Rutledge innovation as embodied in the Madisonian Compromise. Under the Articles of Confederation, Congress had encountered and failed to resolve these very challenges when it established a Court of Appeals in Cases of Capture, which, although nationally staffed, was largely at the mercy of the states because of their ability to bar (1) appeals from their courts to the Capture Court and (2) enforcement by their courts of the Capture Court’s judgments. See 1 Goebel, *supra* note 19, at 178–82, 194–95 (describing the Capture Court’s frustration by “the intransigence [sic] of the states”).

208. See *supra* notes 9, 23, 46 and accompanying text. In the Committee’s next draft, the legislature’s power to “organize” became a power to “Regulat[e]” the supreme tribunal’s jurisdiction. See *infra* note 223 and accompanying text. During the ratification debates, nationalists discussing Congress’s power to limit federal appellate jurisdiction usually focused on the “Regulations,” not the “Exceptions,” power. See, e.g., 2 Elliot, *supra* note 4, at 494 (Dec. 7, 1787) (statement of James Wilson at Pennsylvania ratifying convention) (“[W]ill not Congress better regulate [appeals], as they rise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered.”); 3 *id.* at 519 (June 18, 1788) (statement of Edmund Pendleton at Virginia ratifying convention) (“Congress may make such regulations [of the Supreme Court’s appellate jurisdiction] as they may think conducive to the public convenience.”); *id.* at 534 (June 20, 1788) (statement of James Madison at Virginia ratifying convention) (“by the word regulations, it is in the power of Congress to prevent [appellate court supercession of jury verdicts], or [to] prescribe such a mode as will secure the privilege of jury trial” and Congress “may make a regulation to *prevent such appeals entirely*” (emphasis added)); see also *infra* notes 366–367, 369, 372 and accompanying text (discussing Supreme Court’s emphasis during the 1790s on “Regulations,” not “Exceptions,” as the source of Congress’s power over the Court’s jurisdiction).

the six "peace and harmony" subcategories insofar as the legislature decided to create any federal jurisdiction over those subcategories, but the legislature retained the option of granting state courts the final say in any or all cases, either by choosing not to extend federal jurisdiction to such cases or by declining to "organize" any appellate method of transferring records from, and judgments and orders to, state courts.

b. *Supremacy Clause*. — The Randolph-Rutledge draft had initially included language, subsequently crossed out by one of the authors, providing that "[a]ll laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle."²⁰⁹ By mandating that the "supreme judiciary" have an effectual power to void state law "repugnant" to the constitution, the crossed out provision departed significantly from the New Jersey/Martin supremacy clause, which had presumptively divided the power to void state law between state (original) and federal (appellate) courts and had premised the power on statutory and treaty, not constitutional, repugnance.²¹⁰ As a matter of pure speculation, one can imagine Randolph inserting, and Rutledge deleting, the clause because it supplemented the presumption favoring federal, at least appellate, jurisdiction over "all cases, arising under laws passed by the general <Legislature>" with a *requirement* of at least federal appellate jurisdiction over all cases arising under the articles of union.²¹¹

2. *The Wilson-Rutledge Draft and the Final Committee Report*. — The only other complete Committee of Detail draft is in James Wilson's hand, again with emendations by Rutledge.²¹² This draft is virtually identical to the final report that the Committee submitted to the Convention on August 6,²¹³ so we discuss both together.

a. *Federal Judiciary*. — The Wilson-Rutledge judiciary article obviously was influenced by the Randolph-Rutledge draft, but is somewhat truer to the Convention's Resolutions:²¹⁴

14.

The Judicial Power of the United States shall be vested in one Supreme (National) Court, and in such (other) <inferior>

209. 2 Farrand, *supra* note 2, at 144.

210. See *supra* notes 143–145, 169, 184 and accompanying text.

211. Cf. Sager, *supra* note 17, at 49 (clause reveals "crucial link between national supremacy and the appellate jurisdiction of the Supreme Court").

212. See 2 Farrand, *supra* note 2, at 163–75.

213. See *id.* at 183, 186, 188 (Aug. 6, 1787) (supremacy, judiciary, and oath provisions in Committee of Detail's final report). Minor stylistic discrepancies between the draft and the final report are ignored.

214. Words in parentheses were crossed out in the original; italics represent Wilson's edits; angle brackets indicate Rutledge's edits. See *id.* at 163 n.17.

Courts as shall, from Time to Time, be constituted by the Legislature of the United States.

The Judges of the Supreme (National) Court shall (be chosen by the Senate by Ballott). (They shall) hold their Offices during good Behaviour. They shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Jurisdiction of the Supreme (National) Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; to all Cases affecting Ambassadors (and other) <other> public Ministers <& Consuls>, to the Trial of Impeachments of Officers of the United States; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies between <States,—except those wh. regard Jurisdn or Territory,—betwn> a State and a Citizen or Citizens of another State, between Citizens of different States and between <a State or the> Citizens (of any of the States) <thereof> and foreign States, Citizens or Subjects. In Cases of Impeachment, (those) <Cases> affecting Ambassadors (and) other public Ministers <& Consuls>, and those in which a State shall be (one of the) <a> Part(ies)<y>, this Jurisdiction shall be original. In all the other Cases beforementioned, it shall be appellate, with such Exceptions and under such Regnulations as the Legislature shall make. The Legislature may (distribute) <assign any part of> the(is)e Jurisdiction <above mentd.,—except the Trial of the Executive—>, in the Manner and under the Limitations which it shall think proper (among) <to> such (other) <inferior> Courts as it shall constitute from Time to Time.²¹⁵

The Wilson-Rutledge draft for the first time (1) identified something called “[t]he Judicial Power of the United States,” that differs from both the particular “Courts” that the constitution and legislature create and their “Jurisdiction,” and (2) vested all of that power “in one Supreme Court *and in* such inferior Courts”²¹⁶ as are “constituted” (i.e., not “ap-

215. *Id.* at 172–73.

216. Here we support Amar’s point that Article III as finally written creates “structural equality” among all federal judges. Amar, *supra* note 17, at 235–39 & n.115, 262. We cannot, however, accept his argument for reading the “*and in*” phrase as if it said only “*and*”—or even “*or*.” By reading the “*in*” out of “*and in*,” Amar departs from the plain meaning approach that he usually adopts, in order to argue that Article III’s phrase “judicial Power” means to say, or at least “subsume” the term, “jurisdiction,” certain categories of which (in his view) have to be vested in some federal court but may be vested in either the inferior courts or the Supreme Court without being vested in both. *Id.* at 221–22, 230–32 & n.88, 233. That reading falters not only because (a) all federal “jurisdiction” concededly is *not* vested in the lower federal courts, although all of the “judicial Power” is vested “*in*” them, but also because (b) Article III, Section 1 irrevocably “vest[s]” the judicial power in all federal courts while Section 2 only says that “[t]he judicial Power shall extend [meaning reach] to” certain heads of jurisdiction, rather than “shall be” composed of that jurisdiction (the Virginia Plan’s pre-Compromise formulation), and because (c) Amar’s interpretation cannot easily be brought into reflective equilibrium with later congressional and Supreme Court practice, see Meltzer, *supra* note 9,

point[ed]”) by the legislature. In so doing, the draft established two *qualitative* traits by which federal courts henceforth were distinguished from state courts. First, the Wilson-Rutledge draft made yet clearer than the Randolph-Rutledge draft (which had made clearer than the Convention drafts) that the national judiciary was *nationally* “constitute[d]”—and thus physically and personally *separate* from state courts. Second, the draft defined a characteristic that all, and only, federal judges had: the duty and responsibility to exercise the “Judicial Power of the United States.” These innovations, in turn, left the *quantity*, or categories, of federal jurisdiction—some of which, at the least, could or would be shared by state original tribunals, and as to which the federal courts’ “Power” merely could, but did not have to, “extend”—with relatively little significance as a means of distinguishing federal courts from state courts.

The intent to establish a set of qualitative, integrative, and distinctive traits of federal judges was even more clearly evidenced by the Committee of Detail’s final report to the Convention, which extended tenure and salary guarantees to all judges rather than only (as in the Convention Resolution and the Wilson-Rutledge draft) to supreme judges.²¹⁷ Doing so amplified the structural equivalence of all federal courts and established a third qualitative respect (independence) in which those courts were distinct from and “structurally superior” to state courts.²¹⁸ Building on the innovation previously made in the Randolph-Madison Substitute for the original Madisonian Compromise, the Wilson-Rutledge draft in these three ways deftly invested the lower federal courts with the entirety of the judiciary’s “Power,” while still maintaining the spirit of the Compromise by refraining from mandating the lower courts’ creation.

The Wilson-Rutledge jurisdictional categories were similar to those of the Randolph-Rutledge version, except that the Wilson-Rutledge draft (1) replaced the “peace and harmony” heading and its various subcategories with a listing of the subcategories alone; (2) substituted “Controversies” for “disputes”; (3) added a new Ambassadors/Ministers/Consuls category; and (4) applied an “*all cases*” description to the “arising under Laws,” “Ambassadors,” and “Admiralty” categories, in contrast to the

at 1585–602. Nor can Amar avoid the first problem by arguing that the “permissive ‘may [from time to time ordain and establish]’” language might have reflected back on the Supreme Court but for the insertion of the second “in.” *Id.* at 232 n.88. The biggest difficulty with this argument is that the “permissive ‘may’” is nowhere to be found in the Wilson-Rutledge draft where the second “in” first appears. Moreover, even if one were to delete the second “in,” there is no straight-faced way to read Article III’s “*such inferior Courts as the Congress may from time to time ordain and establish*” language to feed back to the Supreme Court. The “*such inferior Courts as*” formulation does all the work Amar would assign to the “in” and in a much clearer manner than “in” could do. There is simply no purpose for the second “in” other than to make clear that the entire “judicial Power” vests “in . . . inferior [federal] Courts.”

217. See 2 Farrand, *supra* note 2, at 186.

218. See Amar, *supra* note 17, at 235–38 (describing the “structural superiority” of federal judges).

"Trial of Impeachments" and the various diversity-of-citizenship-based "Controvers[y]" categories. Given Wilson and Rutledge's retention of the Randolph-Madison Substitute's "shall extend to" innovation, the Wilson-Rutledge draft's selective use of the word "all" apparently was meant to extend the legislature's power to confer jurisdiction to all subcategories within the specified categories of cases, rather than to limit the legislature's power to withhold jurisdiction over cases within those categories.²¹⁹ The selective use of "all" thus may have reflected: (a) an intent to include criminal as well as civil disputes within "Cases," but only civil disputes within "Controversies";²²⁰ (b) a desire to include single-party "cases" in categories in which there need not be a "controversy" between two or more people;²²¹ and/or (c) an effort to include every dispute within the subject-matter-defined categories and not just those presenting pristine questions of law, and the whole such dispute rather than just the part of it involving the "federal" (or equivalent) question—thus ruling out the Pinckney Plan's limitation of jurisdiction to a subset of cases in which some treaty or other provision of national or international law needed to be "constru[ed]," and the New Jersey Plan's option of addressing only the federal (or equivalent) construction question *itself*, and not the entire case or controversy.²²²

The last three sentences of the Wilson-Rutledge draft closely paralleled the format of the analogous provisions in the Randolph-Rutledge version, with an "Exceptions" clause aimed at least in part at giving the legislature power to shift the supreme court's appellate jurisdiction to its original jurisdiction, a "Regulations" clause (synonymous with the prior draft's "organize it" clause)²²³ giving the legislature a more muscular power to deny supreme court appeals, and an "assign[ments]" clause letting the legislature shift cases within the supreme tribunal's jurisdiction to inferior federal courts.²²⁴ Notably, however, the later version's "Exceptions" clause was more general than the prior version's, potentially allowing it to do some of the same work as the "Regulations" and "assign[ments]" clauses. A more important difference between the two

219. See *supra* notes 129–133 and accompanying text. But see Amar, *supra* note 17, at 229–30, 238–59.

220. See *supra* note 43 and accompanying text.

221. See Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 *Notre Dame L. Rev.* 447, 449–50, 472–511 (1994).

222. See *supra* notes 80, 137, 139 and accompanying text; *infra* notes 470–474 and accompanying text. Under this interpretation, it would be natural to omit "all" before the "Controversy"-denominated heads of jurisdiction, because, in those disputes where jurisdiction is dependent on the nature of the parties, not the type of legal issue, no ambiguity exists over whether a dispute qualifies and whether the federal court gets the whole case.

223. See Clinton, *supra* note 19, at 778, 781 (noting the relationship between the Randolph-Rutledge "organize it" clause and the Wilson-Rutledge "Regulations" clause); Ratner, *supra* note 18, at 170 (as used in the eighteenth century, "[a] 'regulation' . . . was a rule imposed to establish good order").

224. See *supra* notes 204–208 and accompanying text.

drafts was the later version's removal of any requirement that jurisdiction shifted from the supreme to the lower courts be "original jurisdiction."²²⁵ This change enabled the Wilson-Rutledge draft once again to take full advantage of the Randolph-Madison Substitute's sacrifice of mandatory supreme court appellate jurisdiction in favor of letting the legislature assign nearly the whole of the federal jurisdiction (original *or* appellate) to any lower federal courts that it might need or want to create.²²⁶

The presumptions the Wilson-Rutledge draft created were similar to those the Randolph-Rutledge draft had established: (1) State court *original* jurisdiction was still the default rule, except as to impeachments and ambassadorial and state-party cases, as to which supreme court original jurisdiction was the rule. But the legislature was invited to shift matters within the supreme court's appellate jurisdiction to its original jurisdiction or to assign cases (except some impeachments) that were presumptively within, or had been legislatively shifted to, the supreme court's original jurisdiction to the original jurisdiction of any lower federal courts that the legislature created. (2) With respect to appellate jurisdiction, the presumption was that the supreme court would hear appeals in all constitutionally specified categories in which it did not have original jurisdiction. But the legislature (a) was invited to shift any of the supreme court's appellate jurisdiction to the lower federal courts and (b) retained the option—though it was not expressly invited—to give state courts the final say in any cases over which they exercised original jurisdiction by declining to promulgate regulations for the transfer of records, judgments, and orders between state and federal courts or otherwise withholding federal appellate jurisdiction.

b. *Supremacy Clause*. — The Wilson-Rutledge draft contained a supremacy clause similar to the Martin provision the Convention had adopted on July 17:

The Acts of the Legislature of the United States made in Pursuance of this Constitution, and all Treaties made under the Authority of the United States shall be the supreme Law of the several States, and of their Citizens and Inhabitants; and the Judges in the several States shall be bound thereby in their Decisions, any Thing in the Constitutions or Laws of the several States to the Contrary notwithstanding.²²⁷

225. Arguably, the power the Wilson-Rutledge draft conferred on the legislature to make assignments to the inferior courts "in the Manner and under the Limitations which it shall think proper," for the first time raised the possibility that the legislature could impose qualitative, not just quantitative, limits on the federal judiciary's decisionmaking powers. See *infra* notes 268–271, 283 and accompanying text.

226. See *supra* notes 129–133 and accompanying text. The Wilson-Rutledge draft thus rejected—permanently, it turned out—any bar to lower federal court consideration of cases begun in the state courts.

227. 2 Farrand, *supra* note 2, at 169.

To Martin's dismay,²²⁸ but apparently not Rutledge's, this clause for the first time forbade state *constitutions*, as well as state laws, to withstand federal laws and treaties with which the former were in conflict. Additionally, by directing the clause to "the Judges *in* the several States," the Wilson-Rutledge draft largely completed the pluralizing, personalizing, and deinstitutionalizing transformation that previously had progressed from "the Judiciary" to "the Judiciaries" to "the Judicatures *of* the several States."²²⁹ As such, it more clearly conscripted state judges as *individuals* (albeit ones still purportedly applying federal law grafted onto the law of the states) into national service as the first line of defense against state laws (and now constitutions) that were contrary to federal statutory and treaty provisions.²³⁰

G. *The Committee of Detail Report in the Convention*

1. *August 20 & 22: Two Rejected Advisory Opinion Amendments.* — Before reaching the judiciary-related aspects of the Committee of Detail report, the Convention referred several new proposals to the Committee. Among them were Pinckney's suggestion that "[e]ach Branch of the Legislature, as well as the supreme Executive [be given] authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions,"²³¹ and Gouverneur Morris's idea for a "Council of State" composed of the heads of several executive departments and the chief justice of the supreme court. In this role, the chief justice would have been responsible not only for advising the President, but also for proposing "alterations of, and additions to, the Laws of the United-States."²³² Hewing to the Convention's consistently strong commitment to judicial independence and effectual judicial decision of the whole case,²³³ the Committee of Detail rejected the advisory opinion proposal and reported a watered down "Privy-Council" provision (with a reduced role for the chief justice) that the Convention then proceeded to ignore.²³⁴

2. *August 23: A Last Debate on the Negative and the Assurance of "this Constitution[']s" Supremacy.* — On August 23, the Convention for the fourth time replayed the debate over mechanisms to keep state law within the bounds of federal law. An array of nationalists again moved and spoke in favor of a national negative, this one requiring a two-thirds vote of both houses and reaching any state law "interfering . . . with the gen-

228. See *supra* note 173.

229. See *supra* notes 143, 169, 173 and accompanying text.

230. See 1 Goebel, *supra* note 19, at 236 (noting that the change from "Judiciaries" to "judges" "had the effect of making personal the injunction").

231. 2 Farrand, *supra* note 2, at 334, 341 (Aug. 20, 1787).

232. *Id.* at 335-36, 342-43.

233. See *supra* notes 74-75, 139, 222 and accompanying text.

234. See 2 Farrand, *supra* note 2, at 367 (Aug. 22, 1787).

eral interests and harmony of the Union."²³⁵ The negative, Wilson said, was "the key-stone" of any effective means of controlling state law, because "the firmness of Judges is not of itself sufficient[.]"²³⁶ An array of confederationists, and Pennsylvania nationalist Morris, again opposed the negative, arguing, *inter alia*, that it was "unnecessary; the laws of the General Government being Supreme & paramount to the State laws according to the plan, as it now stands."²³⁷ Anticipating the last point, Rutledge had earlier in the day moved, and the Convention had unanimously agreed, to extend the reach of the supremacy clause to assure for the first time that "[t]his Constitution" itself, and not merely federal acts and treaties, would be treated as "the supreme law of the several States."²³⁸ Two days later, the Convention also unanimously expanded the supremacy clause to make clear its inclusion of preexisting as well as newly made laws and treaties.²³⁹ The motion to seek additional committee consideration of the negative failed, six states to five.²⁴⁰

As on each prior occasion, the answer to the question of how to keep state law within federal law came back to "the Judges"—begging the follow-up questions that also had been mooted on every prior occasion and never satisfactorily resolved: *Which* judges, subject to what duties and what review?²⁴¹ Possible answers to these questions were embodied in (1) Randolph and Madison's Virginia Plan—proposing an exclusively *federal* judicial approach to the review of state law; (2) Rutledge's June 5 Amendment—jettisoning federal in favor of state original jurisdiction but retaining federal appellate review; and (3) the various intermixtures of, and presumptions as to, state and federal original and appellate review reflected in the Madisonian Compromise itself, the Randolph-Madison Substitute, the New Jersey Plan, the Convention's Resolutions to the Committee of Detail (now including a supremacy clause), and that Committee's Randolph-Rutledge, Wilson-Rutledge, and final drafts. The evanescence of all of these solutions revealed, however, that the underlying question had not yet received an acceptable answer. With the national negative and the various revisionary and privy councils now permanently laid to rest, and with "force" rejected as a cure worse than the disease, the judiciary question—now refined to a question of presumptive quantities and assured "Power[s]," or qualities, of review—had to be resolved.

235. *Id.* at 382, 390 (Aug. 23, 1787) (motion of Charles Pinckney); see *id.* at 390 (statement of James Madison); *id.* at 391 (statement of John Langdon of New Hampshire).

236. *Id.* at 391.

237. *Id.* at 390 (statement of Roger Sherman); see *id.* (statement of George Mason); *id.* at 391 (statement of John Rutledge); *id.* (statement of Hugh Williamson); *id.* (statement of Gouverneur Morris).

238. *Id.* at 381–82, 389.

239. See *id.* at 409, 417 (Aug. 25, 1787) (quoted *infra* note 248).

240. See *id.* at 382, 391 (Aug. 23, 1787).

241. See *supra* notes 84, 87–88, 90–101, 157–173, 180–185 and accompanying text.

3. *August 27: The Final Madisonian Compromise.* — Matters came to a head on August 27, a date equal in importance to June 5 (the Madisonian Compromise), June 13 (the Randolph-Madison Substitute), and July 17 (the negative's defeat and replacement by the supremacy clause) in the development of the Convention's novel and complex judicial solution to the state law "vices" that provided the Convention's *raison d'être* for Madison and his allies.²⁴² As much by voting down certain proposals as by adopting others, the Framers finally constituted their federal experiment. In doing so, to be sure, they confirmed (1) the original Compromise's mandate of a supreme national tribunal and (mere) authorization of inferior ones; (2) the Substitute's "shall extend to," instead of "shall be," trade-off of mandatory supreme court appellate jurisdiction for increased legislative leeway to create more numerous and more geographically proximate lower federal courts on which could be conferred original *or* appellate jurisdiction; and (3) the Committee of Detail's investiture of the entire national judiciary with the full "judicial Power," its broadened "arising under" category, and its legislative "Exceptions" and "Regulations" powers over appellate jurisdiction. In addition, however, the delegates (4) conformed the supremacy and "arising under" clauses, carefully linking the state courts' filtering and the federal courts' spot-checking duties; (5) calibrated the presumptions that would govern the legislature's allocation of (a) jurisdiction between state and federal courts and (b) federal original and appellate jurisdiction between inferior and supreme courts; and, most importantly, (6) clarified the qualitative nature of "[t]he judicial Power" and insulated it from legislative interference—building on earlier decisions to ensure judicial independence and freedom from advisory duties and other political entanglements and to oblige federal courts to apply supreme law effectually to decide the whole case.

a. *The Quality of Decisionmaking Preserved and the "Arising Under" Jurisdiction Expanded.* — Excluding minutia, the day began with the adoption, six states to two, of a motion to insert the words "both in law and equity" after the opening phrase of the judiciary article—"The Judicial Power of the United States."²⁴³ That addition was supplemented later in the day by a successful motion to expand the "arising under" jurisdictional category to include all cases "in law and equity."²⁴⁴ In a subsequent touch-up of the judiciary article, the Convention withdrew the "law and equity" modifier of "[t]he judicial Power," thus leaving the phrase to expand the

242. See *supra* notes 53–55, 110–113 and accompanying text.

243. 2 Farrand, *supra* note 2, at 422, 428 (Aug. 27, 1787) (motion of William Johnson).

244. 2 *id.* at 425. The "law and equity" addition to the jurisdictional enumeration was surplusage if "all" already was meant to mandate federal jurisdiction in all "arising under" matters, see Amar, *supra* note 17, at 229–30, 246–52, but not, e.g., if "all" was designed to exclude the Pinckney and New Jersey possibility that only abstract legal issues could generate federally cognizable "arising under" cases. See *supra* notes 43, 80, 137, 139, 220–222 and accompanying text.

number of "arising under" cases to which "[t]he judicial Power shall extend" without corrupting the qualitative content of that "Power" with a quantitative descriptor.²⁴⁵ Turning then to judicial independence, and continuing to exhibit more agreement on its importance than on all other aspects of the judiciary article, the Convention, seven states to one, rejected Dickinson's proposal for executive removal of federal judges on the application of Congress.²⁴⁶

Next, in a crucial series of additional modifications to the "arising under" clause, the Convention, spurred on by, of all people, confederationist John Rutledge, unanimously agreed to expand *federal* jurisdiction to include not only "all Cases arising under the laws passed by the Legislature of the United States" (the preexisting language) but also all cases arising under "*this constitution*."²⁴⁷ In addition, the delegates carefully modified the language of the "arising under" clause (deleting "passed by the Legislature" with respect to "laws" and adding "and treaties made or which shall be made under their [the constitution's and laws'] authority") so as, in Rutledge's words, to revise the "arising under" jurisdiction "*conformably to a preceding amendment in another place*," to wit, the now linguistically identical supremacy clause as expanded on Rutledge's motion four days earlier.²⁴⁸ The Framers thus self-consciously and irrevocably forged the constitutional structural link between the front-line decisionmaking of "the Judges in every State" under the supremacy clause and the supervisory decisionmaking of the federal judiciary when called upon to exercise the "arising under" jurisdiction permitted by the judiciary article.

As Madison explained to Jefferson in an 1823 letter rejecting the Virginia Court of Appeals' claim that the Supreme Court was not authorized to review state court decisions:

Believing as I do that the General Convention regarded a provision within the Constitution for deciding in a peaceable &

245. 2 Farrand, *supra* note 2, at 621 (Sept. 15, 1787).

246. See *id.* at 423, 428–29 (Aug. 27, 1787). As before, see *supra* notes 75, 177 and accompanying text, the Convention deemed inflationary dilution of judicial salaries a greater threat to independence than a legislative power to increase them, and accordingly defeated Madison's proposal to forbid increases or, at least, to delay their effective date. See 2 Farrand, *supra* note 2, at 423, 429–30 (Aug. 27, 1787).

247. 2 Farrand, *supra* note 2, at 423, 430 (Aug. 27, 1787) (emphasis added); see *supra* notes 145, 173 and accompanying text.

248. 2 Farrand, *supra* note 2, at 422–24, 428, 431 (Aug. 27, 1787) (emphasis added). After the amendments of August 23 and 25, the supremacy clause read:

This Constitution and the Laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the several States

Id. at 409 (emphasis added) (discussed *supra* notes 238–239 and accompanying text). As reconstructed, the "arising under" clause read:

The Jurisdiction of the Supreme Court shall extend to all cases both in law and equity arising under *this constitution the laws of the United States and treaties made or which shall be made under their authority.*

regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that it intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the exercise of its functions, (the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths & official tenures of these, with the surveillance of public Opinion, being relied on as guarantying their impartiality); and that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them . . . thus believing I have never yielded my original opinion indicated in the "Federalist" No. 39 . . .²⁴⁹

The only (and, as it turned out, fleeting) objection to the addition of "this constitution" to the body of federal law under which federal cases might arise was advanced by, of all people, James Madison. Revealing the strength of the view that the constitutionally assured *quality* of federal judicial decisionmaking was more important than even the constitution-encompassing *quantity* of it, Madison initially opposed adding "this constitution" because it might invite the judiciary to offer advice to the political branches on the constitution's meaning, and because outside "cases of a Judiciary Nature . . . [t]he right of expounding the Constitution . . . ought not to be given to [the judiciary] Department."²⁵⁰ Others clearly agreed, but assured Madison that "the jurisdiction given was constructively limited to cases of a Judiciary nature."²⁵¹ It thus being "generally supposed" that "cases" meant "*Judiciary*" cases, the motion passed without dissent.²⁵² Together with the same day's "law and equity" amendment, and the Convention's prior rejection of the Pinckney and New Jersey proposals for abstract federal judicial disquisitions on the constitution's "construction," the August 27 colloquy over "this constitution" confirmed the Framers' view that the federal courts were authorized to decide the whole "arising under" "Case"—and *nothing but* such "Cases" and "Controversies."

b. *Quantitative Presumptions Revisited.* — Having found as much common ground as they could, the delegates repaired to their respective camps and let fly a barrage of motions aimed at the question that yet remained: As between state judges conscripted to national service by the supremacy clause and federal judges to whom the legislature might "extend" jurisdiction, *which* judges would presumptively bear responsibility for what cases?

First came a remarkably even-handed proposal (offered, perhaps, by its anonymous author as an eve-of-battle olive branch) to distribute the

249. Letter from James Madison to Thomas Jefferson (June 27, 1823), in 4 Farrand, *supra* note 2, at 83, 83–84.

250. 2 Farrand, *supra* note 2, at 430 (Aug. 27, 1787).

251. *Id.*

252. *Id.* at 430 (emphasis added); see *id.* at 423.

nonoriginal aspects of what at this point²⁵³ was still styled "[t]he Jurisdiction of the Supreme Court" as follows:

In all the other cases beforementioned [i.e., in all enumerated cases save the few designated for original supreme court jurisdiction] original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make.²⁵⁴

The motion eventually was withdrawn. This may have occurred because the nationalists were unwilling to create so strong a presumption in favor of state court original jurisdiction. Or the confederationists may have been unwilling to extend so strong an invitation to the legislature to give the lower federal courts appellate (and maybe *only* appellate) jurisdiction vis-à-vis state courts or to let federal courts review state court fact findings ("Law and fact" being new to the debates). Or finally, both sides may have worried about the exceptions and regulations the legislature was invited to make (e.g., withholding federal appeals entirely; permitting appeals of "Law" but not "fact"; or establishing supreme court or lower federal court, in lieu of state court, original jurisdiction). What is remarkable about the proposal (and may account for the academic disregard of it)²⁵⁵ is how close it came to the set of presumptions the delegates ultimately would adopt. But until more partisan motions were either rejected or watered down, neither side apparently was able to appreciate how well the proposal discerned the political center of gravity.

The proposal's "Law and fact" phrase did, however, capture the attention of nationalist and federal judiciary expansionist Gouverneur Morris, perhaps on the "whole case" theory that, if state courts were going to exercise significant original federal question jurisdiction, federal courts should thereafter have the potential ability to exercise supervisory authority over every aspect of the case that could impinge on the supremacy of federal law. As a follow-on to Morris's query whether the supreme court's appellate jurisdiction would extend to "matters of fact as well as law—and to cases of Common law as well as Civil law"²⁵⁶—Dickinson moved and the Convention agreed without dissent to insert the phrase "both as to law [and] fact" after the words "[this jurisdiction] shall be appellate."²⁵⁷

c. *Three Crucial Motions.* — The last three significant judiciary motions were especially critical in determining the quantity and quality of

253. See *supra* note 215 and accompanying text (text of judiciary article prior to August 27).

254. 2 Farrand, *supra* note 2, at 424 (Aug. 27, 1787).

255. But cf. 1 Goebel, *supra* note 19, at 239–41 (reading the motion's withdrawal as a nationalist victory).

256. 2 Farrand, *supra* note 2, at 431 (Aug. 27, 1787).

257. *Id.* at 424, 431; see also *id.* at 431 (Wilson's view that the appellate jurisdiction conferred by his existing Committee of Detail draft already was intended to reach the whole case).

federal judging the constitution contemplated. As of this point, section 3 of the judiciary article, to which the final three motions were directed, read:

Sect. 3. [1] The Jurisdiction of the Supreme Court shall extend to all cases arising under this constitution the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all Cases of Admiralty and maritime jurisdiction; to Controversies to which the United States shall be a Party, controversies between two or more States . . . [and various diversity] controversies [2] In cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, this jurisdiction shall be original. [3] In all the other cases before mentioned, it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make. [4] The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

Unanimously adopting a motion by Madison and Morris, the Convention first substituted "The Judicial Power" for "The jurisdiction of the Supreme Court" in sentence [1].²⁵⁸ By a vote of six states to two, the Convention then rejected a motion to replace sentence [3] with "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct."²⁵⁹ Finally, the Convention unanimously removed sentence [4], the so-called "assignments" clause.²⁶⁰ Thus, at the end of the day, section 3 read:

Sect. 3. [1] The *Judicial Power* shall extend to all cases both in law and equity arising under this constitution the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all Cases of Admiralty and maritime jurisdiction; to Controversies to which the United States shall be a Party, controversies between two or more States . . . [and various diversity] controversies [2] In cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, *the Supreme Court shall have original jurisdiction*. [3] In all the other cases before mentioned, it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make. []

The three motions completed the gradual but crucial shift in the judiciary article from a mainly quantitative to a mainly qualitative federal

258. *Id.* at 425, 432. This change required the delegates to substitute "The supreme Court shall have original jurisdiction" for "this jurisdiction shall be original" in the second half of sentence [2]. *Id.* at 425.

259. *Id.* at 425, 431.

260. *Id.*

judicial check on state law—a check that, in the absence of a legislative veto, had become the principal mechanism for achieving Madison's central constitutional goal of controlling the excesses and injustices of state law. Via the Madisonian Compromise, the nationalists had relinquished the Virginia Plan's division of mandatory federal jurisdiction between inferior (original) and supreme (appellate) tribunals to reclaim a *possibility* (denied by Rutledge's temporary pre-Compromise victory) of legislatively appointed lower tribunals with exclusive original jurisdiction and a supreme court with mandatory appellate jurisdiction. Via the Randolph-Madison Substitute, the nationalists then gave up mandatory federal jurisdiction of any sort in return for a broad legislative discretion to appoint lower courts and an express invitation to the legislature to invest those courts with whatever jurisdiction (original or appellate) it might choose. The Committee of Detail drafts and the early proceedings on August 27 preserved the outlines of this latter compromise, but proposed various presumptions in regard to the allocation of jurisdiction among state courts, lower federal courts, and the supreme court—eventually settling on a strong presumption (expressed in preamendment sentences [1]–[3]) in favor of (mainly appellate) supreme court jurisdiction, and a relatively weak invitation to the legislature (expressed in the "assignments clause" in preamendment sentence [4]) to spread or shift some of the supreme court's jurisdiction to the lower federal courts. Through the series of motions late on the 27th, the nationalists made another trade that entirely refocused the judicial check. In return for a constitutional guarantee of the *quality* of judging that all federal courts would exercise whenever jurisdiction was conferred, the nationalists (1) gave up even the formality of a *constitutional* conferral of large amounts of federal jurisdiction, (2) modestly weakened the presumption that *the legislature* would confer broad supreme court jurisdiction, and (3) dropped any express invitation to the legislature to confer lower federal court jurisdiction.

(i) *Sentence [1]*. — To see how this new compromise took shape, recall that section 1 of the judiciary provision that emerged from the Committee of Detail had vested "[t]he Judicial Power" in its entirety "*in*" each and every inferior court that the national legislature chose to constitute as well as "*in*" the constitutionally created supreme court.²⁶¹ The first late-27th motion then "extend[ed]" the "Judicial Power" to a list of cases and controversies over which at least some of those courts probably would *never* exercise jurisdiction. For instance, any lower federal courts the legislature created very likely would never exercise jurisdiction in cases over which the supreme court presumptively had original (and, in that event, final) jurisdiction. Even more to the point, the legislature could simply deprive any lower courts it created of jurisdiction in many or most of the listed disputes.²⁶² As such, the "Judicial Power shall extend

261. See *supra* note 216 and accompanying text.

262. Whatever their positions on other issues, nearly all observers acknowledge Congress's power not to confer all of the jurisdiction enumerated in Article III on the

to" language could not mean "jurisdiction shall be," because in some cases jurisdiction would *not* be. The first change thus confirms, contrary to the views of neonationalists Amar and Clinton,²⁶³ that, after the Randolph-Madison Substitute, the delegates did not mean to dictate the federal courts' jurisdiction (hence the Substitute's deletion of "shall be") but merely intended to say how far that jurisdiction could potentially reach (hence the Substitute's inclusion of "shall extend").

But sentence [1]'s modification went further than the Randolph-Madison Substitute. Removing the word "jurisdiction" meant that sentence [1] no longer would play *any* role in conferring or allocating jurisdiction over the listed categories of cases and controversies, much less establish a mandatory floor on that jurisdiction. Although the sentence did give inferior federal courts the same relationship to the listed categories as the supreme court, it defined that relationship *not* by the quantity of cases over which all federal courts would exercise jurisdiction, but rather by the quality of decisionmaking—the "Power"—that all would apply to cases over which they were given jurisdiction by some other means.

Neoconfederationist scholars thus are correct—from a quantitative perspective—that inserting "[t]he Judicial Power" in sentence [1] merely gave federal judges as a class a "capacity," if and when the legislature chose to trigger it, to exercise jurisdiction over the specified matters.²⁶⁴ But this neoconfederationist conclusion is incomplete because it ignores the important *qualitative* effect of, and therefore, the nationalists' reason for accepting, the change. Thus, in return for removing "jurisdiction" from sentence [1]—and in return for all their other quantitative concessions stretching back to the Madisonian Compromise—the nationalists secured an all-important qualitative assurance via the extension of "[t]he Judicial Power" to the specified categories of cases and controversies: Whenever called upon to decide those matters, federal judges would be required to deploy the qualities—the decisionmaking powers and responsibilities—inherent in "[t]he Judicial Power" and thus inherent in every court constituted by or under the judiciary article.

It is not surprising, therefore, that four of those qualities, powers, and responsibilities had dominated the delegates' attention in the days leading up to, and in their deliberations earlier on, the 27th.²⁶⁵ Building on the Committee of Detail's efforts to increase both the professionalism of all federal courts and their independence vis-à-vis state courts and

lower federal courts. See, e.g., Amar, *supra* note 17, at 229; Ratner, *supra* note 18, at 158; Sager, *supra* note 17, at 23; *infra* note 371 and accompanying text (discussing Joseph Story's views).

263. See Amar, *supra* note 17, at 239; Clinton, *supra* note 19, at 782–86.

264. See, e.g., Harrison, *supra* note 9, at 214–18.

265. See *supra* notes 231–252 and accompanying text.

political entanglements,²⁶⁶ the delegates had (1) rejected Pinckney's and Morris's advisory opinion proposals and (2) insisted on empowering federal courts to decide matters finally, but only if they constituted "cases of a Judiciary [i.e., nonadvisory] Nature." (These powers and constraints were confirmed by sentence [1]'s limitation of "[t]he Judicial Power" to "Cases" or "Controversies.") (3) The "Law and fact" amendment of the 27th reinforced the "whole case" assurance implied by the delegates' earlier rejection of the Pinckney and New Jersey proposals to limit "arising under" jurisdiction to abstract legal questions or cases presenting such questions. And (4) expanding the "arising under" category to track the state-law-controlling function of "the Judges in every State" under the previously expanded supremacy clause solidified the federal courts' obligation to decide matters (and, especially, to supervise state courts) in such a way as to uphold the supremacy of federal law.

Insertion of the phrase "[t]he Judicial Power shall extend to" in sentence [1] thus brought to a climax the nationalist effort from the Randolph-Madison Substitute forward to ensure the quality of federal judging. The qualitative significance of the amendment disproves the claim that sentence [1]'s mandatory "shall" lacks effect unless "shall extend" means "shall include" or "shall be."²⁶⁷ To help see why, consider a police chief's statement to line officers: "From now on, your [exercise of the qualities of] courtesy, professionalism, and respect shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs." Notwithstanding this statement's use of the mandatory "shall" (and the quantitative "all"), its qualitative subject matter makes clear that it does not require officers to attend all, or any, athletic events, parties, or professional conferences, but only to behave themselves when they do. Likewise, to say that "federal courts' power to reach independent, comprehensive, final, and effectual decisions shall extend to all cases arising under the Constitution, laws, and treaties of the nation" is not to require those courts to decide all such cases but only to require that they deploy the included judicial qualities when they do decide them.

The directive nature of the "shall extend to" language remains critical, however. If the legislature were to tell federal courts to exercise something less than "[t]he Judicial Power" in cases within their jurisdiction, the courts would be required to ignore that directive because the Constitution itself, through sentence [1], dictates that "[t]he Judicial Power *shall* extend to" those cases. And if the legislature were to assign anything other than the listed "Cases" and "Controversies" to the "Supreme" and "inferior" courts, those courts would have to decline the assignment so as not to address a matter beyond that to which "shall ex-

266. See *supra* notes 198–199, 216–217 and accompanying text (discussing the Committee of Detail's extension of tenure and salary protections to lower federal courts that the legislature would have the power to "constitute[]" and not merely "appoint[]").

267. Cf. *supra* notes 41, 129 (citing authorities favoring a "shall be" interpretation).

tend" (1) the only "Power" Article III, Section 1 gives them and (2) the power by which they are defined.

Barely had the ink dried on Madison and Morris's qualitatively directed revision of sentence [1] when it, too, came under attack, from a proposal that "[i]n all the other cases before mentioned [i.e., in all matters outside the supreme court's original jurisdiction] the judicial power shall be exercised in such manner as the Legislature shall direct."²⁶⁸ Had the Convention agreed to this motion, the qualitative federal judicial protections against multiple, mutable, unjust, and impotent state laws²⁶⁹ would have been added to the long list of Madisonian casualties—force, the council of revision, mandatory federal jurisdiction, and the national negative—and, consequently, Madison's most basic hope for the Convention would have been dashed. For a legislative capacity to control the "manner" in which federal courts exercised "[t]he Judicial Power" would have entirely neutralized the independence, "whole case," "whole supreme law," finality, and effectualness qualities of federal judicial decisionmaking.²⁷⁰ But the motion was defeated, six states to two; the last—and the most comprehensively *qualitative*—version of the Madisonian Compromise held.²⁷¹

(ii) *Sentence [2]*. — The nationalists' victory came at a cost. The judiciary provision that emerged mandatorily conferred *no* (or very little) federal jurisdiction and, instead, contained *only* (or mainly) presumptions and invitations to the legislature with respect to both the conferral and the distribution (original versus appellate) of jurisdiction. What is more, by the end of the day, those presumptions ran less powerfully in the direction of federal jurisdiction than they had at the beginning of the day.

268. 2 Farrand, *supra* note 2, at 425 (Aug. 27, 1787).

269. See *supra* notes 53–55 and accompanying text.

270. See Velasco, *supra* note 8, at 733 (defeated "proposal was dangerously susceptible to abuse, for it gave Congress plenary authority not only over *jurisdiction*, but over the *judicial* power" and "might have empowered Congress to dictate . . . how [federal courts] should decide . . . cases"). At the time of the Framing, "manner" connoted the substantive "method" or "way of performing or executing" the specified task, or a "[c]ertain" "[s]ort," "kind," or "degree or measure of" the specified behavior. Johnson, Strahan ed., *supra* note 129, under "manner"; 2 Noah Webster, *An American Dictionary of the English Language*, under "manner" (Johnson Reprint Corp. ed. 1970) (1828).

271. See 2 Farrand, *supra* note 2, at 425 (Aug. 27, 1787). Given the proposal's grant of authority over the way in which "the *judicial power* shall be exercised," the claim that the proposal's defeat forbade any "legislative meddling with [sentence [1]'s supposed] grant of [federal] *jurisdiction*," 1 Goebel, *supra* note 19, at 240 (emphasis added); see Clinton, *supra* note 19, at 791; Ratner, *supra* note 18, at 173, is misguided. This is particularly so because, at this point on August 27, sentence [1], which the proposed sentence would have modified, no longer granted *any* jurisdiction nor even used the word. The defeated proposal's apparent aim, therefore, was not to limit the already legislatively controlled *quantity* of federal jurisdiction, see *supra* notes 129–130, 204–208, 223–226 and accompanying text, but instead to subject the otherwise constitutionally sacrosanct *quality* of federal judging to legislative diminution.

For example, before the revisions, the "Jurisdiction of the Supreme Court shall extend to" language of sentence [1] invited (without requiring) the legislature to confer federal court jurisdiction in the listed categories of cases. Withdrawing "jurisdiction" from sentence [1] withdrew that invitation. Now, "jurisdiction" appeared for the first time in a slightly modified sentence [2]: "In cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction." This sentence can plausibly be read in two ways. It might mandate original supreme court jurisdiction over the two specified categories of disputes. Alternatively, it might leave the legislature with the power to decide whether to confer supreme court jurisdiction over those disputes, while embodying a strong presumption in favor of doing so and a requirement that any such jurisdiction be original. Supporting the latter interpretation is Congress's actual treatment of the substantively similar provision in the final Article III (Congress, from 1789 forward, never having required the Supreme Court to hear all "Cases *affecting* Ambassadors, other public Ministers and Consuls").²⁷² The placement of "the supreme Court shall have original jurisdiction" at the *end* of the sentence (where it arguably tells the legislature what to do with jurisdiction already conferred—"make it original") rather than at the beginning (where the language might more clearly do the conferring itself) also lends some support to the latter reading.

(iii) *Sentence [3]*. — Proceedings late on the 27th left sentence [3] intact (as modified earlier in the day by the "law and fact" insertion): "In all the other cases before mentioned, it [supreme court jurisdiction] shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make." Even more so than that of sentence [2], sentence [3]'s syntax suggests that it was not designed to confer supreme court jurisdiction in the specified categories of cases. Instead, its apparent intent was to create a strong presumption that *the legislature* would (1) vest that jurisdiction (2) in the supreme court (3) in an appellate form. Together with the steps taken earlier in the day to conform the scope of "arising under" jurisdiction to the scope of state judges' supremacy clause duties, sentence [3] strongly encouraged the legislature to give the supreme court appellate jurisdiction over decisions resolving disputes within the categories enumerated in sentence [1] and, most particularly, over state decisions "arising under" federal law.²⁷³

272. See Amar, *supra* note 17, at 261 n.183.

273. The strongest basis for reading the corresponding sentence in Article III to confer jurisdiction is language added by amendment the next day, modifying sentence [3] to read, "In all the other cases before mentioned, *the Supreme Court shall have appellate jurisdiction*" instead of "In all the other cases before mentioned, *it shall be appellate*." 2 Farrand, *supra* note 2, at 434 (Aug. 28, 1787) (emphasis added). But Madison's notes explain the next day's change as designed solely to make clear that the referent of "it" was the supreme court's jurisdiction (however conferred). See *id.* at 437–38. Even if sentence [3] actually conferred appellate jurisdiction on the supreme court, the conferral still was only presumptive, because it could be overcome by the legislature's invited decision to

The legislature could, however, overcome the presumptions in selected cases, in four or five ways. Using its "Exceptions" power, the legislature (a) might have been permitted to make the supreme court's presumptively appellate jurisdiction in the specified cases original;²⁷⁴ (b) clearly was permitted (as contemplated, e.g., by the Randolph-Madison Substitute and Committee of Detail Report and by the switch on the 27th from "[t]he Jurisdiction of the Supreme Court" to "[t]he Judicial Power")²⁷⁵ to shift some of the supreme court's *appellate* responsibilities on an overflow basis to lower courts;²⁷⁶ and (c) apparently was permitted simultaneously to make specified aspects of the supreme court's appellate jurisdiction original *and* to assign that jurisdiction to lower federal courts.²⁷⁷ As we develop above, moreover, the legislature could use its "Regulations" power (d) to withhold jurisdiction by declining to authorize the transfer of records and issuance of judgments needed to permit appeals in certain enumerated categories, including appeals of state decisions; or (e) to limit appeals to matters of law as opposed to "law *and fact*."²⁷⁸

(iv) *Sentence [4] No More.*—By removing any implication that sentence [1] conferred, or required the legislature to confer, the specified "jurisdiction" on the supreme court, and by largely delegating that decision to the legislature in sentences [2] and [3]—albeit with a strong presumption that the legislature *would* confer the jurisdiction and make it original or appellate as indicated in those sentences—the Convention quantitatively weakened the federal judiciary. This effect was enhanced by the last of the late-27th motions, which removed former sentence [4]'s express invitation to spread or shift the supreme court's original or appellate jurisdiction to inferior federal courts.

The standard view is that sentence [4]'s deletion accomplished nothing not already accomplished by sentence [1]'s shift from "[t]he Jurisdiction of the *Supreme Court*" to the more catholic phrase, "[t]he Judicial Power."²⁷⁹ But that is not accurate. Although the modification of sen-

withhold jurisdiction by "regulation[]" or to shift the jurisdiction to a lower court (including in an "original" form) by "exception[]."

274. See authorities cited *supra* note 48. Compare *supra* note 204 and accompanying text; *supra* text following note 222 (as initially drafted by the Committee of Detail, the "Exceptions" clause clearly let the legislature make parts of the supreme court's presumptively appellate jurisdiction original), with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–75 (1803) (holding that, as ultimately adopted, the Exceptions Clause did not give Congress that power).

275. See *supra* notes 128–133, 223–226 and accompanying text.

276. See authorities cited *infra* notes 380, 890 and accompanying text.

277. Cf. authorities cited *infra* note 279 (interpreting Article III's Exceptions Clause to have *only* this effect).

278. See *supra* notes 205–208, 223–224 and accompanying text.

279. See, e.g., Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 12 n.46 (3d ed. 1988); Clinton, *supra* note 19, at 792–93; Sager, *supra* note 17, at 50 n.95. Some commentators read the "Exceptions" clause in sentence [3] of the August 27 draft (or the analogous clause in Article III itself) to permit—and *only* to

tence [1] gave qualitative protection to inferior federal courts, and confirmed that the legislature was *permitted* to give those courts jurisdiction over the listed matters, the withdrawal of sentence [4] removed any *express invitation* to the legislature to create and confer either original or appellate jurisdiction on such courts and thereby diminish the amount of state court original jurisdiction or increase state court susceptibility to federal, and especially lower federal, court review. Indeed, the August 27 draft's silence on lower federal court jurisdiction, together with section 1's baseline of no lower federal courts, meant that the draft embodied fairly strong presumptions favoring *state court original* jurisdiction and *supreme court appellate* jurisdiction. The former presumption was rebuttable only if two constitutional preferences—that federal jurisdiction be appellate and be exercised by the supreme court—were overcome.²⁸⁰ The latter presumption was rebuttable in favor of either *lower federal court* appellate jurisdiction, if the preference for supreme court exercise of appellate jurisdiction was overcome,²⁸¹ or *no* federal appellate jurisdiction, if the preference for federal appellate review was overcome.

As we noted above, this outcome nearly replicated the proposal withdrawn earlier in the day to confer presumptive original jurisdiction in most cases on state courts and appellate jurisdiction on federal courts.²⁸² As such, the late-27th draft preserved the quantitative aspects of the original Madisonian Compromise in what from the nationalist perspective was

permit—Congress to assign cases, or at least certain categories of cases, otherwise falling within the supreme court's jurisdiction to lower federal courts. See, e.g., Amar, *supra* note 17, at 221, 257; Clinton, *supra* note 19, at 778, 793. If that reading is correct, the "Exceptions" and assignments clauses were redundant, explaining the latter's deletion on August 27. See Clinton, *supra* note 19, at 793. The difficulty with the redundancy theory is that both clauses entered the judiciary article at the same time, in the Randolph-Rutledge Committee of Detail draft (in rough form) and in the Wilson-Rutledge and final Committee of Detail drafts (in a more complete form). See *supra* notes 197, 215 and accompanying text. If the two clauses were intended to accomplish precisely the same thing, there is no reason for their simultaneous development nor their running in tandem for so long. A less radical reading is that the "Exceptions" clause permitted a *variety* of things, including the assignment of cases within the supreme court's appellate jurisdiction to lower courts. Still, that understanding cannot explain the simultaneous insertion of the assignments and "Exceptions" clause—unless (as we have argued) the assignments clause was designed to affect the "presumptions" by explicitly inviting the legislature to grant lower federal court jurisdiction.

280. Congress adhered to this presumption for 86 years after the Constitution became law. See *infra* note 374.

281. Today, of course, inferior federal courts routinely hear appeals in cases in which lower federal courts and administrative agencies have original jurisdiction. In addition, lower federal courts' removal and state-prisoner habeas jurisdiction, and other recognized exceptions to the *res judicata* effect of state court decisions and the bar to federal court injunctions against state court proceedings, often require lower federal courts to review state court decisions—a fact the Supreme Court has acknowledged in expressly upholding lower federal courts' "appellate jurisdiction" over cases commenced in state courts. See *supra* note 226; *infra* notes 327, 376–389, 886–895 and accompanying text.

282. See *supra* notes 253–255 and accompanying text.

the only moderately strengthened form of the Randolph-Madison Substitute.

Sentence [4]'s withdrawal had another, *qualitative*, effect. Recall its language, that "[t]he Legislature may assign any part of the jurisdiction above mentioned . . . in the *manner*, and under the *limitations* which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." The "manner/limitations" language raised the possibility that the assignments clause, while serving the nationalists' *quantitative* desires by inviting Congress to confer lower federal court jurisdiction, served the confederationists' *qualitative* desires by letting the legislature control the lower federal courts' *exercise* of jurisdiction that was conferred on them.²⁸³ All in all, therefore, sentence [4]'s deletion may simply have confirmed the terms of the compromise that the previous three motions had constructed—with the nationalists receding on their quantitative judicial ambitions in return for assurances of comprehensive qualitative protection.

August 27 thus was a day of quantitative compromise, as ardent nationalists and confederationists finally acknowledged that their ideal approaches to the relative amounts of state and federal jurisdiction would not command a majority, and that the best they could do was to let the legislature make many of the hard decisions under the influence of a set of presumptions on which the delegates could agree. Just as significantly, though, August 27 was a day on which the delegates refused to compromise on, or to trust the legislature with, issues of quality—or, at the least, agreed to make the qualities inherent in "[t]he Judicial Power" constitutionally sacrosanct in return for the nationalists' relinquishment of their quantitative ambitions.²⁸⁴

H. *The Committee of Style*

On September 8, the Convention appointed Hamilton, William Johnson, King, Madison, and Gouverneur Morris to a committee charged with stylizing and arranging the articles the delegates had approved.²⁸⁵ Four days later, the Committee issued its report, employing the familiar seven-article structure of the Constitution as adopted.²⁸⁶

1. *Article III*. — The Committee made two notable changes in the judiciary article (now Article III). First, it revised the opening sentence to vest the judicial power of the United States "in such inferior courts *as the Congress may from time to time ordain and establish*," instead of "in such Inferior Courts *as shall, when necessary, from time to time, be constituted by the*

283. See *supra* notes 225, 268–271 and accompanying text.

284. Three days later, the Convention, eight states to one, with two delegations divided, accepted Madison's weakest mechanism for restraining state law—the oath. See 2 Farrand, *supra* note 2, at 461, 468 (Aug. 30, 1787).

285. See *id.* at 547, 553 (Sept. 8, 1787).

286. See *id.* at 590–603 (Sept. 12, 1787).

Legislature of the United States."²⁸⁷ Any change here is subtle. But (1) by replacing "establish" or "constitute[]"—the words used respectively, in the two Committee of Detail drafts²⁸⁸—with "ordain and establish," it confirmed that inferior courts would be entirely the creation of Congress, not reupholstered state courts.²⁸⁹ And (2) by substituting "may from time to time ordain and establish" for "shall, when necessary, from time to time . . . constitute[]," it accentuated the legislature's discretion while jettisoning an awkward formulation that probably emerged as a result of nationalist and confederationist jockeying for quantitative advantage.²⁹⁰

Second, the Committee combined into a single section the prior draft's section 1, vesting the judicial power in the Supreme Court and in all legislatively created lower federal courts, and section 2, giving all such courts tenure and salary protections.²⁹¹ Doing so confirmed the qualitative content of "[t]he judicial power" by literally attaching it to the article's most explicit qualitative specification—independence.²⁹²

2. *The Supremacy and Oath Clauses.* — The Committee of Style's supremacy clause, in Article VI, recharacterized federal law from "the supreme law of the several States, and of their citizens and inhabitants" to "the supreme law of the land."²⁹³ This change elegantly confirmed the special, quasi-fourth branch (or intermediate) status of state judges, who already had come to be described in a more personal than institutional manner, and now were made supremely beholden to a body of law that was neither defined, even fictionally, as the law of the sovereignties that selected them, nor identified, at least directly, as the law of the separate sovereignty of the United States. Further emphasizing the supremacy clause's impressment of state judges into quasi-national service was the Committee's placement of the provision alongside the oath clause requiring state judges and other state officers to swear fealty to national law.²⁹⁴

287. *Id.* at 575, 600 (Sept. 10, 1787) (emphasis added).

288. See *supra* text accompanying notes 197, 215.

289. The Committee's decision to replace one creative verb ("constitute") with two ("ordain and establish") suggests that it understood the legislature's power with respect to inferior courts to be bifaceted—i.e., arguably, to include a power to "ordain" lower courts' existence and "establish" their jurisdiction.

290. The drafters' progression from references to such lower courts as "may" be created, to "as shall, from time to time, be" created, to "as shall, when necessary, from time to time, be" created, to "as the Congress may from time to time" create, suggests that the contending forces worked hard to adjust to their liking the presumption governing the creation, or not, of lower federal courts. See 2 Farrand, *supra* note 2, at 146, 172, 186, 600.

291. Compare *id.* at 575–76 (Sept. 10, 1787), with *id.* at 600 (Sept. 12, 1787).

292. Treating judicial independence as partially definitive of "[t]he judicial Power" are, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582–83 (1985); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828).

293. Compare 2 Farrand, *supra* note 2, at 572 (Sept. 10, 1787), with *id.* at 603 (Sept. 12, 1787). The Committee also shortened "the several states" in one place to "every state" and in another to "any state," and dropped the phrase "in their decisions." *Id.* at 572 (Sept. 10, 1787); *id.* at 603 (Sept. 12, 1787).

294. See *id.* at 603.

I. *The Convention in Retrospect and Prospect*

1. *The Course of the Convention Away from Madison's Original, Veto-Focused Conception.* — Madison came to Philadelphia with the principal goal of creating a strong central government that had the tools needed to control the encroachments on national authority and the internal mischiefs and injustices of the states and, particularly, of state *law*. He built five mechanisms toward that end into the Virginia Plan. In short order, however, Madison himself abandoned one of those mechanisms—the use of force against recalcitrant states—and by mid-July, the Convention had rejected the two additional mechanisms that Madison considered most important—the national negative and the council of revision. The Convention did so largely on the ground that some version of his remaining two proposals—state officials' oath of loyalty to federal law, and judicial review of the state law those officials made—would suffice to assure that state law was consistent with national authority and “just.” Accordingly, notwithstanding Madison's own view that *no* version or combination of the last two mechanisms could effectively substitute for the veto and council, the Convention's deliberations came to focus increasingly, indeed obsessively, on the question of what version of judicial review, bolstered by what duty of loyalty on the part of state officials, would effectively restrain state law.

The Convention essentially got under way with the delegates, consideration of the mandated *quantity* of federal jurisdiction, prompting the first Madisonian Compromise on June 5. Abandoning the Virginia Plan's system of mandatory original jurisdiction in inferior federal courts and mandatory appellate review by one or more supreme courts, nationalists accepted as merely a *presumption* the confederationists' momentarily adopted *irrebuttable rule* that state courts would hear all cases of federal concern as an original matter, subject to mandatory appeal to one federal supreme court. But confederationists conceded to Congress the power to overcome that presumption by (1) “appointing” state courts to serve as federal tribunals and (2) shifting original jurisdiction to them.

The delegates then spent the middle months of the Convention trying to achieve a mutually acceptable specification of the strength of the presumptions favoring *state original* and *federal appellate* jurisdiction, especially in “arising under” cases addressing state law's consistency with federal law. Additionally, beginning just after the defeat of the national negative, and as an acknowledged substitute for it, the delegates sought a mutually acceptable super-oath committing state judges not only to obey the nation's “supreme” laws but to deploy those laws to neutralize their own laws when the two conflicted.

Barely a week after the Madisonian Compromise, the Convention replaced it with the Randolph-Madison Substitute. Using “shall *extend to*” jurisdiction-conferring language in place of “shall *be*,” the nationalists gave up mandatory, in favor of presumptive, supreme court appellate jurisdiction in return for an explicit invitation to Congress to use inferior

federal courts to take over some state court original or Supreme Court appellate jurisdiction. The nationalists then fought off the New Jersey Plan's attempted restoration of Rutledge's state-original/supreme court-appellate arrangement and its limitation of federal appellate "arising under" jurisdiction to the giving of advice to state courts on the proper "construction" of federal law.

When Madison offered the Compromise and Substitute, he considered them merely fail-safes for the legislative negative. That device's defeat, however, left the nationalists with no choice but to rely entirely on judicial mechanisms, including the confederationists' alternative to the veto—a requirement that state judges void at least some state law that was inconsistent with at least some "supreme" federal law. The two Committee of Detail drafts and its final report consolidated these developments in several ways: (1) emphasizing the merely presumptive nature of the "shall extend to" language with an "exceptions and regulations" invitation to Congress to limit the Supreme Court's appellate jurisdiction; (2) inviting Congress to assign some of the Supreme Court's jurisdiction to lower federal courts; (3) protecting the *quality* of federal judicial decisionmaking by (a) extending the Supreme Court's tenure and salary protections to lower federal courts, (b) making the latter courts freestanding creatures of Congress, not converted state courts, and (c) expanding the "arising under" jurisdictional category; and (4) modestly expanding the Supremacy Clause's co-optation of state judges to perform the national function of reviewing state law for consistency with federal law.

The Convention virtually came to a close, then, with the nationalists' August 27 relinquishment of all the *quantitative* adjustments of lower court *original* jurisdiction they had achieved through the Randolph-Madison Substitute and the Committee of Detail drafts in return for a continued presumption of federal *appellate* review (presumptively but not inevitably by the Supreme Court) and mandated *qualitative* protection of federal judicial decisionmaking. On the *quantitative* side, the "*jurisdiction shall extend to*" language was replaced by "[t]he *Judicial Power* shall extend to." And the "exceptions and regulations" invitation to limit federal jurisdiction was preserved, while the invitation to assign Supreme Court jurisdiction to lower federal courts was dropped.

On the *qualitative* side, the delegates rejected two proposals to give Congress plenary control over the "manner" in which federal courts exercised "[t]he judicial Power." And the delegates approved (1) the Madison-Morris extension of that "Power"—and the judicial independence that went with it—to any case to which jurisdiction was constitutionally extended and congressionally conferred on any federal court; (2) Madison's anti-advisory opinion caveat; and (3) Dickinson's "whole case" expansion of federal appellate jurisdiction to questions of "law and fact." Perhaps the most important qualitative gain, however, was the broadening (on John Rutledge's motion) of the federal courts' capacity in "arising under" cases to apply the "whole supreme law." This change made

federal judges' authority in such cases precisely "conformable" to state judges' ever-more personalized and (at Rutledge's insistence) ever-more state-law-subordinating, federal-law-protecting, and thus federally co-optive obligations under the Supremacy Clause. Whenever Congress acted in conformity with the constitutional presumption in favor of conferring federal appellate "arising under" jurisdiction vis-à-vis state decisions, therefore, Congress would give federal courts a power independently and comprehensively to superintend state court decisionmaking that was substantively commensurate with the state courts' obligation to keep state law consistent with federal law.

2. *The Effect of the Convention's Substitution of Judge-Focused Madisonian Mechanisms.* — Such, then, was the judge-centered plan for constraining offensive state law with which the Convention replaced Madison's original conception. As Madison and his allies explained the new plan in the ratification debates, the national judiciary would "under a wise management . . . be made the keystone of the arch, the means of connecting and binding the whole together [and] of preserving uniformity in all judicial proceedings of the Union"²⁹⁵—the "quarter . . . [to] look [to] for protection from an infringement on the Constitution,"²⁹⁶ and, short of "coercion by military force," the only "rational way of enforcing the [nation's] laws" against the states.²⁹⁷

But to restate the question with which this Article began, how adequate a replacement for Madison's veto-centered proposal, in which mandatory federal courts and jurisdiction played only a supporting role, was a plan that lacked any veto (or council of revision) and ceded to Congress the "wise management" of the plan's principal, judicial check? How could a judiciary-centered plan succeed if Congress (1) could forgo creating all but one of the federal courts supposed to be the "keystone" of the edifice for controlling state law; and (2) via the "shall extend to" and other language, could limit the amount of jurisdiction that federal, as opposed to state, courts would exercise in most matters of national concern? How could the plan succeed when, in Hamilton's words in *The Federalist*:

If some partial inconveniences should appear to be connected with the incorporation of any of [the jurisdictional categories] into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.²⁹⁸

295. 4 Elliot, supra note 4, at 258 (Jan. 16, 1788) (statement of Charles Pinckney at South Carolina ratifying convention).

296. 3 id. at 554 (June 20, 1788) (statement of John Marshall at Virginia ratifying convention).

297. 4 id. at 155 (July 29, 1788) (statement of William R. Davie at North Carolina ratifying convention).

298. *The Federalist* No. 80, supra note 3, at 450 (emphasis omitted); see *The Federalist* No. 81, at 457 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (Congress's

The answer to these questions is supplied by five alternative Madisonian mechanisms through which the conveners undertook their *own* "wise management" of the judicial check on errant state law—in the process achieving nearly the same effect as Madison had sought from his original conception. In lieu of the national negative, the conveners relied on a combination of: (1) state judges co-opted by the Supremacy Clause to serve the national function of supervising state law for consistency with federal law; and (2) federal judges commissioned by their "arising under" jurisdiction—which the Framers carefully conformed to state judges' Supremacy Clause duties—to superintend state judges' performance of their Supremacy Clause obligations. And in lieu of mandatory federal courts and jurisdiction, the absence of which might otherwise have neutralized the federal judiciary's role, the conveners: (3) calculated that placing the scope of the federal judiciary and federal jurisdiction in the hands of a naturally ambitious Congress would keep that judiciary and (particularly its "arising under" variety of) jurisdiction as broad as Congress's nationalizing ambitions; (4) subjected Congress to a set of "quantitative" presumptions favoring conferral on the Supreme Court or, alternatively, the lower federal courts of appellate jurisdiction over state courts in "arising under" cases; and, most importantly, (5) invested federal courts with a muscular set of "qualitative" capacities definitive of "[t]he judicial Power" that Congress could not withdraw when it conferred jurisdiction. We discuss each mechanism below.

power to declare exceptions and regulations "enable[s] the government to modify [federal jurisdiction] in such a manner as will best answer the ends of public justice and security"); The Federalist No. 82, at 461 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (appeals from state to federal courts will occur only in "cases in which they may be deemed proper" by Congress); Velasco, *supra* note 8, at 734–37 & nn.304–07 (collecting numerous statements by nationalists during the ratification debates acknowledging Congress's control over federal jurisdiction); *supra* note 208 (similar). Hamilton also said that it would not offend the states to withhold jurisdiction from them in cases over which they had never previously exercised it (e.g., cases arising under newly made federal law), and he no doubt preferred that outcome. See The Federalist No. 82, *supra*, at 459. But, hypernationalist though he was, Hamilton did not say in the passages quoted above or elsewhere that the Constitution *required* federal court participation in "arising under" cases. The furthest he went was a statement that "[t]he evident aim of the plan of the convention is that all the causes of the specified classes shall, *for weighty public reasons*, receive their original or final determination in the courts of the Union." *Id.* at 460 (emphasis added). This statement, however, in no way disputes Congress's power to withhold jurisdiction over enumerated cases in the *absence* of weighty reasons to confer it. Similarly, other nationalists assumed during the ratification debates that public reasons would compel Congress to establish lower federal courts, even while they acknowledged Congress's power to forgo creating lower federal courts. See, e.g., 2 Elliot, *supra* note 4, at 488–91 (Dec. 7, 1787) (statement of James Wilson at Pennsylvania ratifying convention); Oliver Ellsworth, Letters of a Landholder (VI), Conn. Courant & Am. Mercury, Dec. 10, 1787, reprinted in Essays on the Constitution of the United States, Published During Its Discussion by the People, 1787–1788, at 161, 164–65 (Paul Leicester Ford ed., 1970) (1892) [hereinafter Ford, Essays]; Roger Sherman, Observations on the New Federal Constitution, A Citizen of New Haven (II), New Haven Gazette, Dec. 25, 1788, reprinted in Ford, Essays, *supra*, at 237, 240–41.

a. *Nationally Co-opted State Judges.* — The nationalists did not come away empty-handed from their losing battle over the negative. Previously, confederationists had resisted requiring state officials even to swear an oath to follow federal law because doing so would conflict with state officials'—and especially state judges'—preeminent loyalty to state law.²⁹⁹ The price of defeating the negative, however, was confederationist support for the oath and, more importantly, for a Supremacy Clause. Through the latter mechanism, the Convention impressed state judges into national service, obliging them not only to subordinate their own state law obligations to federal ones, but also actively to police state law and void any (even the most fundamental) if it was inconsistent with any (even the least important) federal law.³⁰⁰ The language of the Supremacy Clause then was carefully adjusted (1) to distance state judges from their local institutional roles (e.g., replacing “the *judiciaries of*” with “the *judges in every State*”) and (2) to commit state judges to deploy the law of a different sovereign to void that of their own sovereign when the two conflicted (replacing “the supreme Law of the respective States” with that of “the Land”).³⁰¹

b. *Superintending Federal Judges.* — Neither nationalists *nor confederationists* were content to rely entirely on state judges to constrain state law, even once those judges' loyalty to that law was tempered by an express obligation to enforce a higher sovereign's supreme law.³⁰² Central to the Convention's constitutional mechanics, therefore, was a system of federal appellate superintendency under Article III of state judges' quasi-federal functions under the Supremacy Clause.³⁰³

In the Framers' view, the peculiar constitutional situation and structural duties of state judges would only *discourage* “biased directions [from] dependent [state] Judge[s]” and a proneness to “local prejudices.”³⁰⁴ But, in Hamilton's words in *The Federalist*, there remained “much to fear from the bias of local views and prejudices and from the interference of local regulations.”³⁰⁵ “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can . . . not be expected

299. See *supra* notes 119, 121 and accompanying text.

300. See *supra* notes 142–147, 166–173, 227–230, 238–239 and accompanying text.

301. See *supra* notes 229–230, 293 and accompanying text.

302. See *supra* notes 95–97, 163, 181 and accompanying text (nationalist views); *supra* notes 87, 91, 92–94, 137–139, 169–173, 182–183 and accompanying text (confederationist views).

303. See, e.g., Amar, *supra* note 17, at 249; Rakove, *supra* note 26, at 1036 (“Be as clever as one will about its ambiguities, silences, and indirection, one still has to work pretty hard to demonstrate that [federal] judicial review was not a major subject of [the Supremacy Clause.]”); Sager, *supra* note 17, at 48; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 4 (1959); *supra* notes 248–249 and accompanying text.

304. 1 Farrand, *supra* note 2, at 124 (June 5, 1787) (statement of James Madison).

305. *The Federalist* No. 22, at 182–83 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

from judges who hold their offices by a temporary commission"³⁰⁶—leaving "reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws[] from the deference with which men in office naturally look to that authority to which they owe their official existence."³⁰⁷

The Framers accordingly concluded that, as long as "there was a necessity of confiding the original cognizance of causes arising under [the] laws to [state judges],"³⁰⁸ and as long as those "judges . . . hold their office by a temporary commission . . . fatal to their necessary independence,"³⁰⁹ state "tribunals [should not be] invested with a right of *ultimate* jurisdiction."³¹⁰ Rather, there was "a correspondent necessity for leaving the door of [federal] appeal as wide as possible."³¹¹

"[At] its inception," therefore, "the American doctrine of judicial review was far more concerned with federalism than with separation of powers . . . [i.e., with] the principle of national judicial supremacy over state legislative acts and judicial decisions."³¹² *Above all else, "the judicial Power" was understood as a power to preserve the supremacy of federal law over contrary state law.*

c. *A Nationally Ambitious Manager of Federal Jurisdiction.* — How, then, did the Convention keep the door of appeal of state decisions as wide as possible and assure the necessary judicial independence? As developed above, the answer was not an array of mandatory federal courts with mandatory jurisdiction over all cases of national interest. On the contrary, through a series of confederationist victories and the Madisonian Compromise they precipitated, the Convention replaced Madison's proposal for multiple mandatory lower and supreme courts with a single mandatory supreme court and a congressional discretion to create lower federal courts.³¹³ And via the Randolph-Madison Substitute and Committee of Detail drafts, the nationalists themselves conceded away mandatory *Supreme Court* jurisdiction, notwithstanding that the confederationists were willing to accept it.³¹⁴

This latter concession was the product of a peculiarly Madisonian calculation in the wake of the defeats leading up to the Compromise. As Madison repeatedly argued, once mandatory original federal jurisdiction was rejected, practical considerations meant that mandatory appellate jurisdiction in a single Supreme Court could not possibly suffice to secure effective federal review of all cases in which there was a national interest.

306. The Federalist No. 78, at 441 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

307. The Federalist No. 22, *supra* note 305, at 182–83.

308. The Federalist No. 81, *supra* note 298, at 454.

309. The Federalist No. 78, *supra* note 306, at 441.

310. The Federalist No. 22, *supra* note 305, at 182.

311. The Federalist No. 81, *supra* note 298, at 454.

312. Rakove, *supra* note 26, at 1034.

313. See *supra* notes 73, 86, 90–103.

314. See *supra* notes 126–133, 197, 215, 223–226 and accompanying text.

This was partly because some litigants could not afford an appeal to a distant Supreme Court. Of greater importance, however, was the Court's inability to cope effectively with mandatory jurisdiction over appeals that *were* brought, given (1) the Court's also significant original jurisdiction, (2) the more substantial work the Court was called upon to do once the focus of its appellate review switched from federal court decisions to those of courts with less institutional fidelity to the national government, and (3) the difficulty of enforcing its judgments from afar.³¹⁵ By virtue of these latter factors, a mandate to hear all appeals would overwhelm the Court's capacity effectively to maintain national supremacy in those particular cases in which its superintendency was most needed.³¹⁶ Absent mandatory original lower federal court jurisdiction, that is, there inevitably would be substantial slippage in any supposed system of mandatory Supreme Court oversight.

What was required, therefore, again per Hamilton, was a "judicial authority of the Union . . . extend[ing] to . . . all [cases] which arise out of the laws of the United States . . . [so as to] giv[e] efficacy to constitutional . . . restrictions on the authority of State legislatures . . . [and establish] *some effectual power* in the government to restrain or correct the infraction[s] of them."³¹⁷ But to *be* effectual that power could not apply in every case within the "arising under," or any other large jurisdictional, category. Rather, still in Hamilton's words, the "most discerning *cannot see* how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes In *proportion* to the grounds of confidence in or distrust of the subordinate tribunals ought to be the facility or difficulty of appeals."³¹⁸

For two classically nationalist reasons, the preferred agency for periodically gauging the confidence due the state courts and on that basis proportioning the number of federal "arising under" appeals was Congress. First was flexibility. As Wilson said at the Pennsylvania Convention, "Congress [could] better regulate [appeals], as they rise from time to time, than could have been done by the Convention[.] Besides, if the regulations [of appeals] shall be attended with inconvenience, the Congress [could] alter them as soon as discovered."³¹⁹

More importantly, as Madison well understood, if any branch of government would be disposed as a matter of its own ambitions to expand

315. See *supra* notes 95–97, 126–133, 226 and accompanying text; see also *infra* note 327 (Hamilton's similar views in *The Federalist*).

316. See *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997) (at the time of the "so-called Madisonian Compromise . . . it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States" (citing Charles Warren, *The Making of the Constitution* 325–27 (1928))).

317. *The Federalist* No. 80, *supra* note 3, at 445 (emphasis added).

318. *The Federalist* No. 81, *supra* note 298, at 454 (emphasis added); accord 2 Farrand, *supra* note 2, at 46 (statement of George Mason) (quoted *supra* text accompanying note 183).

319. 2 Elliot, *supra* note 4, at 494 (Dec. 7, 1787).

national power—and, in the process, to expand national judicial authority to facilitate that power—it was Congress.³²⁰ Indeed, carefully read, Madison's post-Compromise criticism of the New Jersey Plan for failing to provide for original federal criminal jurisdiction was not that *the Constitution* should mandate such jurisdiction but rather that *Congress* should have the ability (which it assumedly would exercise liberally) to authorize it.³²¹ An often asserted "political axiom[]" of the day—that "the judicial power of a government [should be] coextensive with its legislative [power]"³²²—strongly supported Madison's assumption that, when Congress decided to supplant exclusive state control over an issue by exerting national legislative control, it also would be disposed to supplant exclusive state *judicial* control over the issue with some amount of federal judicial control. Indeed, a prominent anti-federalist criticism of the proposed Constitution was that it placed the legislative fox in charge of the judicial chicken coop, assuring broad federal jurisdiction.³²³ Thus, absent exclusive original lower federal court jurisdiction, it was a practical fact of life not only that some picking and choosing would necessarily occur among cases in which federal judicial review of state decisions might possibly take place, but also that Congress was the best picker and chooser from a nationalist perspective—not because of its fastidiousness about the integrity of national law or its doubts about the justice of state law, but simply to promote its own ambitions.³²⁴

d. *Presumed Federal "Arising Under" Jurisdiction.* — The conveners did not, however, leave Congress's discretion to determine the scope of federal "arising under" jurisdiction entirely unconstrained. Rather, their Judiciary Article matched a presumption favoring state court original jurisdiction with one favoring federal court appellate jurisdiction in "arising under" cases, and permitted the use of lower federal courts when neces-

320. See *The Federalist* No. 47, at 309–10 (James Madison) (Isaac Kramnick ed., 1987) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department that the people ought to . . . exhaust all their precautions.").

321. See 1 Farrand, *supra* note 2, at 317 (June 19, 1787); *supra* note 150 and accompanying text.

322. *The Federalist* No. 80, *supra* note 3, at 446; see 3 Elliot, *supra* note 4, at 532 (June 20, 1788) (statement of James Madison at Virginia ratifying convention); Amar, *supra* note 17, at 250–51 & n.147 (citing numerous authorities); Harrison, *supra* note 9, at 241 (finding wide, but not unanimous, acceptance of the "coextensive powers" axiom among the founding generation).

323. See Rakove, *supra* note 26, at 1050 (citing authority).

324. Here we follow Professor Wechsler:

[G]overnment cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. . . . The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed.

Wechsler, *supra* note 9, at 1006; see Hart, *supra* note 5, at 1370–71; Van Alstyne, *supra* note 10, at 257.

sary to lighten the Supreme Court's appellate load. These presumptions emerged, to begin with, from Article III's (1) baseline assumption of no federal inferior courts, (2) rejection of the Virginia and Randolph-Rutledge proposals to confine lower federal courts to original tasks,³²⁵ and (3) assignment to the Supreme Court of significant original jurisdiction³²⁶ (belying any blanket assumption that lower and supreme federal tribunals were courts of, respectively, original and appellate jurisdiction). All three factors encouraged the assignment of original tasks to state courts. The two latter factors liberated Congress to make the jurisdiction of any lower federal courts it created appellate, including vis-à-vis state courts.³²⁷

The presumptions also emerged from (4) Article III, Section 2's strong invitation to Congress to give the Supreme Court appellate jurisdiction in a variety of enumerated cases³²⁸ and (5) its conformance of federal courts' "arising under" jurisdiction to state judges' Supremacy Clause duty to keep state law consistent with federal law, thereby creating an especially strong presumption of federal (including lower federal court) appellate jurisdiction in "arising under" cases. If state courts were to be the presumptive filter for unconstitutional state law, federal courts presumptively were to monitor the filters to assure that they served their constitutionally crucial structural function.

e. *Mandated Qualitative Attributes of "the Judicial Power."* — Notwithstanding these presumptions, the Convention did not mandate appeals in "arising under" cases as *often* as possible. But, as Hamilton said, the Convention did "leav[e] the door of appeal as *wide* as possible" whenever Congress opened it.³²⁹ Thus, particularly as a result of the ultimate, August 27 Madisonian Compromise, the focus of Article III was not the frequency but the breadth of appeals—not the quantity of appellate jurisdiction but the quality of "[t]he judicial Power" to decide any given ap-

325. See *supra* notes 73, 197, 226 and accompanying text.

326. See *supra* note 215 and accompanying text; *supra* text accompanying note 272.

327. Enlarging on Madison's views at the Convention, see, e.g., *supra* notes 95–97, 132, 150 and accompanying text, Hamilton, in *The Federalist*, perceive[d] . . . no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals[] and many advantages attending the power of doing it . . . [including] contract[ing] the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court may be made to lie from State courts to district courts of the Union.

The *Federalist* No. 82, *supra* note 298, at 461; see The *Federalist* No. 80, *supra* note 3, at 445 (discussing the "authority in the federal courts to overrule such [state law] as might be in manifest contravention of the articles of Union" (emphasis added)); 3 Elliot, *supra* note 4, at 552–53 (similar statement of John Marshall at Virginia ratifying convention); *supra* notes 226, 281 and accompanying text; *infra* notes 380, 388, 890.

328. See *supra* note 215 and accompanying text; *supra* text following note 226; *supra* text accompanying notes 273–278.

329. The *Federalist* No. 81, *supra* note 298, at 454 (emphasis added).

peal so as effectively to superintend the state judicial check on state law. The Convention insisted upon at least five qualitative attributes of "[t]he judicial Power."

First was "independence" of political influence in the decision of cases. The Convention assured this quality by giving all Article III judges life tenure and forbidding the diminution of their salaries³³⁰ and, most decisively, by rejecting a congressional power to dictate the "manner" in which federal courts exercise "[t]he judicial Power."³³¹ As Hamilton said, "nothing can contribute more [than such protections] to the independence of judges"³³² serving as "the bulwarks of a limited Constitution against legislative encroachments,"³³³ particularly given that no similar "prospect of . . . independence . . . is discoverable in the constitutions of any of the States in regard to their own judges."³³⁴

Second was insulation from self-consciously political decisionmaking, as might occur were judges drawn outside the confines of judicial disputes or subjected to legislative or executive revision of their decisions. Again in Hamilton's words, federal "courts must declare the sense of the law; and . . . [not] be disposed to exercise WILL instead of JUDGMENT."³³⁵ The conveners assured this quality by (a) limiting "[t]he judicial Power" to the decision of "Cases" and "Controversies";³³⁶ (b) accepting the Madisonian caveat that "Cases" arising under the Constitution include only "cases of a Judiciary Nature";³³⁷ (c) refusing on judicial independence grounds to let members of the judiciary serve on a Council of Revision, helping to doom it;³³⁸ (d) shelving Pinckney's proposal for Supreme Court opinions "upon important questions of law, and upon solemn occasions" at the request of the President or Congress;³³⁹ (e) tabling Morris's suggestion that the Chief Justice participate in a Council of State to advise the President and recommend legislation;³⁴⁰ (f) putting the Article III "judicial Power" on a constitutional par with the Article I "legislative Powers" and the Article II "executive Power";³⁴¹ and (g) vesting the "judicial Power" in all, but only, judges created by or under Article III.³⁴²

330. See *supra* notes 73–75, 177, 197, 217–218, 246 and accompanying text.

331. See *supra* notes 259, 268–271 and accompanying text.

332. The Federalist No. 79, at 442 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

333. The Federalist No. 78, *supra* note 306, at 440.

334. The Federalist No. 79, *supra* note 332, at 444.

335. The Federalist No. 78, *supra* note 306, at 440.

336. See *supra* note 215 and accompanying text.

337. 2 Farrand, *supra* note 2, at 430 (Aug. 27, 1787) (discussed *supra* notes 250–252 and accompanying text).

338. See *supra* notes 65, 84–85, 104–108 and accompanying text.

339. See *supra* notes 231, 233–234 and accompanying text.

340. See *supra* notes 232–234 and accompanying text.

341. See Harrison, *supra* note 9, at 211–12; Velasco, *supra* note 8, at 697–700.

342. See The Federalist No. 47, *supra* note 320, at 305; The Federalist No. 78, *supra* note 306, at 437–38.

Third was the Convention's insistence upon independence of, and protection from revision by, state courts. The conveners thus (a) abandoned proposals to "appoint" state courts as federal courts, instead requiring Congress to "ordain and establish" freestanding federal tribunals,³⁴³ and (b) rejected the New Jersey Plan's limitation of supreme court cognizance of state "arising under" cases to the rendering of abstract opinions on the "construction" of federal law.³⁴⁴

Fourth was the capacity to decide the whole case, not just part of it. The delegates assured this quality by (a) limiting federal jurisdiction to "cases of a Judiciary Nature";³⁴⁵ (b) rejecting the New Jersey Plan's limitation of appeals to construing legal provisions; (c) adopting Dickinson's amendment expanding the reach of appeals to include matters of "law and fact";³⁴⁶ and, most importantly, (d) investing "[t]he judicial Power" with an elastic capacity to apply with full force in any case in which jurisdiction was conferred.³⁴⁷

Fifth and finally was the obligation to decide cases on the basis of all pertinent federal law and so as effectually to maintain the supremacy of that law—a duty that applies with particular force to appeals of state decisions that address the validity of state law under federal law and thereby reveal the perspicacity with which state judges are fulfilling their Supremacy Clause duties. The Convention assured this quality by (a) expanding "federal question" jurisdiction from the Virginia Plan's "questions involving the national peace and harmony," to the Committee of Detail's "cases arising under [federal] laws," to the August 27 draft's "cases arising under this constitution the laws of the United States and treaties," thereby self-consciously "conform[ing]" "federal question" jurisdiction to the Supremacy Clause duties of state judges;³⁴⁸ (b) rejecting the New Jersey Plan's limitation of "arising under" appellate jurisdiction to questions of construction and the Pinckney Plan's limitation of that jurisdiction to cases presenting such pure legal questions, in favor of jurisdiction extending to "all" types of "arising under" cases;³⁴⁹ and (c) extending the "judicial Power" to "law and equity" cases and "law and fact" questions on appeal.

343. See *supra* notes 198, 287–289 and accompanying text; *supra* text following note 216.

344. See *supra* notes 80, 137, 139, 201, 222, 250–252 and accompanying text.

345. See *supra* notes 250–252 and accompanying text; see also Letter from James Iredell to Richard Spaight (Aug. 26, 1787), in 2 *Life and Correspondence of James Iredell* 172, 173 (Griffith J. McRee ed., Peter Smith 1949) (1857) (letter of future Supreme Court Justice James Iredell to Richard Spaight, who was then serving as a North Carolina delegate to the Constitutional Convention: "It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another.").

346. See *supra* notes 256–257 and accompanying text.

347. See *supra* notes 258, 261–267 and accompanying text.

348. See *supra* notes 73, 215, 238–239, 247–249 and accompanying text.

349. See *supra* notes 80, 137, 139, 201, 222, 250–252 and accompanying text.

Explaining in *The Federalist No. 39* why the states had nothing to fear from reposing jurisdiction over disputes between state and federal authority in courts established under the latter, Madison nicely summed up the qualitative attributes of the judicial power:

[I]n controversies relating to the boundary between the two jurisdictions, the tribunal which is *ultimately to decide* is to be established under the general government. But this does not change *the principle of the case*. The decision is to be *impartially made*, according to the *rules of the Constitution*; and all the *usual and most effectual precautions* are taken to secure this *impartiality*.³⁵⁰

Tracking Madison's, our summary of "[t]he judicial Power" is this: *Read, as designed, in conjunction with the Supremacy Clause, "[t]he judicial Power" means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.* By "*independently, finally, and effectually decide*," we mean dispositively to arrange the rights and responsibilities of the parties on the basis of independently developed legal reasons, subject to review only by a superior Article III court. By "*case*," we mean a court action that can be resolved on the basis of enforceable law, and by "*whole case*," we mean not only the "construction" of applicable provisions of law but also their actual application to the facts to reach a decision.³⁵¹ By deciding "*nothing but the case*," we mean a court's insulation from formally giving advice to another agency of government, particularly advice of a political nature, either inside or outside the context of particular disputes. By "*maintaining the supremacy of the whole federal law*," we mean (1) giving the entire body of hierarchically ordered federal law the effect on the decision that the law, on its own terms, demands, and (2) treating as void any law or judicial decision—most explicitly, any *state* law or judicial decision—that is contrary to hierarchically ordered federal law and to which the case necessarily calls the federal court's attention.

As a whole, the Madisonian mechanics of the system for controlling state law are as follows: The oath of loyalty to federal law imposes an internal check on state legislators. That check is reinforced by a stronger, external check on state law exercised by state judges pursuant to their internal obligation under, and the quasi-nationalizing influence of, the Supremacy Clause. The federal courts then add a yet stronger (because

350. *The Federalist No. 39*, at 258 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added); see 2 Elliot, *supra* note 4, at 196 (Jan. 7, 1788) (statement of Oliver Ellsworth at Connecticut ratifying convention) ("If [Congress] make[s] a law which the Constitution does not authorize . . . , the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. . . . [I]f the states . . . make a law which is a usurpation upon the general government . . . , independent judges will declare it . . . [void]."); *id.* at 489 (Dec. 7, 1787) (statement of James Wilson at Pennsylvania ratifying convention); 3 *id.* at 553 (June 20, 1788) (statement of John Marshall at Virginia ratifying convention).

351. See *infra* notes 674, 774–799 and accompanying text (clarifying this principle).

independent, final, and effectual) external check on state judges—or, more accurately, a checking up on or spot-checking of state judicial decisions to assure that state judges are fulfilling *their* checking function vis-à-vis state law. Federal judges' exercise of this power is internally checked by their obligation both to exert and to constrain themselves to decide the whole case and nothing but the case, and to do so independently, effectually, and finally on the basis of reason, not will, as dictated by the whole supreme law. Although an internal *check*, federal judges' obligation to follow the whole law in deciding the whole case, no matter where legal reason leads and notwithstanding where *else* political will might lead, also confers a kind of *power*—i.e., the neutrality and integrity needed to command the respect and acquiescence of states and federal branches disadvantaged by the judges' decisions. Finally, Congress's control of the jurisdictional spigot externally checks the federal courts,³⁵² while Congress is itself checked by a variety of forces. Internally, Congress's own oath to preserve federal law and Article III's presumption in favor of federal appellate review—and externally, the legislature's need for effective enforcement tools to pursue its own ambitions, and its inability to alter the purity or quality of the judicial power it releases—keep it from too severely constraining the judicial branch. But, on the other hand, the constitutional presumption in favor of state court original jurisdiction (an internal constraint), together with the power of the states in Congress³⁵³ and Congress's judicially enforceable inability to alter the purity of the judicial power it releases even when that power is turned against Congress *itself* (external constraints), discourages an over-liberal use of the federal judicial check on state courts.

Although this system is classically Madisonian in its conception, it was not the system that Madison himself favored. Not surprisingly, given his preference for the national negative and council of revision, which a federal judiciary with *exclusive* control over nationally important cases would merely have *backed up*, "it was by no means certain [to Madison] that state courts, or even federal courts [by themselves], would have the political will and resources to oppose their judgment to the contrary whims of the people . . . [given] the inherent factiousness and parochialism of state politics that drove his constitutional theory."³⁵⁴ As he fretted in his post-Convention letter to Jefferson:

It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more

352. See Charles L. Black, Jr., *The Presidency and Congress*, 32 Wash. & Lee L. Rev. 841, 846 (1975) (Congress's power over federal jurisdiction is "the rock on which rests the legitimacy of the judicial work in a democracy").

353. See *The Federalist* No. 46, *supra* note 54, at 298; 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, 544–52 (1954).

354. Rakove, *supra* note 26, at 1049.

convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.³⁵⁵

Eventually, however, Madison came around—as revealed by his 1823 letter to Jefferson that we quote above, in which he rejected the neoconfederationist claim of the day that the Supreme Court lacked the constitutional power to review state court decisions.³⁵⁶ Thus, after 34 years of judicial operations under a Judiciary Act designed by former nationalist delegate Oliver Ellsworth and nationalist convert William Paterson, which faithfully tracked the constitutional presumptions and practical predictions described above,³⁵⁷ and after 20 years of operations under the strong nationalist hand of Chief Justice John Marshall, Madison was able to express substantial confidence in the system's federal—i.e., its simultaneously nationalist and confederationist—mechanics as conjointly codified in Article III and the Supremacy Clause.

II. "THE JUDICIAL POWER" EVER SINCE

As the events of August 27, 1787, had assured, "[t]he Courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the [judicial] power . . . ; [and] the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."³⁵⁸ But what is "[t]he judicial Power"? What are its inseparable attributes?

In Part I, we showed that the Constitutional Convention systematically addressed this question. It defined "[t]he judicial Power" as, first, Article III judges' authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually, to decide the whole case and nothing but the case on the basis of legal reasoning, not political expedience. Also included is a requirement that, when federal law by its own terms applies to the case, and particularly when the case reaches the federal courts on appeal from a state court, Article III judges must decide the case on the basis, and so as to maintain the supremacy of, the whole, hierarchically ordered federal law. In the latter regard,

355. Letter from James Madison to Thomas Jefferson, *supra* note 55, at 211.

356. See Letter from James Madison to Thomas Jefferson, *supra* note 249, at 83–84 (quoted *supra* text accompanying note 249).

357. See *infra* notes 374–375 and accompanying text.

358. *Michaelson v. United States*, 266 U.S. 42, 65–66 (1924); accord *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–18 (1995); see *supra* notes 216–218, 258, 261–267 and accompanying text.

Article III judges have the power and obligation to treat as void—to deprive of force or effect *as law*—any legislative enactment or judicial decision (and, most especially, any *state* law or judicial decision) that is inconsistent with federal law. Although Congress largely controls the (quantitative, jurisdictional) question whether a case is before a federal court, once Congress confers federal jurisdiction over a matter, Article III itself controls the (qualitative, “judicial Power”) question whether the matter constitutes a “case” and, if so, *what* that “case” entails. Insofar as the Constitution does bear on the quantitative question, it is only by creating some more or less easily rebuttable presumptions in favor of particular grants of jurisdiction (e.g., in favor of state court original jurisdiction and federal court appellate jurisdiction) and (as we will see) by discouraging official steps to neutralize the practicalities on which the Framers relied to assure that enough cases would reach Article III courts to permit them to maintain the supremacy of national law.

In this Part, we revisit a number of classic Federal Courts decisions to show that they are most powerfully understood as letting federal courts exercise all and only “[t]he judicial Power” as defined above. After briefly discussing the “quantity of jurisdiction” issue—to show, *inter alia*, how rarely and disinterestedly the Supreme Court has discussed it—we proceed in roughly the order in which the Court first authoritatively addressed particular aspects of “[t]he judicial Power.”

We begin with the limitation of Article III courts to “cases,” which turns out to encompass not only a limitation of the judiciary to its area of constitutional competence but also an empowerment of it to “decide” cases—meaning to exercise “judgment,” not “will,” and a “final” and “effectual” authority. In this and following discussions we bifurcate our analysis into cases reviewing federal, then state, law and decisions—revealing important affinities between cases that traditionally are treated as unrelated illustrations of distinct separation of powers and federalism principles. Next, in cases limiting or asserting the Court’s authority on matters over which the Constitution “extend[s]” jurisdiction, come perhaps the most classic decisions, which, we show, insist upon a judicial power not only to “decide” the case “independently” and “effectually” but also to decide the “whole case” (or, more accurately, the “whole question”) on the basis of the “whole supreme law.” These latter powers oblige Article III courts to decide all aspects of the dispute that require a normative judgment about the meaning of federal law, but permit those courts to forgo deciding aspects of the dispute that do not implicate Article III courts’ supremacy-maintaining function. We then consider cases in which the Court has forbidden non-Article III decisionmakers to use interpretive or remedial devices to neutralize the *stare decisis* effect of prior Court decisions. Finally, after discussing a narrow set of practicalities-

preserving cases, we acknowledge our debt to Henry Hart's *Dialogue*,³⁵⁹ while noting respects in which Hart's analysis was incomplete.

A. *Not Quantity: Congress's Control of the Courts' Jurisdiction*

Partisans on both sides of the debate over the quantity of constitutionally mandated federal jurisdiction have noted that the Court's statements on the topic—most suggesting that Congress can withdraw much of the Court's and all of the lower courts' jurisdiction³⁶⁰—are nearly all *en passant* and dicta.³⁶¹ Advocates of mandatory federal jurisdiction treat the Court's neglect of the issue as proof that it remains open, while their opponents argue that the legal culture has so thoroughly accepted Congress's power that counsel and the courts rarely take seriously the claim that it is lacking. We take the latter view, but for this reason: The Framers self-consciously *swapped* quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts. This explanation calls into question the emphasis of much of the academic work in the area, which tends to neglect qualitative issues, save for a passing and often inaccurate discussion of *Klein v. United States*.³⁶²

1. *Permitting Congressional "Regulation"*: Wiscart. — Early on, the Supreme Court did confront a quantity-of-jurisdiction question, but it was just the sort of question that our history of the Convention would predict:

359. See Hart, *supra* note 5.

360. See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 697–98 (1992); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

361. See, e.g., Amar, *supra* note 17, at 271 n.221 ("dicta"); Gunther, *supra* note 9, at 908; Van Alstyne, *supra* note 10, at 250–52 ("advisory"). Even *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869), which let Congress withdraw the Supreme Court's *appellate* habeas jurisdiction, was careful to note in a concluding paragraph that Congress had left intact the Court's *original* jurisdiction over the same cases—a jurisdiction the Court then proceeded to exercise only a few months later in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102–03 (1869). See *Felker v. Turpin*, 116 S. Ct. 2333, 2338–39 (1996).

362. 80 U.S. (13 Wall.) 128 (1872). Contrary to the common "qualitative" reading of *Klein* to forbid Congress to "prescribe rules of decision to the Judicial Department . . . in cases pending before it," Velasco, *supra* note 8, at 749 (quoting *Klein*, 80 U.S. (13 Wall.) at 146); see, e.g., Gunther, *supra* note 9, at 910; Sager, *supra* note 17, at 68, Congress routinely establishes standards of relief that prescribe rules of decision, and has even been permitted to command Article III judges to decide particular pending cases in particular ways. See, e.g., *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 434–35 (1992); *Pope v. United States*, 323 U.S. 1, 11–12 (1944) (discussed *infra* note 433 and accompanying text); cf. *infra* notes 447–450, 678–686 and accompanying text (discussing limits on Congress's power in this regard). Other qualitative commentary, usually supported by brief discussions of *Klein*, emphasizes, variously, the "independence," "finality," "effectualness," and "whole supreme law" qualities of "[t]he judicial Power." See, e.g., Amar, *supra* note 17, at 233 (the judicial power "encompasses the power . . . to speak definitively and finally"); Sager, *supra* note 17, at 87 (Congress may not "leave[] the basic jurisdiction of the federal courts untouched but deprive[] them of jurisdiction to provide effective relief"); Wechsler, *supra* note 9, at 1006 (Congress may not "employ federal courts as organs of enforcement and preclude them from attending to the Constitution in arriving at decision of the cause").

How do Article III's jurisdictional presumptions affect the interpretation of jurisdictional statutes? The 1810 decision in *Durousseau v. United States* typically is cited as establishing that Congress's explicit grant of appellate Supreme Court jurisdiction is "understood to imply a negative on the exercise of such appellate power as is *not* comprehended within" the grant, i.e., as impliedly "intending to execute the power [Congress] possessed of making exceptions to the [Court's] appellate jurisdiction."³⁶³

In fact, the principle dates back to the 1796 decision in *Wiscart v. D'Auchy*, which held that the 1789 Judiciary Act's authorization of Supreme Court review of lower federal court admiralty decisions on "writs of error," which bring up only legal questions visible on the face of the lower court judgment, impliedly denied the Court the broader power to hear admiralty "appeals" which, in addition, bring up factual questions and the evidentiary record.³⁶⁴ A dissent by Justice Wilson—nationalist author of the second Committee of Detail draft—sometimes is cited as arguing that the Constitution, not Congress, controls the Court's jurisdiction.³⁶⁵ But Wilson said the opposite: "The legislature might . . . ma[k]e exceptions, and introduce[] regulations" in regard to admiralty appeals.³⁶⁶ He thus agreed with his former Committee of Detail colleague, Chief Justice Oliver Ellsworth, writing for a majority, that the Court's "appellate jurisdiction is . . . qualified[] inasmuch as it is given 'with such exceptions, and under such regulations, as the congress shall make.'"³⁶⁷

Where Wilson and Ellsworth disagreed, therefore, was only on the question of how the presumptions ran. Focusing on the word "Exceptions" and failing to answer his own question—"how [cases] are to be brought hither for final adjudication . . . [when] congress makes no provision on the subject," i.e., how "all the testimony which was produced in the court below, should also be produced in this court" absent a statutory way to bring up the record—Wilson perceived a constitutional presumption favoring "appellate" jurisdiction unless explicit "words in the judicial act[] restrict[] the power of proceeding by appeal."³⁶⁸ Emphasizing the word "Regulations" and the absence as a practical matter of any factual record to review, Ellsworth concluded that, "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction."³⁶⁹ Ellsworth made the same point three years later in

363. 10 U.S. (6 Cranch) 307, 314 (1810) (emphasis added); see, e.g., Sager, *supra* note 17, at 25.

364. 3 U.S. (3 Dall.) 321, 327 (1796) (Ellsworth, C.J.).

365. See, e.g., Robert N. Clinton, A Mandatory View of Federal Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515, 1569–70 (1986).

366. *Wiscart*, 3 U.S. (3 Dall.) at 326 (Wilson, J., dissenting); see *supra* note 319 and accompanying text (Wilson's similar views in the ratification debates).

367. *Wiscart*, 3 U.S. (3 Dall.) at 327 (Ellsworth, C.J.).

368. *Id.* at 325, 326 (Wilson, J., dissenting) (emphasis added).

369. *Id.* at 327 (Ellsworth, C.J.).

Turner v. President of the Bank of North America,³⁷⁰ supported by Justice Chase, who similarly discerned both a legal rule that "congress is not bound" to grant jurisdiction and a "political truth . . . that the disposal of the judicial power . . . belongs to congress," so that only "[i]f congress has given this power to the court" can "we possess it."³⁷¹

Wiscart supports our conclusion that Congress's "Regulations" power is the source of its ability to control appeals by organizing the interactions among courts that are a necessary attribute of appeals.³⁷² It also, if less obviously, comports with the constitutional presumption we noted favoring Supreme Court appellate jurisdiction. Because, as a matter of efficient practice as well as law, the Court needs an affirmative congressional "rule to regulate [its] proceedings" on appeal from each type of subordinate court in each type of case, and because of the awkwardness of statutorily specifying the cases over which the Court may *not* exercise jurisdiction as opposed to the jurisdiction it *may* exercise, the Court sensibly has refused to treat the constitutional presumption of appellate jurisdiction as aimed at the form as opposed to the effect of statutes. *Pace Wilson*, therefore, Congress may proceed by statutorily "ruling in" rather than "ruling out" classes of cases as long as its statutes' overall effect is to make appellate jurisdiction the rule, not the exception, in the cases Article III lists. Proceeding according to this "ruling in" strategy, Congress arguably has succeeded since 1789 in making appellate review the general practice—justifying the Framers' gamble that Congress's ambitions would generate enough federal jurisdiction to let the qualitative ingredients of "[t]he judicial Power" serve their structural, supremacy-maintaining function.³⁷³

2. *Preserving Congressional Control: The Judiciary, Full Faith and Credit, and Anti-Injunction Acts.* — The little the Court has said on the quantity

370. 4 U.S. (4 Dall.) 8, 10 n.(a) (1799) (Ellsworth, C.J., during oral argument) ("the federal Courts [cannot] exercise a jurisdiction, without the intervention of the legislature, to distribute and regulate the power").

371. *Id.* (Chase, J., during oral argument). Justice Story often is associated with the view that Congress must vest all jurisdiction listed in Article III. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328–31, 337 (1816) (dicta). But when presented with the issue, Story took Chase's "political" view: No matter how "mandatory to the legislature" it was to vest the jurisdiction Article III delineates, a federal court may not actually *take* "jurisdiction, which is not given by some statute." *White v. Fenner*, 29 F. Cas. 1015, 1015–16 (C.C.D.R.I. 1818) (No. 17,547).

372. See *supra* notes 208, 223–224 and accompanying text.

373. See *Velasco*, *supra* note 8, at 743–44; *supra* notes 320–324 and accompanying text. Qualifying our conclusion in the text is the replacement early in this century of writs of error as of right to the Supreme Court with a discretionary certiorari procedure, thus undoubtedly reducing substantially the proportion of "arising under" and other enumerated cases in which actual federal review has occurred. The effect of this change has been moderated, however, by the Court's exercise of its discretion to review with an eye towards the policy of maintaining federal legal supremacy. Also important to our conclusion is Congress's "appellate" use of federal habeas review of state convictions as a surrogate for Supreme Court review in that large and important category of cases. See *infra* notes 891–892 and accompanying text.

of constitutionally mandated federal jurisdiction contrasts with how much the Court has let Congress *do* to control that quantity. The pattern was set immediately after ratification by the 1789 Judiciary Act, which conferred considerably less than the constitutionally permitted maximum jurisdiction and less than would be required by a principle of some federal jurisdiction over all federal questions.³⁷⁴ Instead, in keeping with the constitutional design that we describe in Part I, the jurisdictional choices the first Congress made conform to a presumption of federal appellate (and also state court original) jurisdiction and strongly imply a spot-checking and supremacy-maintaining understanding of the federal courts' role in reviewing state decisional and other law.³⁷⁵

374. Notwithstanding some contrary views by individual members of Congress (none, however, who attended the Convention), see, e.g., 1 Annals of Cong. 828, 831–32 (Joseph Gales ed., 1789) (statement of Rep. Smith); William Maclay, *Sketches of Debate in the First Senate of the United States 1789–1791*, at 86–87 (Harrisburg, Lane S. Hart 1880), the first Congress as a whole assumed that the Constitution (1) let it confer substantially less federal jurisdiction than that to which Article III, Section 2 provides that “[t]he judicial Power shall extend”—including as to categories of disputes to which Section 2 attaches the adjective “all”—and (2) let it withhold Supreme Court appellate jurisdiction from cases as to “all” of which the second paragraph of Section 2 says “the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.” See An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) (withholding, e.g., original federal “arising under” jurisdiction in civil cases and Supreme Court appellate jurisdiction over federal criminal cases and over state “arising under” cases in which the state court *upheld* a claimed federal right); see also 1 Annals of Cong. 854 (Joseph Gales ed., 1789) (statement of Rep. Stone) (noting that the drafters of what became the 1789 Act “have modified the tribunal; they have restrained its jurisdiction; they have directed appeals only to be had in certain cases; they have connected the State courts with the District Courts in some cases; this shows that, in their opinion, the articles of the constitution gave them a latitude”; quoted further, *supra* note 129); William R. Casto, *The First Congress’s Understanding of its Authority over the Federal Courts’ Jurisdiction*, 26 B.C. L. Rev. 1101, 1102 (1985) (noting “general acceptance” among “the principal drafters of the Judiciary Act . . . of extensive congressional control over federal court jurisdiction”). Professor Amar’s claims that, properly interpreted, Article III’s “arising under” language only authorizes appeals of decisions denying (as opposed to upholding) federal rights and that, properly interpreted, the 1789 Act authorized Supreme Court appellate jurisdiction over decisions upholding (as well as denying) federal rights, compare Amar, *supra* note 17, at 262–63, with Akhil Reed Amar, *Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1530–31 (1990), not only are hard to reconcile with each other but also are inconsistent with the actions of the First Congress, the 1914 Congress that repealed the bar to appeals of state decisions upholding federal claims, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, and Court decisions from 1806 on, e.g., *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268, 269 (1806). See Meltzer, *supra* note 9, at 1587.

375. The 1789 Act carefully rationed federal jurisdiction (including that of the inferior federal courts it chose to establish) to assure the ample and effective exercise of federal judicial authority in the types of cases in which Madison and other nationalists thought such jurisdiction most crucial to the effectuation of national authority, including by mandating original federal criminal jurisdiction, see An Act to Establish the Judicial Courts of the United States, ch. 20, §§ 9, 11, 1 Stat. 73, 76–77, 78–79 (1789), and by limiting Supreme Court appellate jurisdiction over state decisions, in a classically spot-checking manner, to ones that erroneously ruled *adversely* to a claim of federal right or of

Less well appreciated in this regard are two other early assertions by Congress of a broad power to decide whether and when federal courts could review state decisions. Article IV of the Constitution requires "each State" to give "Full Faith and Credit . . . to the . . . judicial Proceedings of every other State."³⁷⁶ Conspicuously absent is any command that *federal* courts give credit to state proceedings—an omission evidently dictated by the federal courts' Article III and Supremacy Clause powers to reverse, and thus *deny* credit to, state decisions in conflict with federal law. In acts passed in 1790 and 1793, however, Congress clearly took the position (1) that *it* would determine whether, when, and which federal courts could review, and thus deny effect to, state decisions that violate federal law, hence (2) that federal courts' "judicial Power" (even as bolstered by omissions from the Full Faith and Credit Clause) did not *inherently* confer that federal jurisdiction. Rather than letting litigants aggrieved by state proceedings challenge them at will in federal courts exercising a supposed *inherent* jurisdiction—or even letting litigants ask federal courts to deny state decisions credit in later cases that they managed to fit within the federal courts' general *statutory* jurisdiction³⁷⁷—the two acts assured that federal courts could only review state proceedings when Congress ex-

federal immunity from state law, id. § 25, 1 Stat. at 85–87. Moreover, the arguments members of Congress made in 1789 in favor of superseding state court with federal jurisdiction tended to rely not on constitutional imperatives but on the kinds of practical considerations—mainly the need for federal jurisdiction to effectuate national authority—that nationalists at the Convention had thought would cause Congress to keep the jurisdictional spigot open. See, e.g., 1 Annals of Cong. 844 (Joseph Gales ed., 1789) (statement of Rep. Madison) (asking "how it could be made compatible with the constitution, *or safe to the Federal interests*, to make a transfer of the Federal jurisdiction to the State courts" (emphasis added)); id. at 864 (statement of Rep. Lawrence) ("[T]he powers of the Judiciary ought to be employed so as to embrace all the cases which necessity required . . . [I]t was not . . . a question on principle, but a question of expediency . . ."); see also Speech of William Paterson in Senate Debate on Judiciary Act of 1789, recorded in Paterson Papers, file 4, Rutgers University Library, reprinted in Casto, *supra* note 374, at 1108 (favoring extension of jurisdiction to lower federal courts because "[t]he Necessity, the Utility, the Policy of them strikes my Mind in the most forcible Manner").

376. U.S. Const. art. IV, § 1 (emphasis added).

377. Suppose *A* successfully sued *B* in state court claiming that *A* was the rightful owner of land in *B*'s possession and that a federal treaty nullified a state statute conveying the land to *B*. Under the 1789 Judiciary Act, *B* could not appeal that "federal question" to the Supreme Court because the state decision *upheld*, and the Act only permitted appeals when the state court *denied*, a claimed federal right. See *supra* note 375. Could *B*, however, citing the "Arising Under" Clause and the negative implication of Article IV's limitation of full faith and credit to other *state* courts, ask a federal court to enjoin the state court order on the ground that it misinterpreted the federal treaty? Or, suppose that thereafter a new state law repealed the prior law conveying the property to *B*, and *B* unsuccessfully sued *A* in state court seeking to repossess the property and claiming, *inter alia*, that the new law unconstitutionally impaired *B*'s contract rights. On *B*'s (permissible) appeal of the adverse Contracts Clause decision, could *B* ask the Supreme Court to ignore the earlier state decision and rule that the federal treaty did not nullify the earlier law conveying the land to *B* and thus that the land was *B*'s if the later repealing law was void under the Contracts Clause? The 1790 and 1793 Acts' answer to both questions was "no."

pressly authorized such review and regulated its timing, predicates, and locus.

First came the 1790 Full Faith and Credit Act³⁷⁸—now codified at 28 U.S.C. § 1738—the black-letter interpretation of which from the beginning has been that, “*absent a countervailing command in another federal statute*,” federal courts must give full faith and credit to prior state decisions.³⁷⁹ As so interpreted, the 1790 Act effectively deprives federal courts of the power to review and supersede state judgments save when Congress expressly confers jurisdiction to conduct such review via, e.g., appeal, writ of error, certiorari, removal, or habeas.³⁸⁰

Next came the 1793 Anti-Injunction Act, forbidding federal courts to enjoin state proceedings.³⁸¹ Although the 1793 Act was framed as a “seemingly uncompromising” bar on injunctions, “the Court soon recognized . . . exceptions” designed to preserve the “intended scope” of later “Acts of Congress” granting lower federal courts jurisdiction to review or supersede state court proceedings—including bankruptcy laws and laws respecting “removal of litigation from state to federal courts, . . . the liability of shipowners, . . . federal interpleader actions, . . . farm mortgages,

378. Act of May 26, 1790, ch. 11, 1 Stat. 122.

379. Hart & Wechsler, *supra* note 37, at 1493 (emphasis added).

380. Compare *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 20 (1992) (O'Connor, J., dissenting) (habeas statute's directive to federal courts to deny effect to unconstitutional state court decisions supersedes full faith and credit requirement), and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985) (leaving open question whether statute giving federal courts exclusive jurisdiction over antitrust claims “implic[s] a” partial repeal of [28 U.S.C.] § 1738,” thereby denying *res judicata* effect to state court rulings on related claims), with *Allen v. McCurry*, 449 U.S. 90, 98 (1980) (requiring evidence clearer than that in the history of 42 U.S.C. § 1983 to warrant a finding that it partially repealed the Full Faith and Credit Act by authorizing federal courts to supersede prior state court decisions adjudicating the same claim). Since 1815, Congress has sometimes permitted litigants to transfer specified (often federal question) cases from state to federal court for independent determination *after* final state court judgment. See, e.g., Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99 (permitting removal by certain federal officials before or *after* final state court judgment, in specified circumstances, and characterizing postjudgment removal as an “appeal”); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57, amended by Act of May 11, 1866, ch. 80, § 4, 14 Stat. 46, 46 (same). In upholding the constitutionality of the 1863 and 1866 postjudgment removal statutes over the objection that lower federal court denial of full faith and credit to state court decisions offends federalism principles, the Supreme Court held that the removal acts were permissibly designed to empower lower federal courts to hear “appeals” from state courts, thus superseding the *res judicata* constraint:

How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, . . . are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature. . . . Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted.

The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251–52 (1868); see *infra* note 663 and accompanying text.

381. Act of March 2, 1793, ch. 23, § 5, 1 Stat. 333, 334–35.

... federal habeas corpus . . . , and . . . control of prices."³⁸² Codifying this longstanding doctrine, the current Anti-Injunction Act forbids federal courts to "grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*," or in two other exceptional situations.³⁸³

Among the "reasons that led Congress to adopt [the 1793 Act]" was a desire to preserve Congress's power to regulate the flow of cases across the state-federal divide and thus, in Justice Black's words, "to work out lines of demarcation between the two systems."³⁸⁴ Congress began that regulatory process in the 1789 Judiciary Act, in which "lower federal courts . . . were not given any power to review directly cases from state courts" and "[o]nly the Supreme Court was authorized to review on direct appeal the decisions of state courts."³⁸⁵ Congress then adopted the Anti-Injunction Act in 1793 to keep state court "[l]itigants who foresaw the possibility of more favorable treatment in [the federal] system . . . [from] hasten[ing] to invoke" federal jurisdiction through mechanisms other than those Congress had expressly provided.³⁸⁶

With the Court's blessing, therefore, the 1790 and 1793 Acts let Congress decide such questions as whether (as in the 1789 Act) to create "essentially separate [state and federal] systems" that "proceed [] independently of the other [except for] ultimate [federal appellate] review in th[e Supreme] Court of the federal questions raised,"³⁸⁷ or instead (as, e.g., in the habeas corpus acts of 1833, 1842, 1867, and 1948) to permit *inferior* federal courts to review and enjoin state proceedings in given circumstances.³⁸⁸ More generally, as vigorously enforced by the Court, the

382. *Mitchum v. Foster*, 407 U.S. 225, 233–35 (1972) (citing, e.g., *Ex parte Royall*, 117 U.S. 241, 248–49 (1886)).

383. 28 U.S.C. § 2283 (1994) (emphasis added); see *Mitchum*, 407 U.S. at 236.

384. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng.*, 398 U.S. 281, 285–86 (1970).

385. *Id.* at 286.

386. *Id.*

387. *Id.*

388. See Act of Mar. 2, 1833, ch. 57, §§ 3, 7, 4 Stat. 632, 633–35; Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539–40; Act of Feb. 5, 1867, ch. 27, 28, 14 Stat. 385, 385–87; Act of June 25, 1948, ch. 646, §§ 2241–2254, 62 Stat. 869, 964–67 (codified as amended in 28 U.S.C. §§ 2241(c) (3), 2251, 2254(a) (1994)); *McFarland v. Scott*, 512 U.S. 849, 857–58 (1994) (federal courts' habeas jurisdiction to stay and review state judgments is an exception to the Anti-Injunction Act); *infra* notes 888–895 and accompanying text. The habeas, removal, civil rights, bankruptcy, interpleader, price control, ship owners, and farm mortgage exceptions to the 1790 and 1793 Acts, see *supra* notes 380, 382–383 and accompanying text, all depart from a "two-sided stepladder" arrangement, under which state courts are joined to, and their cases are subject to review by, the federal courts only at the "top rung" representing the Supreme Court. Those exceptions neatly conform to the original understanding of Article III, which creates a *presumption* of Supreme Court appellate jurisdiction over state decisions but permits Congress in appropriate circumstances to overcome that presumption and confer appellate jurisdiction on lower federal courts. See *supra* notes 374–375 and accompanying text; cf. Scheidegger, *supra* note 75, at 894, 898–900, 902, 912, 915–16, 919, 936 (advocating a "two-sided stepladder"

1790 and 1793 Acts have operated under the assumption, and have assured, that Congress has the sole "quantitative" power to confer or deny federal appellate jurisdiction over state proceedings—and both treat that power as strong enough to permit Congress to neutralize the *expressio unius est exclusio alterius* implication of Article IV's omission of a full faith and credit command to federal courts adjudicating issues previously addressed by state courts.³⁸⁹

arrangement, but conceding that the Framers did not require it and that Congress repeatedly has departed from it).

389. Also effectively barring losing litigants whom Congress has denied federal jurisdiction to appeal from using general grants of original jurisdiction to obtain federal review are, e.g., federal statutes that make state convictions predicates for federal crimes while barring collateral attacks on the predicate convictions, and also the Tax Injunction Act, 28 U.S.C. § 1341 (1994); the Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (1994) (discussed in Hart, *supra* note 5, at 1363); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (affording state judges absolute immunity from section 1983 damages for deliberative conduct); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (because Congress had withheld lower federal court jurisdiction over appeals from state court civil judgments, a losing state court litigant could not—as “merely an attempt to get rid of [the unappealable state] judgment”—bring an original federal question action claiming that the unappealable judgment violated the Constitution); *Fouvergne v. Municipality No. 2*, 59 U.S. (18 How.) 470, 473 (1856) (forbidding litigant to use general equity jurisdiction as a basis to challenge a 60-year-old Spanish probate decree, inasmuch as “[t]he courts of the United States have no probate jurisdiction”) (misdescribed in Scheidegger, *supra* note 75, at 908 & n.120); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03, 209 (1830) (in order to distinguish habeas jurisdiction, which the 1789 Judiciary Act granted, from jurisdiction to hear criminal appeals, which the 1789 Act withheld, the Court refused on habeas to “look[]” at routine appellate issues such as whether the indictment in the case was procedurally flawed, and instead limited habeas review (pre- or post-conviction) to claims attacking “the legality”—meaning, in the language of the day, the constitutionality—“of the commitment”) (discussed in James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at 37–40 (2d ed. 1994); misdescribed in Scheidegger, *supra* note 75, at 889 & n.2, 929–31).

The 1790 and 1793 Acts' *quantitative* function of preserving Congress's power to say *whether, when, and which* federal courts have appellate jurisdiction over state decisions reveals why the Acts are not appropriately understood *qualitatively* as telling federal courts *how* to decide cases within their jurisdiction. The Acts do not tell federal courts (1) to affirm state decisions the courts have jurisdiction to review despite the decisions' inconsistency with federal law, but rather (2) to forbear exercising the general jurisdiction Congress has given them in a way that covertly arrogates to themselves an appellate power to review state decisions that Congress has withheld. That the Court has not technically labeled the two Acts “jurisdictional” does not undermine this understanding. Compare Scheidegger, *supra* note 75, at 916 (Acts' identification as jurisdictional, or not, is important), with *id.* at 918, 921 (doctrines' identification as jurisdictional, or not, is unimportant). The two Acts come into play only when some kind of federal jurisdiction concededly has been conferred that an unsuccessful state litigant is trying to use as a substitute for a different type of federal appellate jurisdiction that Congress has withheld. Because the Acts are not designed to deny all jurisdiction but, instead, to require courts to disentangle exercises of jurisdiction that Congress has conferred from uses of the same jurisdiction as shills for appellate jurisdiction that Congress has withheld—and because nonjurisdictional screening devices may supply the most effective means of serving (and for centuries *have* successfully served) that delicate function—the relevant doctrines' denomination as jurisdictional *vel non* is not decisive.

B. *Nothing but the Case: The Bans on Advising and Being Revised*

1. *No Advising of, or Revising by, a Political Branch.* — Many attributes of the judicial power serve simultaneously as powers and constraints.³⁹⁰ The Supreme Court's tendency to discuss some of them mainly as constraints has obscured the extent to which they also enhance the quality and force of the decisions through which the federal courts fulfill their structural role of subordinating inferior to supreme law. A case in point is the limitation of the judicial power to the decision of cases or controversies—in Madison's phrase at the Convention, the "limit[ation] to cases of a Judiciary Nature."³⁹¹ As did the Framers,³⁹² the Court, starting in the 1790s, repeatedly has disapproved exercises of "[t]he judicial Power" that either merely *advise*, or are subject to being *revised* by, non-Article III agencies of government.

a. *No Advising.* — Barred by the anti-*advising* rule are an Article III court's: (1) formally providing legal advice to a non-Article III entity outside the context of a case in which the entity has an interest;³⁹³ (2) "giving an opinion in a case which has not yet come regularly and judicially before us";³⁹⁴ and (3) deciding questions that depend on standards "so vague and amorphous as to be beyond the competence of the judiciary to enforce"³⁹⁵ or are "abstract, hypothetical or contingent."³⁹⁶

Also barred by the rule against advising is an Article III court's (4) adjudication of liability for harms that are not "likely to be redressed by a favorable decision,"³⁹⁷ because: (a) the moving party has not (or has not yet) suffered or is no longer suffering the kind of injury alleged (standing, ripeness, and mootness problems);³⁹⁸ (b) the court is being asked to

390. See *supra* notes 330–351 and accompanying text.

391. 2 Farrand, *supra* note 2, at 430 (August 27, 1787); see *supra* notes 250–252 and accompanying text.

392. See *supra* notes 65, 84–85, 104–108, 231–234 and accompanying text.

393. See, e.g., Letter from Chief Justice John Jay and the Associate Justices to President Washington (August 8, 1793), in 3 Correspondence and Public Papers of John Jay 488, 488–89 (Henry P. Johnston ed., Burt Franklin 1970) (1890).

394. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 414 n.† (1792) (reprinting letter of C.C.D.N.C. to President Washington rendering opinion that a statute under which no case had yet arisen was unconstitutional, but expressing "doubts as to the propriety" of—which soon turned into a blanket rule against—rendering such advice, "because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a preconceived opinion, even unguardedly, much more deliberately, given").

395. *Blessing v. Freestone*, 117 S. Ct. 1353, 1358 (1997) (internal quotations omitted); see *Nixon v. United States*, 506 U.S. 224, 228 (1993) ("A controversy is nonjusticiable . . . where there is 'a . . . lack of judicially discoverable and manageable standards for resolving it . . .'" (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

396. *Clinton v. Jones*, 117 S. Ct. 1636, 1642 n.11 (1997) (internal quotations omitted); see *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 242 (1937) (exercise of judicial power requires a "dispute" that "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts").

397. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38–39 (1976).

398. See, e.g., *id.*

nullify only one of multiple sufficient legal causes of the alleged harm, so that the harm will remain in place whether or not the moving party wins³⁹⁹ (an "adequate and independent ground" problem); or (c) the "court is powerless to enforce" its judgment in a way that would make a difference to any party, as where the court has no remedy at its disposal for the harm,⁴⁰⁰ or, as sometimes happened when territories became states, where the non-Article III court from which the case was appealed was dismantled without replacement and no other means of making the

399. See, e.g., *Lambrich v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (if "the state-law determination is sufficient to sustain the decree, any opinion of this Court on the [separate] federal question would be purely advisory" and beyond the Court's jurisdiction); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Although not typically explained in this way, the harmless error doctrine is analogous. If the facts predestine the outcome, so that a remand for provision of a federal right that previously was denied would change nothing, reversal merely revises a ruling, without deciding the case. Of course, determining whether curing the violation would make a difference is difficult. This explains (1) why courts in harmless error situations (unlike "adequate and independent state ground" cases, see *Lambrich*, 117 S. Ct. at 1522) often ascertain the contours of the violation before assessing its harmfulness, and (2) why the Court frequently uses proxies for probable harmfulness, instead of actually requiring harm to be proved. In the latter regard, see, e.g., *United States v. Olano*, 507 U.S. 725, 737 (1993) (discussing errors as to which courts "presume prejudice" because prejudice is likely but hard to prove); *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993) (structural errors that "infect the entire trial process" always require reversal). Given the uncertain effect of errors, anti-advising concerns can tolerate considerable judicial discretion to reverse decisions premised on errors that probably did not affect the outcome, but *might* have. Compare *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring reversal of criminal convictions on direct appeal upon finding a federal constitutional error that the state cannot show was "harmless beyond a reasonable doubt"), with *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (in cases involving nonconstitutional error in criminal cases on direct appeal and constitutional error in habeas cases, reversal is required whenever the error had a substantial effect on the jury's verdict or "the conscientious judge [is] in grave doubt about the likely effect of an error on the jury's verdict"). But at least the modern practice has been to forbear reversing whenever there is no reasonable possibility that an error affected the outcome, and to reverse whenever the error's effect on the outcome is more probable than not—the former practice being dictated (in our terminology) by the "whole case and nothing but the case" or "anti-advising" ingredient of the judicial power and the latter by the "effectualness" ingredient requiring Article III judges to effectuate supreme law in cases within their jurisdiction. See *infra* Part II.B.1.c–D (effectualness requirement). The claim of Professors Fallon and Meltzer that harmless error doctrine reveals Article III courts' "remedial discretion" upon finding federal legal error, see Fallon & Meltzer, *supra* note 37, at 1797–805, is incomplete, therefore, because it ignores the anti-advising limit on the power to grant, and the effectualness limit on the power to deny, relief. See *infra* notes 697, 747, 774–799 and accompanying text (further discussing Fallon and Meltzer's thesis).

400. *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 & n.20 (1983) (Marshall, J., dissenting) ("adjudication of rights which a court is powerless to enforce is tantamount to an advisory opinion"); see *Miller v. Albright*, 118 S. Ct. 1428, 1146 (1998) (Scalia, J., concurring in the judgment) (an Article III court must dismiss the case if the court "has no power to provide the relief requested"); Sager, *supra* note 17, at 88 n.222 ("A denial of jurisdiction to grant effective relief could 'in sufficiently extreme cases' also effectively put the federal courts in the position of rendering mere 'advisory opinions,' in violation of the case or controversy requirement of article III." (quoting Tribe, *supra* note 46, at 137))).

Article III court's mandate or judgment legally binding on the parties was available.⁴⁰¹ As the Justices said in 1793, in refusing to answer questions put by President Washington concerning certain treaty and international law obligations, "the lines of separation drawn by the Constitution between the three departments of the government . . . [that] in certain respects [are] checks upon each other, and our being judges of a court in the last resort, . . . afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to."⁴⁰²

b. *No Revising*: *Hayburn's Case* and *Plaut*. — The rule forbidding revision of Article III court decisions by non-Article III agencies bars (1) an Article III court's entry of a judgment that requires the approval of a non-Article III agency before it can become final or enforceable against the parties;⁴⁰³ and (2) Congress's annulment of, or its command that a court reopen and consider revising, a judgment that previously has become final within the federal "judicial department" under existing law.⁴⁰⁴ In announcing the former rule, the Justices (on circuit) and judges joining the three 1792 lower court opinions collected in *Hayburn's Case* explained their refusal to rule on petitions for orphans' and veterans' pensions subject to War Department and congressional revision on the

401. See *Gordon v. United States*, 117 U.S. 697, 704–05 (decided 1864, reported 1885) ("The Court has uniformly refused to take jurisdiction where there was not a court . . . to which we were authorized by law to send a mandate to carry into effect the judgment of this court" because "[we] could merely express an opinion, which . . . binds no one, is no judgment in the legal sense of the term, and may or may not be carried into effect . . ."); accord *McNulty v. Batty*, 51 U.S. (10 How.) 72, 79 (1850) ("[S]ince the termination of the Territorial government, there is no court in existence to which the mandate of this court could be sent to carry into effect our judgment. Our power, therefore, would be incomplete and ineffectual, were we to consent to a review of the case."); *Hunt v. Palao*, 45 U.S. (4 How.) 589, 590–91 (1846).

402. Letter from Chief Justice John Jay and the Associate Justices to President Washington, *supra* note 393, at 488.

403. See, e.g., *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (declining jurisdiction to review administrative order that thereafter could not become effective without presidential approval: "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts . . . may not lawfully be revised, overturned or refused faith and credit by another Department . . ."); *United States v. Jones*, 119 U.S. 477, 478 (1886); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647–48 (1874); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 46–47 (1851).

404. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("[h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case . . . and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the court said it was" and order the court to reopen the suit to apply the new law (emphasis added)); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856) (dicta) ("congress cannot . . . annul the judgment of the court already rendered, or the rights determined thereby"); sources cited *infra* note 441; see also *Pope v. United States*, 323 U.S. 1, 8–9 (1944) (questioning whether Congress may "*pendent lite* . . . set aside a judgment of the Court of Claims in favor of the Government and . . . require relitigation of the suit").

ground that "revis[ion] and control[] by the legislature, and . . . the executive department . . . [are] radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important [separation of powers] principle which is so strictly observed by the Constitution of the United States."⁴⁰⁵ Accordingly, although "congress may certainly establish . . . appellate jurisdiction . . . [by] courts . . . consist[ing] of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior," Congress may not vest revisionary authority in the Secretary of War, who lacks such tenure, nor may a "decision of any court of the United States . . . under any circumstances . . . agreeable to the constitution, be liable to revision, or even suspension, by the legislature itself."⁴⁰⁶

Extending this principle in *Plaut v. Spendthrift Farm, Inc.*, Justice Scalia announced the second anti-revising rule:

[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.⁴⁰⁷

c. *No Other Limits on Effectualness*: Gordon. — Straddling the anti-advising/anti-revising border, and distilling the effectualness principle uniting the two doctrines, is Chief Justice Taney's fascinating opinion in *Gordon v. United States*, which placed outside "[t]he judicial Power," hence outside the Supreme Court's appellate jurisdiction, the functions assigned the Court of Claims in its first incarnation.⁴⁰⁸ Congress created the claims court in 1855 to stem the flow of private bills seeking compensation from the government that Congress's assertion of sovereign immunity had previously prevented courts from providing. In 1863, Congress

405. 2 U.S. (2 Dall.) 409, 411–12 n.† (1792) (reprinting letter of C.C.D. Pa. (Wilson and Blair, Circuit J.J., Peters, D.J.) to President Washington).

406. *Id.* at 413 n.† (reprinting letter of C.C.D.N.C. (Iredell, Circuit J., Sitgreaves, D.J.) to President Washington).

407. *Plaut*, 514 U.S. at 218–19 (quoting Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)).

408. 117 U.S. 697 (decided 1864, reported 1885). Taney died before his opinion for the Court in *Gordon* was published, leaving the court reporter to announce simply—without publishing Taney's opinion—that "no appellate jurisdiction over the Court of Claims could be exercised by this court." *Gordon v. United States*, 69 U.S. (2 Wall.) 561, 561 (1864). Taney's draft opinion came to light, and was published in an appendix, in 1885. See *United States v. Jones*, 119 U.S. 477, 477–78 (1886) (discussing *Gordon's* history). Treating Taney's opinion as authoritative are, e.g., *Plaut*, 514 U.S. at 226; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.38 (1982); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (plurality opinion).

let the Court of Claims certify appeals to the Supreme Court in important cases.⁴⁰⁹

Taney based his conclusion that the Court of Claims's work did not qualify as an exercise of the judicial power on a statute providing that "no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims [or, if appealed, by the Supreme Court], till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."⁴¹⁰ Thus, "[n]either the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury," who then must "decide whether he will include it in his estimates of private claims, and [even then] it rest[ed] with Congress to determine whether they will or will not make an appropriation for its payment."⁴¹¹ Notably, the statute did not invite the Secretary or Congress to review or revise the *judgment* of the awarding court, nor was there any reason to think that the Secretary treated his task as more than ministerial (adding up the accumulated judgments and requesting an appropriation) or that Congress treated the Secretary's "estimate[s]" as less than obligatory. Even though the judgment thus seemed fully and finally to resolve the dispute, Taney found missing a critical attribute of the judicial power. The courts could not *themselves* make their judgments stick: "Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress."⁴¹²

Congress thus gave the Court either too much power or too little. On the "too much" side, "Congress cannot extend the appellate power of this Court beyond the limits prescribed by the Constitution" by "confer[ring] or impos[ing] on it the authority or duty of . . . determining an appeal from a Commissioner or Auditor, or . . . other tribunal exercising only [a] special power[]" to determine an amount owed.⁴¹³ "[N]or," on the "too little" side, "can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised [because] its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect":⁴¹⁴

The award of execution is . . . an essential part of every judgment passed by a court exercising judicial power. . . . Without such an award the judgment would be inoperative and nugatory It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should . . . pass a law authorizing the court to

409. *Gordon*, 117 U.S. at 698.

410. *Id.*

411. *Id.* at 698–99.

412. *Id.* at 699.

413. *Id.* at 702.

414. *Id.* (emphasis added).

carry its opinion into effect. Such is not the judicial power confided to this Court⁴¹⁵

In support of this effectualness ingredient of the judicial power—a court's ability "to carry its *opinion* into *effect*"⁴¹⁶—Taney cited two types of authority: the Court's decisions refusing to exercise appellate jurisdiction, notwithstanding a power fully and finally to declare the parties' rights, when the appealed-from territorial court had fallen casualty to statehood legislation identifying "no [successor] . . . court . . . to which we were authorized by law to send a mandate to carry into effect the judgment of this court,"⁴¹⁷ and section 25 of "the [Judiciary] act of 1789, authorizing, in certain contingencies [i.e., appeals from recalcitrant state courts], . . . [the] execution by this court" of its own appellate judgment, without reliance on a mandate issued to the state court.⁴¹⁸ The judicial power thus encompasses a power to bind an inferior court to effectuate the Court's "opinion," or barring that, to issue its own order making its judgment directly binding on the parties.⁴¹⁹

Taney carefully explained why the Court must "execute[] firmly all the judicial powers entrusted to it . . . [but] will abstain from exercising any power that is not strictly judicial in its character."⁴²⁰ As had the Convention, Taney linked (1) the empowering requirements of judicial independence and effectualness and the constraining requirement that the Court stay out of the political branches' business (even when they entice the Court into it) to (2) the Court's "unusual power" under "the second section of Article VI [the Supremacy Clause]."⁴²¹ In the process,

415. *Id.*; see *id.* (to qualify as an Article III court, "a judicial tribunal [must be] authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect"); *Eisentrager v. Forrestal*, 174 F.2d 961, 965–66 (D.C. Cir. 1949), *rev'd* on other grounds *sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (statute conferring habeas jurisdiction but placing the prisoner's overseas military custodian, to whom a remedial order would have to be directed, beyond the court's control violates Congress's duty under Article III "to confer the whole of the federal judicial power").

416. *Gordon*, 117 U.S. at 702, 704 (emphasis added).

417. *Id.* at 704 (discussing cases cited *supra* note 401).

418. *Id.* at 705; see *infra* note 483 and accompanying text.

419. At the least, effectualness requires that an Article III court have the power to make its judgment legally binding on the parties either by its own order, or by the order of another court that is legally bound by its mandate—or by the *res judicata* effect of its judgment—to enforce the judgment against the parties. See *Gordon*, 117 U.S. at 704–05; *infra* notes 432–458 and accompanying text. Effectualness also encompasses the power to make decisional law binding on the same and inferior courts in later similar cases. See *infra* Part II.D. Effectualness may not, however, require a coercive power to deploy marshals or otherwise force the parties to obey. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 568–71 (1962) (plurality opinion) (suggesting that the modern Court of Claims' power to enter final orders binding on the parties suffices for Article III purposes, even absent a power to make Congress appropriate funds to comply with the court's judgment).

420. *Gordon*, 117 U.S. at 700–01.

421. *Id.* at 706.

Taney noted an important, but often ignored, connection between federalism and separation of powers. The Supremacy Clause directs the Court to "decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory" and, in doing so, to determine whether the law of either sovereign conflicts with the Constitution and, if so, to declare it "null and void."⁴²² "The complex character of the Government of the United States," with "separate governments exercising certain powers of sovereignty over the same territory," creates "an absolute necessity, in order to preserve internal tranquility, that there should be some tribunal" with both the *authority* to fulfill that supremacy-preserving role without first securing the approval of either sovereign and the *prestige* (based on its independence) to do so with the acquiescence of both.⁴²³ "Hence the care with which [the Court's] jurisdiction, powers, and duties are defined in the Constitution, and its independence . . . secured," and hence the independence- and power-preserving rule that "[n]o appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution."⁴²⁴ Only insofar as the Court had a self-contained power to make its judgments binding, that is, could it command the respect needed to fulfill its supremacy-maintaining function.

d. *Implications.* — Our analysis helps resolve a number of important puzzles in anti-advising and anti-revising doctrine, including the doctrine's coherence, the Court's tolerance of federal judges' performance of certain apparently advisory functions, the line between Congress's revision of prior decisions (forbidden) and its revision of the law governing those and future decisions (permissible), and the constitutionally required effect of declaratory judgments.

Anti-advising and anti-revising doctrine sometimes is criticized as standing for no single principle save the question-begging one that Article III courts cannot be assigned "duties, but such as are properly judicial, and to be performed in a judicial manner."⁴²⁵ Our analysis reveals, however, that the anti-advising and anti-revising decisions belong under the same umbrella because they all capture qualities on which the

422. *Id.* at 700; see *id.* at 705.

423. *Id.* at 700–01; cf. Martin H. Redish, Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*, 39 DePaul L. Rev. 299, 303 (1989) ("An Article III court reduced to acting as a mere administrative functionary that assists or serves the political branches may have difficulty commanding the prestige necessary to check the exercise of majoritarian will found to conflict with constitutionalized values.").

424. *Gordon*, 117 U.S. at 700; see *id.* at 701.

425. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792); see Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 644–45 (1992) (doubting the coherence of rules grouped under the "advisory opinion" rubric).

Convention insisted to fortify and cabin the judicial power in ways that permit its holders to fulfill their structural, supremacy-preserving function. "The judicial Power" thus is diminished in one or more ways when a federal court is permitted or required to advise the President or Congress, or otherwise to express opinions outside the confines of a particular case, or to do so within those confines but on an as-yet hypothetical matter, or on a matter to which no manageable legal standards apply, or when nothing the court says can change the current status of the parties, or when the court lacks the enforcement power to make what it says stick, or when it knows or fears that another agency of government will revise its judgment or require *it* to do so.

On the "too little power" side, the court is not *independent* because it is asked to cater to the interests, or forced to rely on the enforcement proclivities, of another agency of government, and its judgment is not *final* or, if final, is not *effectual* (i.e., capable of being carried into effect by the court). On the "too much power" side, the court is invited to act based on political "will" or expediency, not judicial "*reason*," and is relieved of responsibility for the effects of its opinions on the parties—undermining its *prestige* and single-minded commitment to the *supremacy of federal law*.⁴²⁶

Our analysis also explains why the Court has not forbidden its members or inferior judges in their "personal" capacities to advise officials of the political branches or to serve in nonjudicial government roles (witness Chief Justice Jay's simultaneous service as Ambassador to England, Justice Jackson's work at the Nuremberg trials, and the "Warren Commission" on President Kennedy's assassination) or as "commissioners" to resolve petitions for government largesse subject to executive or legislative revision.⁴²⁷ Nor has it resisted the statutorily imposed duty to generate legally binding procedural rules for use in the federal courts⁴²⁸ or to perform nonjudicial duties "directly analogous to [those] that federal judges perform in other [Article III] contexts."⁴²⁹ Nor, combining both caveats, did it disapprove a statute assigning judges to the Sentencing Commission that produces binding sentencing rules for the

426. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 411 n.† ("the people of the United States . . . have placed their judicial power, not in Congress, but in 'courts' . . . [that] 'hold their offices during good behavior,' receive 'salaries [that] shall not be diminished,' and 'are under the indispensable necessity of acting according to the best dictates of [their] own judgment, after duly weighing every consideration'").

427. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 400 (1989); *United States v. Ferreira*, 54 U.S. (15 How.) 40, 46–47 (1852) (district judges may act as "commissioners" and "personally . . . perform" administrative duties subject to Treasury Department revision that Article III forbids them to perform as *courts*); William R. Casto, *The Supreme Court in the Early Republic 71–72*, 178 (1995) (discussing legal advice that first two Chief Justices privately gave to President Washington); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123.

428. See, e.g., Rules Enabling Act, 28 U.S.C. § 2072 (1994).

429. See *Morrison v. Olson*, 487 U.S. 654, 677, 681–82 (1989) (quoted material at 681).

federal courts.⁴³⁰ These activities have caused no great expansion or tarnishing of the judicial power, because the advice sought was unofficial and private;⁴³¹ the duties performed were so occasional, solemn, and momentous that independence of mind and commitment to reason were crucial and assumed; the "advice" judges provided was to *themselves* in the form of rules governing judicial matters about which courts are understood to exercise reason (rules, by the way, that kept the legislature from imposing its own rules by fiat); or the tasks could not be mistaken for a demeaning requirement to referee disputes that the court could not finally or effectually resolve.

Also explained by our analysis is the Court's recent voiding of an act forcing federal courts to revisit previously final decisions, though earlier cases had upheld similar statutes. The earliest case, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, enforced an act declaring certain bridges over the Ohio River "lawful structures in their present positions and elevations" and designating them "post-roads for the passage of the mails of the United States," though four years earlier the Court had declared one of the bridges "an obstruction of the free navigation of the said river . . . and directed that the obstruction be removed."⁴³² In *Pope v. United States*, the Court of Claims previously had denied Pope damages for a government contract breach, but the Court enforced a special act letting him sue again for the same damages "'notwithstanding any prior determination [or] any statute of limitations'" and directing the claims court to use a formula for valuing Pope's work that differed from the one the court previously had used in denying relief.⁴³³ Additionally, the Court twice upheld acts ordering the claims court to consider anew an Indian tribe's previously rejected compensation claims.⁴³⁴ Despite the Government's waiver of *res judicata* in the latter Indian tribe case, the Court thought it necessary *sua sponte* to consider (because its jurisdiction was implicated), but ultimately rejected, the argument that "Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions."⁴³⁵

In the most recent case, however, *Plaut v. Spendthrift Farm, Inc.*,⁴³⁶ the Court *voided* an act requiring federal courts to reinstate Rule 10b-5 actions dismissed earlier as untimely under the Court's ruling in *Lampf*,

430. See *Mistretta*, 488 U.S. at 412 (upholding 28 U.S.C. §§ 991, 992 (1984)).

431. Cf. Casto, *supra* note 427, at 180 (suggesting implicit "distinction . . . between private opinions offered by individual Justices, and formal opinions issued by the Court as an institution").

432. 59 U.S. (18 How.) 421, 429 (1856) (discussing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851)).

433. 323 U.S. 1, 3-4 (1944) (Special Act of Feb. 27, 1942, Priv. L. No. 306, 56 Stat. 1122).

434. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 407 (1980); *Cherokee Nation v. United States*, 270 U.S. 476, 484-86 (1926).

435. *Sioux Nation*, 448 U.S. at 391 & n.22.

436. 514 U.S. 211 (1995).

Pleva, Lipkind, Prupis & Petigrow v. Gilbertson.⁴³⁷ *Lampf* had rejected a lower court consensus that federal law adopted state statutes of limitations in 10b-5 cases, and instead had applied a shorter limitations period.⁴³⁸ *Plaut* did not attempt to distinguish *Wheeling Bridge* and *Pope*, and limited the Indian tribe cases to government res judicata waivers which, it said, pose no Article III problem because courts may reject them on judicial economy grounds⁴³⁹—though neither Indian tribe case had relied on the res judicata waiver or the courts' discretion to reject it. Nor did *Plaut* consider interpreting the statute before it as merely withdrawing the defendant's right to assert res judicata while preserving the court's discretion to decide whether to treat the prior judgment as final.⁴⁴⁰

Our analysis explains these cases by identifying as decisive the question whether the statute under review projects a message that Congress is exercising a power to revise a *judicial* decision or merely one to revise federal *statutory* law. It asks whether the statute evidently invokes a power to rectify an Article III court's mistake, or whether it merely exercises Congress's power (1) to modify its own prior enactment, (2) to adopt a new statute governing matters that it previously had failed to regulate, or (3) to forbid the Executive or a private party to raise a res judicata defense. In the former situation, the statute attacks the independence, finality, and effectualness of an Article III court's decision;⁴⁴¹ in the latter, it merely exerts Congress's control over the law governing, or defenses to, particular lawsuits.

Indicative of the latter, benign interpretation (although not always individually dispositive) are (1) the statute's apparent intention to establish new, judicially enforceable rights (e.g., the *Wheeling Bridge* statute's new definition of obstructive bridges and creation of new uses for two

437. 501 U.S. 350 (1991).

438. See id. at 364.

439. See *Plaut*, 514 U.S. at 231–32.

440. The Court made clear that Congress's intentionally retroactive withdrawal of previously accrued defenses posed no due process, and only an Article III, problem, see id. at 227, and noted, without disapproving, federal statutes that abrogated private parties' res judicata defenses, for example, to enable soldiers to reopen decisions obtained against them while they were serving overseas, see id. at 235.

441. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) ("When the political branches . . . act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases . . . the Court will treat its precedents with the respect due them under settled principles . . ."); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 431 (1980) (Rehnquist, J., dissenting) ("[I]t is not the province of Congress to judge the persuasiveness of the opinions of federal courts—that is the judiciary's province alone."); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) (plurality opinion) ("Congress may not by fiat overturn the constitutional decisions of this Court . . ."); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 *Duke L.J.* 291, 314 (1996) ("Was Congress . . . ever put in charge of 'overruling' the Supreme Court, and given power to 'reverse' the Court's decisions . . . ? It seems seriously doubtful that this can be so.").

bridges, and the new rights to compensation that the Court interpreted the "inartistically drawn" statute in *Pope* and the later Indian tribe act to provide);⁴⁴² (2) the statute's placement on the Government of a new obligation (e.g., the duty to use a specified bridge as a post road (*Wheeling Bridge*), to compensate a government contractor for services previously deemed noncompensable (*Pope*), or to provide or risk additional compensation for lands ceded to the Union (Indian tribe cases)); (3) the passage of a significant amount of time between the court's prior decision and Congress's resurrection of the issue (Indian tribe cases),⁴⁴³ or the previous judgment's operation against the parties in a manner that the new statute does not entirely change retroactively (as in *Wheeling Bridge*, in which the new act reopened the bridge but did not compensate its owners for the period while it was condemned);⁴⁴⁴ (4) the formation of a new moral or legal consensus in favor of previously withheld rights (as in the later Indian tribe case);⁴⁴⁵ (5) Congress's broad discretion to renegotiate the terms of the agreement the prior decision interpreted (e.g., the government contract in *Pope* and the treaties in the Indian tribe cases); and/or (6) the statute's apparent intention to forbid the Government or a private party⁴⁴⁶ to assert a res judicata defense (*Pope*), and the Government's actual waiver of the defense (the later Indian tribe case).⁴⁴⁷

In *Plaut*, no such factors were present. On the contrary, Congress retroactively applied the longer statute of limitations only in *Lampf* and other previously closed cases, while endorsing *Lampf*'s shorter limitations period for pending and future cases. Congress thus validated its prior enactment as interpreted in *Lampf*, leaving as the only clear target of the new statute the (by implication) unfair way in which the Court had applied the prior act to the defendants in the cases that Congress sought to reo-

442. See *Sioux Nation*, 448 U.S. at 406-07 ("When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right."); *Pope v. United States*, 323 U.S. 1, 9 (1944) ("While inartistically drawn the Act's purpose and effect seem . . . to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before."); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1856).

443. In *Cherokee Nation* Congress acted 13 years, and in *Sioux Nation* 36 years, after the prior judgment in question. See *Sioux Nation*, 448 U.S. at 384-87, 395; *Cherokee Nation v. United States*, 270 U.S. 476, 477-78 (1926).

444. See *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32.

445. See *Sioux Nation*, 448 U.S. at 389, 397-98.

446. See supra note 440.

447. See, e.g., *Sioux Nation*, 448 U.S. at 392 & n.22. Although relevant, Congress's waiver of res judicata or the court's ability to ignore the waiver is not decisive. Compare *id.* at 396-97, with *id.* at 432-33 (Rehnquist, J., dissenting) (disagreeing over Article III implications of the act's treatment of a prior decision, but agreeing that Congress's waiver of res judicata was not decisive and omitting mention of the court's discretion to ignore the waiver). Thus, if Congress conveys the message that it is waiving res judicata to provoke reconsideration of a mistaken final decision, Article III may bar the suit's reopening though there is no judicial economy or similar objection to relitigation.

pen and, evidently, to "reverse."⁴⁴⁸ The statute's unadorned directive to "reinstate[]" previously final causes of action likewise left no room to interpret it as withdrawing a party's *res judicata* defense rather than the prior decision's finality.⁴⁴⁹ Perhaps even more clearly indicative than the *Plaut* statute of the forbidden message that Congress is exercising a revisory power would be a statute neutralizing a party's victory in a case involving *constitutional* rights that Congress has no or only a tenuous power to modify.⁴⁵⁰

Finally, our analysis illuminates the question whether a declaratory judgment lacking immediate enforceability is impermissibly advisory if it also lacks *res judicata* effect.⁴⁵¹ As just noted, the message of the anti-reopening decisions is that federal court decisions must remain final and binding on the parties by operation of the *res judicata* principle unless those courts themselves approve a statutory or litigating party's waiver of that principle that does not impugn the independence, finality, and effectualness of Article III judgments.⁴⁵² Moreover, as applied in *Gordon* and the "defunct territorial court" cases, the effectualness requirement de-

448. Congress apparently objected to what it saw as *Lampf's* unfairly retroactive application to the losing plaintiffs of a *new* limitations rule *different* from the one the lower court consensus previously had established. Given, however, the Court's understanding of its actions in such cases as supplying the interpretation the law *always* had deserved (a contrary lower court consensus notwithstanding), see *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 307, 312 (1994), the new act clearly embodied an unconstitutional "declar[ation] . . . that the law applicable to *that very case* was something other than what the court[']s prior decision had] said it was" and that Congress was acting to overturn the erroneous decision. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). Importantly, the problem in *Plaut* was not the statute's retroactivity *per se*, see *id.* at 226-27, but how surgically the statute targeted only the outcomes of cases previously decided under *Lampf*—while adopting a different policy for future cases—thus conveying the message that Congress had, and was exercising, a power to overturn the final, but assertedly "erroneous," Article III court decision in *Lampf*.

449. *Plaut*, 514 U.S. at 217.

450. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (contrasting decision rules that are "incidental to Congress' power to define the right that *it* has created" and decision rules Congress imposes "when the right being adjudicated is not of congressional creation," and concluding that the latter rules have "[u]o comparable justification" and make "unwarranted encroachments upon the judicial power"); *infra* notes 678-686 and accompanying text.

451. Compare *Steffel v. Thompson*, 415 U.S. 452, 477 (1974) (White, J., concurring) ("there is every reason for not reducing declaratory judgments to mere advisory opinions," so "a final declaratory judgment entered by a federal court holding . . . conduct . . . immune on federal constitutional grounds from prosecution under state law should be accorded *res judicata* effect in any later prosecution of that very conduct"), with *id.* at 470 (majority opinion) (a declaration that a threatened but not yet initiated state prosecution is unlawful "may have some *res judicata* effect [on a later prosecution], though this point is not free from difficulty" (citation omitted)), and *id.* at 482 & n.3 (Rehnquist, J., concurring) (a federal "declaratory judgment is simply a statement of rights" that "State authorities may *choose* to be guided by" (emphasis added)). See generally Hart & Wechsler, *supra* note 37, at 96-98, 1275-91 (discussing competing views on the *res judicata* question).

452. See *supra* notes 403-407, 441-450 and accompanying text.

mands that Article III courts have an ability to carry their judgments into practical effect, if not through their own direct orders (as under section 25 of the 1789 Judiciary Act), then at least through statutorily mandated obedience to their judgments by another court with jurisdiction.⁴⁵³ The Declaratory Judgment Act meets this requirement by providing that, in addition to the declaration, "[f]urther necessary and proper relief . . . may be granted"⁴⁵⁴ and that federal declarations "shall have the force and effect of a final judgment or decree."⁴⁵⁵ Insofar as the Court's abstention doctrines keep declaration-issuing federal courts from imposing "[f]urther necessary and proper relief" through injunctions or contempt citations against responding state officials, the only means left for the effectual enforcement of the judgment is the Act's obliging of *other* courts with jurisdiction to give the declaration "the force and effect of a final . . . decree."

Accordingly, a blanket rule adopted *ab initio* that a type of federal declaration is unenforceable, either by the issuing court via injunction or contempt, or by the declaration's *res judicata* effect on state courts to which it is presented, would violate not only the Act but also the requirement that "[t]he judicial Power" be powerful.⁴⁵⁶ Nor does an Article III court's *after-the-fact* ability to accept "waivers" of *res judicata* on a *case-by-case* basis—after assuring itself that doing so does not endorse a negative message about the finality and effectualness of Article III judgments that other agencies of government dislike—justify a federal court's *before-the-fact* announcement that its judgments are ineffectual *as a class*.⁴⁵⁷ As the Supreme Court implied in *Samuels v. Mackell*, if an Article III court cannot enforce a declaratory judgment against an ongoing state enforcement action by injunction, and is not prepared to insist that its judgment be given *res judicata* effect in the state court hearing the enforcement

453. See *supra* notes 408–424 and accompanying text.

454. 28 U.S.C. § 2202 (1994).

455. *Id.* § 2201.

456. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them"; "a 'judicial Power' is one to render dispositive judgments" (quoting Easterbrook, *supra* note 407, at 906)); *Michaelson v. United States*, 266 U.S. 42, 66 (1924) ("attributes" of the judicial "power . . . can neither be abrogated nor rendered practically inoperative"); *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, reported 1885) (Article III court judgments may not be "inoperative and nugatory"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816) (judiciary's central role is "to expound and *enforce* [federal law, and] . . . to *carry into effect* . . . the express provisions of the constitution" (emphasis added)); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) ("[T]he essential, constitutional role of the judiciary . . . [requires] both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law.").

457. See Hart & Wechsler, *supra* note 37, at 526–27 (suggesting distinction between Article III decisions that are advisory from the start or only become, *ex post*, advisory).

action, it must decline to exercise what, by the Article III court's own definition ab initio, does not constitute "[t]he judicial Power."⁴⁵⁸

2. *No Advising of, or Revising by, a State Court:* Murdock, Martin, Osborn, Cohens, and Ableman. — Although rarely grouped together, a number of well-known Supreme Court cases bar federal courts from advising and being revised by state courts, paralleling the more famous set of decisions barring advising and being revised by other federal branches. As we develop in this section, *Murdock v. City of Memphis*,⁴⁵⁹ *Martin v. Hunter's Lessee*,⁴⁶⁰ and *Osborn v. Bank of United States*⁴⁶¹ bar direct federal court advising of state courts, either (1) through federal question opinions on appeal of state judgments that rest comfortably on state law, regardless of whether the state court correctly analyzed any federal issues it discussed, or (2) by providing interpretive advice on federal law without a power to apply the law to the facts to decide the case. *Martin* and *Cohens v. Virginia*⁴⁶² also bar *implicit* advising of state courts, holding that the Supremacy Clause and Article III not only permit Congress to subject state court judgments to federal appeals, but also assure federal courts the capacity to *effectuate* their (thus nonadvisory) appellate judgments, including by commandeering state courts to execute federal judicial mandates. Finally, to keep state courts from *revising* federal judgments, *Martin* requires state courts subject to federal appeal to enforce federal mandates they believe are wrong, and *Ableman v. Booth*⁴⁶³ forbids state courts to subject federal decisions to appellate review of any sort.

a. *No Direct Advising:* Murdock, Martin, and Osborn. — In *Murdock* and (particularly) its progeny, the Supreme Court established that, even when a statute gives the Court appellate jurisdiction to review federal questions adjudicated in final state court proceedings, Article III forbids the Court to do so if an independent state ground of decision supports the state court judgment, thus depriving an appellate opinion on the federal question of any practical effect on the parties.⁴⁶⁴ Tracking the

458. 401 U.S. 66, 72 (1971) (federal court must abstain from declaratory judgment on the legality of ongoing state prosecution, given declaration's "practical impact" on state proceedings: "If [the declaration . . .] [is] *res judicata*, so that the [state court] cannot . . . decide . . . for itself . . . the federal court has virtually lifted the case out of the State [court] before it could be heard. If not, the federal judgment *serves no useful purpose as a final determination of rights.*" (emphasis added) (citation omitted)); see also David L. Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw. U. L. Rev. 759, 764 (1979) ("The very purpose of the declaratory judgment proceeding would appear to be thwarted were this determination to be regarded, in a subsequent proceeding between the same parties, as no more than the view of a coordinate court.").

459. 87 U.S. (20 Wall.) 590 (1875).

460. 14 U.S. (1 Wheat.) 304 (1816).

461. 22 U.S. (9 Wheat.) 738 (1824).

462. 19 U.S. (6 Wheat.) 264 (1821).

463. 62 U.S. (21 How.) 506 (1859).

464. *Murdock*, 87 U.S. (20 Wall.) at 636 (dicta) (although a federal act purports to give the Court jurisdiction over a federal issue arising in a state case and to require the Court to "examine the judgment so far as to enable it to decide whether this [federal] claim . . . was

Convention's rejection of the limited "arising under" jurisdiction in the New Jersey Plan,⁴⁶⁵ *Murdock* thus forbids Congress to order federal courts to give state courts advice on the meaning of federal law.⁴⁶⁶

The anti-advising principle supported *expansive* interpretations of federal "arising under" jurisdiction in *Martin* and *Osborn*. In *Martin*, the Supreme Court had earlier concluded that a Virginia Court of Appeals decision awarding property to Hunter's lessee instead of Fairfax's heir violated 1783 and 1794 treaties with England securing then-existing property rights of English citizens.⁴⁶⁷ Reversing the Virginia court's conclusion that Fairfax lacked treaty protection because his title had lapsed before the 1783 treaty was made, the Court's prior decision had held that (1) the Court's appellate "arising under" jurisdiction brought before it the question whether Fairfax retained title as of 1783 under general legal principles as applied to the facts of the case, because that question was necessarily preliminary to the federal question of the treaty rights of Fairfax's heir, and (2) Fairfax had title as of 1783.⁴⁶⁸ On remand, the Virginia Court of Appeals refused to obey the Supreme Court's mandate, concluding, *inter alia*, that Article III's "arising under" clause gave the Court no authority to determine any issue—including whether, on the facts of the case, Fairfax retained "title" as of 1783—that did not itself constitute what we today would call a "pure" question of federal law depending entirely on the proper construction of the words of a federal constitutional, statutory, or treaty provision.⁴⁶⁹

correctly adjudicated by the State court," the Court should deny the appeal if "there is any other matter . . . adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding . . . error in deciding the issue raised by the Federal question"). The Court now seems to treat *Murdock's* dictum as a jurisdictional requirement of Article III, not merely a prudential or statutory concern, thus demanding threshold consideration whether an adequate state ground is present and, if so, dismissal of the suit without reaching the federal merits. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Eustis v. Bolles*, 150 U.S. 361, 366 (1893); decisions cited *supra* note 399.

465. See *supra* notes 80, 137, 139, 201, 222, 250–252 and accompanying text.

466. Likewise, only state law issues were raised in one of the "defunct territorial court" cases, so the "advice" the Court refused to give through the medium of an unenforceable judgment would have run mainly to state courts. See *McNulty v. Batty*, 51 U.S. (10 How.) 72, 79 (1850); *supra* notes 401, 417 and accompanying text. The Court cannot always tell whether a state decision can rest entirely on state law, and the Court's response to ambiguities in this regard has vacillated. See *Hart & Wechsler*, *supra* note 37, at 526–27, 538–44. Our analysis suggests that an Article III court should not decide federal issues in state cases when there is so much ambiguity as to whether a federal decision would affect the outcome that deciding the case would project the message that the federal court is undertaking merely to advise the state court on the federal issue.

467. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 626–28 (1813).

468. See *id.* at 627; cf. *id.* at 632 (Johnson, J., dissenting) (agreeing with the majority on point (1) because "otherwise, an appeal to this court would be worse than nugatory," but dissenting on point (2)).

469. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 49–50 (1814).

On appeal to enforce the Court's prior judgment, it reaffirmed its jurisdiction to decide the "title" question. Although Justice Story's analysis focused on the 1789 Judiciary Act's grant of jurisdiction over "'a suit,'" his analysis applies no less clearly to Article III's confinement of the judicial power to "cases or controversies." Story based his conclusion on an "advisory opinion" point following directly from the Framers' rejection of the Pinckney and New Jersey proposals to limit federal question jurisdiction to "pure" federal questions:⁴⁷⁰ If the Court could only address the pure question of a federal legal provision's abstract meaning, but could not decide what we today might call the "mixed" question of how that meaning emerges from the provision's application to the facts of the case or interaction with state law questions, it would lack the *independence*, *finality*, and *effectualness* needed to "decide" the "whole suit," dependent as the Court would be on a state court's ability to determine the actual effect of the Court's interpretation in the actual circumstances of the case:

[T]he case for which the [1789 Act] provides a remedy by writ of error . . . [is] a *suit* where is drawn in question the construction of a treaty, and the decision is against *the title set up by the party*. It is, therefore, the *decision* against the title set up with reference to the treaty, and *not the mere abstract construction of the treaty itself*, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide, whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? . . . [E]very error that immediately respects that question [of the treaty's protection of the title] must, of course, be within the cognizance of the court.⁴⁷¹

Chief Justice Marshall expressed the same "whole case" conclusion in *Osborn*, finding constitutional a grant of "arising under" jurisdiction to lower federal courts that effectively withdrew an important class of cases from state courts and, as the Court noted, set the outer limits of its own "arising under" jurisdiction on appeal of state decisions.⁴⁷² At issue was an act granting original federal jurisdiction over all suits by the Bank of

470. See *supra* notes 80, 137, 139, 201, 222, 250–252 and accompanying text.

471. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 358–59 (1816) (emphasis added). Justice Johnson agreed:

The title may exist, notwithstanding the decision of the State Courts to the contrary; and in that case, the party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities, or defects, in state jurisprudence against which the constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on a mere hypothetical case—to give a construction to a treaty without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate.

Id. at 369–70 (Johnson, J., concurring).

472. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824).

the United States, even when all issues raised "depend on the general principles of the law, not on any act of Congress" or other federal provision.⁴⁷³ As an uncontroversial step towards what remains today the controversial conclusion that Congress could do so, Marshall said that Congress could not limit a federal court's "arising under" jurisdiction to merely declaring the abstract meaning of relevant federal constitutional, statutory, and treaty provisions, else federal court decisions would be rendered unconstitutionally ineffectual and advisory.

Marshall noted that forbidding consideration of the federal legal provision's actual *effect* in the circumstance of the case would undermine the federal judicial power in one of two ways. It would denigrate federal question jurisdiction to the minuscule category of cases that could be finally and effectually resolved based entirely on "pure" questions of federal law. Or it would force Article III courts to reach judgments lacking the constitutionally necessary "[]secure" effect on the outcome of the case—thus letting state courts control the actual force, and risk the supremacy, even as federal courts controlled the "construction," of federal law. Thus, if every case that did not itself require the interpretation of federal law automatically were

withdrawn . . . from the jurisdiction of the federal Courts, almost every case . . . would be withdrawn; and [the "arising under"] clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing.

. . . .

If it be a sufficient foundation for jurisdiction, that the . . . right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then *all the other questions* must be decided as incidental to this, which gives that jurisdiction. . . . On the opposite construction, the judicial power never can be extended to a *whole case*, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. . . . [A]nd words obviously intended to secure . . . rights under the constitution, laws or treaties of the United States . . . will be restricted to the insecure remedy of an appeal, upon an insulated point, after it has received that shape which may be given to it by another tribunal.⁴⁷⁴

b. *No Implicit Advising*: *Martin and Cohens*. — Anti-advising and related issues arose in another guise in *Martin*. On remand from the

473. *Id.* at 819.

474. *Id.* at 819–20, 822–23 (emphasis added); accord *Martin*, 14 U.S. (1 Wheat.) at 357 (if section 25 of the 1789 Judiciary Act is limited to federal appellate review of pure legal determinations, "it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure").

Supreme Court's initial decision, the Virginia Court of Appeals reached three conclusions, each suggesting an alternative limitation on the federal judicial power: (1) The Constitution gives the Supreme Court no power to review final state court decisions.⁴⁷⁵ (2) Whatever power the Court may have over state *cases*, the Constitution gives it no power to force state *courts* (in today's lingo, to "commandeer" them) to effectuate the Court's mandate, hence "obedience to its mandate [may] be [and was] declined."⁴⁷⁶ Or (3) the Court's decision was legally erroneous because it reached a question (the "title" issue) beyond the Court's competence⁴⁷⁷—a conclusion adding nothing to the others unless the Virginia court thought the federal judicial power could operate on state cases or courts only insofar as the state courts found the federal appellate court's opinion convincing or correct. Conclusions (1) and (2) (discussed in this section) effectively denied federal courts the power to render any but advisory opinions on review of state decisions; conclusion (3) (discussed in the next section) invested state courts with a power to revise federal court appellate decisions by declining to enforce any that the state courts found unpersuasive.

One might have expected the Virginia court—as did the lawyers defending it in the Supreme Court—to premise its three conclusions on the redundancy and insult of federal appellate review, given the oath its members took and their Supremacy Clause duty to enforce federal law.⁴⁷⁸ The Virginia judges relied instead on a different premise, one that even their closest ally on the Court found "alarming,"⁴⁷⁹ though it derived a certain logic from the constitutional history we set out above. Although conceding that they were bound as "individuals, in their individual capacities," to follow federal law, the Virginia judges claimed they were not bound *as a court* of a different sovereign, hence their decisions as a court could not be subjected to review by another sovereign's court, nor could they be compelled as a court to act as the mechanism through which

475. See *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 58 (1814) ("the appellate power of the Supreme Court of the United States, does not extend to this court, under a sound construction of the constitution of the United States").

476. *Id.* at 59; see *id.* at 9 ("nothing in the constitution . . . gives to the Federal Courts any . . . claim to prevent or redress, by any procedure acting on the state Courts, an . . . encroachment on the Federal jurisdiction").

477. See *id.* at 49–50, 59.

478. Compare *Martin*, 14 U.S. (1 Wheat.) at 346–47 (discussing argument of counsel; quoted *infra* note 656), with *id.* at 347 (Justice Story's response: although "the judges of the state courts are, and always will be, of as much learning, integrity and wisdom, as those of the courts of the United States . . . , the constitution has proceeded upon a theory of its own"—"that state attachments . . . and . . . interests, might sometimes obstruct, or control . . . the regular administration of justice," and that in "cases arising under the constitution, laws and treaties of the United States . . . reasons of a higher and more extensive nature, touching on the safety, peace and sovereignty of the nation, might well justify a grant of [final federal appellate] . . . jurisdiction").

479. *Id.* at 364–65 (Johnson, J., concurring).

another sovereign enforced its law—unless they were sufficiently persuaded by the other court's opinion to adopt it voluntarily.⁴⁸⁰

The Virginia judges thus declined to fall willingly into the double trap the Supremacy Clause had laid for them by (1) creating a rationale for subjecting their formal decisions of federal law to review by federal courts and (2) forcing them, in a structurally novel fashion, to divide their loyalties between the sovereign that employed them and a supreme national sovereign:

If this Court should now proceed to enter a judgment in this case, according to the instructions of the Supreme Court, the Judges of this Court . . . must act either as Federal or as State Judges. But we cannot be made Federal Judges without our consent, and without commissions . . . [which are] wanting . . . We must, then, in obeying this mandate, be considered still as State Judges. We are required, as State Judges to enter up a judgment, not our own, but dictated and prescribed to us by another Court. . . . But, before one Court can dictate to another, the judgment it shall pronounce, it must bear, to that other, the relation of an appellate Court. The term appellate, however, necessarily includes the idea of *superiority*. But one Court cannot be correctly said to be *superior* to another, unless both of them belong to the same sovereignty. . . . The Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty—and of course, their commands or instructions impose no obligation.⁴⁸¹

We discuss below the Supreme Court's reasons for rejecting the Virginia court's first conclusion, that there is no federal judicial power to review state decisions.⁴⁸² *Martin* formally avoided the Virginia court's second conclusion, that the Court could not force state courts to enforce its judgments, by taking the 1789 Judiciary Act's invitation, when a state court rejected its prior mandate, to issue its own judgment directly against the private parties to the suit.⁴⁸³ The Court refused, however, to "assent" to the Virginia court's underlying premise that the Constitution "was never designed to act upon state sovereignties . . . and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts."⁴⁸⁴ The Court thought it "obvious that th[e Supremacy Clause] obligation is imperative upon the state judges in their official, and not merely in their private, capacities" and that "[t]hey were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws, and treaties of the United

480. *Hunter*, 18 Va. (4 Munf.) at 8–12.

481. *Id.* at 12.

482. See *infra* notes 488–498, 654–673 and accompanying text.

483. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 354 (1816) (applying Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 86); *supra* note 418 and accompanying text.

484. *Martin*, 14 U.S. (1 Wheat.) at 343.

States—"the supreme law of the land."⁴⁸⁵ State judges thus could not avoid the trap "the American people, by whom [the Constitution] was adopted," had set for them.⁴⁸⁶ Because "the constitution . . . meant to provide for cases within the scope of the judicial power of the United States, which might . . . depend before state tribunals," and because of those judges' "imperative [obligation] . . . to decide . . . according to the constitution, laws and treaties of the United States,"⁴⁸⁷ there was no escaping that,

[i]n respect to the powers granted to the United States, [State judges] are not independent; they are expressly bound to obedience, by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no . . . reason for giving their judgments an absolute and irresistible force. . . .⁴⁸⁸

*Cohens v. Virginia*⁴⁸⁹ formally decided the issue *Martin* avoided. The Cohens appealed Virginia antigaming convictions, claiming federal statutory authority to sell District of Columbia lottery tickets in Virginia. Because the Court could enforce an order reversing criminal convictions only through the state courts, Virginia again claimed that the Court lacked "power to compel State tribunals to obey your decisions" and, thus, lacked a crucial component of the judicial power absent which it could not constitutionally take jurisdiction.⁴⁹⁰ In affirming Congress's power to command state courts to enforce the Court's mandate, Chief Justice Marshall cited the Supremacy Clause's "authoritative" "subordination" of state courts to national authority.⁴⁹¹ Under that Clause, the Court was not "[a]t liberty to insert in [Article III's] general grant [of appellate 'arising under' jurisdiction], an exception of those cases in which a State may be a party."⁴⁹² Rather, to avoid "prostrat[ing] . . . the government and its laws at the feet of every State . . . the Courts of the Union" had to have an efficacious power to "correct the judgments by which [state criminal] penalties may be enforced" inconsistently with national law.⁴⁹³ The supremacy and "arising under" clauses thus empowered Congress to force state courts to "transfer [the] . . . record into" and "submit [their] judgment[s] . . . to re-examination" by the Court, and

485. *Id.* at 340-41.

486. *Id.* at 347.

487. *Id.* at 340-41, 342.

488. *Id.* at 340-42, 344.

489. 19 U.S. (6 Wheat.) 264 (1821).

490. *Id.* at 317 (argument of counsel for Virginia) ("you have not the power to compel State tribunals to obey your decisions" and thus may not exercise the "[j]udicial power, [which] includes power to decide, and power to enforce the decision"); see *supra* notes 408-424 and accompanying text.

491. *Cohens*, 19 U.S. (6 Wheat.) at 381-82.

492. *Id.* at 382-83.

493. *Id.* at 385; see *id.* at 388 (it would not suffice "to give efficacy to the present system" to require the Court "to act on individuals directly, instead of acting through the instrumentality of State governments").

required that the judicial "department" have effective "power to revise the judgment[s]" by binding state courts to execute the Court's mandates.⁴⁹⁴

Although resisting Virginia's hyperbole that "[t]he American people [could not] give to a national tribunal a supervising power over those judgments of the State Courts, which may conflict with [national law] . . . without converting them into federal Courts," Marshall acknowledged the intermediate or "'auxiliar[y]'" status the Supremacy Clause gives state courts.⁴⁹⁵ He justified that status as central to what we here have called the Convention's "state court filtering/federal court spot-checking" compromise. In lieu of "'[a] complete consolidation of the States, so far as respects the judicial power,'"⁴⁹⁶ and so that "'the local courts [not] be excluded from a concurrent jurisdiction in matters of national concern'" by exclusive federal jurisdiction, the Framers gave the state courts original cognizance of many such matters.⁴⁹⁷ But to preserve national prerogatives, the Constitution "'extend[ed] the national judiciary's appellate power] to the State tribunals'" in an effectual, if limited, way—"authoriz[ing] the legislature to confer on the federal Courts appellate jurisdiction from the State Courts . . . in a few specified cases in the decision of which the nation takes an interest."⁴⁹⁸

In *Printz v. United States*, the Court recently affirmed state courts' susceptibility to congressional commandeering for national purposes—noting that the Supremacy Clause commandeers them for the same purpose—while strictly forbidding Congress to commandeer state legislative and executive officials.⁴⁹⁹ The Court was not being inconsistent nor drawing into question its established rule that Congress may use state courts for national purposes.⁵⁰⁰ Instead, it was strongly affirming the Virginia court's complaint in *Martin* that such commandeering compromises state officials by situating them simultaneously in both state and federal governments⁵⁰¹—while also affirming *Martin's* conclusion that the Constitution itself gives state judges that hybrid status, in service of their designedly crucial *national* structural function.

c. *No Revising*: *Martin* and *Ableman*. — *Martin* also rejected the Virginia Court of Appeals' third conclusion—that state courts need only enforce the Court's judgment if they find it legally persuasive. Story's opinion makes clear that state courts, like other non-Article III agencies of government, lack authority thus to "revise" the Court's judgments or to

494. Id. at 410, 415; see id. at 413–15.

495. Id. at 419, 421 (quoting The Federalist No. 82, supra note 298, at 460).

496. Id. at 422 (quoting argument of counsel for Virginia, id. at 320).

497. Id. at 419 (quoting The Federalist No. 82, supra note 298, at 460).

498. Id. at 419, 422 (quoting The Federalist No. 82, supra note 298, at 460).

499. 117 S. Ct. 2365, 2371, 2381 (1997).

500. See, e.g., *Testa v. Katt*, 330 U.S. 386, 389–92 (1947).

501. See *Printz*, 117 S. Ct. at 2370–72; *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 12 (1814).

provoke the Court to "reopen" its own judgments by refusing to enforce them when they are not found persuasive:

[I]t is contended that [as] the former judgment of this court . . . was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain any subsequent proceedings. . . . [A] second writ of error has never been supposed to draw in question the propriety of the first judgment, *and it is difficult to perceive how such a proceeding could be sustained, upon principle*. A final judgment of this court is . . . *conclusive upon the rights which it decides*, and no statute has provided any process by which this court can revise its own judgments.⁵⁰²

Justice Johnson agreed. Begging "a little more moderation" of the Virginia high court,⁵⁰³ he characterized its statement that the case was "*coram non judice*, in relation to this court"⁵⁰⁴ as

assuming a truly alarming latitude of judicial power. Where is it to end? . . . Are, then, the judgments of this court to be reviewed in every court of the Union? . . .

We pretend not to more infallibility than other courts composed of the same frail materials But . . . we are constituted by the voice of the Union, and when decisions take place . . . ours is the superior claim upon the comity of the state tribunals.⁵⁰⁵

To effectuate its anti-revising views, the Court went beyond (1) substituting its own directly effective judgment for the one its prior mandate had unsuccessfully ordered the state high court to enter. In addition, it (2) granted a new writ of error, (3) declared the Virginia high court's decision on remand in error, and (4) explicitly undertook by its judgment to "reverse" that decision.⁵⁰⁶ Because the 1789 Act only authorized (and petitioning counsel only requested) the first step,⁵⁰⁷ something *more*—evidently, the *constitutional* policy against a state court's revision of an Article III court's judgment—drove the Court's additional steps of reviewing and reversing a state court decision that was the revisory "equivalent to a perpetual stay of proceedings upon the [Court's] mandate, and a perpetual denial of all the rights acquired under it."⁵⁰⁸

Understanding *Martin* this way makes sense of another case marking a flashpoint of federalism, *Ableman v. Booth*.⁵⁰⁹ *Ableman* has been triply damned by association—with the Fugitive Slave Act of 1850 (FSA),⁵¹⁰

502. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 354–55 (1816) (emphasis added).

503. *Id.* at 364 (Johnson, J., concurring).

504. *Hunter*, 18 Va. (4 Munf.) at 59.

505. *Martin*, 14 U.S. (1 Wheat.) at 364–65 (Johnson, J., concurring).

506. See *id.* at 353–54, 362.

507. See *id.* at 315 (argument of counsel); *supra* note 375.

508. *Martin*, 14 U.S. (1 Wheat.) at 353–54.

509. 62 U.S. (21 How.) 506 (1859).

510. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

whose constitutionality it declared in dicta;⁵¹¹ with its author, Chief Justice Taney, in his *Dred Scott* phase;⁵¹² and with the excesses of *Tarble's Case*,⁵¹³ through which many readers are introduced to *Ableman*.⁵¹⁴ The case bears reexamination.

Ableman jointly decided two cases involving three federal actors in whose business the Wisconsin Supreme Court had interfered—a federal commissioner (similar to a modern federal magistrate judge), a federal district judge, and the United States Supreme Court. In the first case, Booth aided and abetted a fugitive slave's escape from federal custody. Finding probable cause that Booth had violated the FSA, a federal commissioner ordered Booth arrested. While in federal marshal Ableman's custody, Booth persuaded the Wisconsin Supreme Court to release him on habeas because he was being held under an unconstitutional act and a defective warrant. The United States Supreme Court issued a writ of error directing the Wisconsin high court to send up its record for review, and that court complied.⁵¹⁵

In the second case, a federal grand jury thereafter indicted and a federal jury convicted Booth under the FSA, and the presiding district judge overruled Booth's constitutional objections and imposed a jail term. Booth again convinced the Wisconsin Supreme Court to release him from federal custody on habeas because the act under which he was convicted was unconstitutional, depriving the federal court of jurisdiction and rendering Booth's conviction and incarceration illegal. Following the Government's request for and the United States Supreme Court's issuance of a writ of error to send up the record, the Wisconsin court forbade its clerk to respond. Granting the Government's motion to proceed on a certified copy of the record, the Supreme Court reversed the judgment "in each of the cases now before the Court," holding that in both the Wisconsin court had unconstitutionally interfered with federal officials' execution of federal law.⁵¹⁶

Ableman's difficulty lies in the plural nature of the federal officialdom with which the Wisconsin high court interfered (a non-Article III commissioner and an Article III district court and Supreme Court) and the federal authorizations that its actions lacked (statutory and constitutional). The decision thus might mean that a state court may never constitutionally interfere with the official acts of *any* federal officer, judicial or otherwise (the approach taken in *Tarble's Case*);⁵¹⁷ that a state court *may* constitutionally interfere with the acts of a federal officer, judicial or not, unless Congress forbids the interference, which it impliedly had

511. See *Ableman*, 62 U.S. (21 How.) at 526.

512. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

513. 80 U.S. (13 Wall.) 397 (1872).

514. See, e.g., Hart & Wechsler, *supra* note 37, at 459.

515. See *Ableman*, 62 U.S. (21 How.) at 507–09.

516. *Id.* at 526.

517. 80 U.S. (13 Wall.) at 412.

done in *Ableman* (a theory sometimes used to tame *Tarble's*);⁵¹⁸ or that it depends on the *kind* of federal acts at issue. Taney's opinion strongly suggests the last interpretation—that the only question before the Court was state court interference with the *judiciary's* power to enforce the national law, and that the answer followed from the anti-revising principle, which forbids *all* state court interference with exercises of the *judicial* power, whether or not authorized by Congress.

In the unified history of the two conjoined cases, Taney discerned a single proposition towards which the Wisconsin Supreme Court had advanced in steps—a proposition “new in the jurisprudence of the United States,” namely,

the supremacy of the State courts over the courts [note the plural] of the United States, in cases arising under the Constitution and laws of the United States

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. . . . But the paramount power of the State court lies at the foundation of these decisions; for their commentaries . . . were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking⁵¹⁹

In its first step, the Wisconsin high court had “claimed . . . the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner . . . [held] for an offence against the laws of this Government.”⁵²⁰ Taney's emphasis on the criminal nature of the proceeding explains why the commissioner's non-Article III status was unimportant: The single object of the commissioner's acts as to “a prisoner . . . committed for [a federal] offence” was a criminal trial before an *Article III* judge with exclusive jurisdiction over the matter.⁵²¹ “In the second case, the State court [went] a step further, and claimed . . . jurisdiction over the proceedings . . . of a *District Court* of the United States, and . . . by *habeas corpus*, has set aside and annulled its judgment”⁵²² Then, in its final step, the Wisconsin court “determined that [its] decision is final and conclusive on *all* the courts of the United States, and . . . refuse[d] obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.”⁵²³

Ableman rejected the Wisconsin court's assertion of “the supremacy of the State courts over the courts of the United States” because: (1) the

518. See *Ableman*, 62 U.S. (21 How.) at 515–16; Sager, *supra* note 17, at 81.

519. *Ableman*, 62 U.S. (21 How.) at 514; see *id.* at 513 (explaining why the Court thought it appropriate to address both cases together).

520. *Id.* at 513.

521. *Id.* at 515; see *id.* at 513.

522. *Id.* at 513–14 (first emphasis added).

523. *Id.* at 514 (emphasis added).

"Government" must be able to "enforc[e] its laws by its own tribunals . . . without the consent of the State"; (2) "any defect of power in the commissioner, or in his mode of proceeding . . . was for the tribunals of the United States to revise . . . and not for a State court"; and (3) "the District Court . . . had exclusive and final jurisdiction by the laws of the United States, and neither the regularity of its proceedings nor the validity of its sentence could be called into question in any . . . court . . . of a State . . . by habeas corpus or any other proceeding."⁵²⁴

Taney's explanation for this strong anti-revising rule reveals its constitutional status and immunity from statutory modification. The need "to secure union and harmony at home"—to keep "local interests, local passions or prejudices . . . [from] lead[ing] to acts of aggression and injustice by one State upon the rights of another"—led the States to cede some of their sovereignty to a "General Government."⁵²⁵ Doing so enabled the national government to serve as "a common arbiter between [the states], armed with power enough to protect and guard the rights of all, by appropriate laws" that were to be "execute[d] . . . by [the national government's] own tribunals, without interruption from a State or from State authorities."⁵²⁶ The Supremacy Clause was central to the plan. "But the supremacy . . . could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution"⁵²⁷ That duty could not be "left to the courts of justice of the several States . . . [which] could hardly be expected to be *always* free from the local influences of which we have spoken," making it "essential" to the Government's

very existence . . . that it should have the power of establishing courts of justice, *altogether independent of State power*, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under [federal law] . . . should be *finally* and *conclusively* decided. . . . [T]he supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possi-

524. *Id.* at 515, 525–26 (emphasis added); see also *Donovan v. City of Dallas*, 377 U.S. 408, 412–13 (1964) (discussing "old and well-established . . . rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions"). Because the Wisconsin court had held that the federal court lacked "jurisdiction" to try Booth because the statute under which he was being tried was unconstitutional, see *In re Booth*, 3 Wis. 157, 211–16 (1855), *Ableman's* conclusion that the state court had no authority to reach the FSA's constitutionality after the federal district court had decided it—which the Court carefully set off from its concededly "unnecessary" additional conclusion that the state court's resolution of that question was wrong, *Ableman*, 62 U.S. (21 How.) at 526—seems to bar state court review to determine if a federal judgment is void, as well as merely voidable.

525. *Ableman*, 62 U.S. (21 How.) at 517.

526. *Id.*

527. *Id.*

bly be maintained peacefully, unless it was associated with this *paramount judicial authority*.⁵²⁸

Taney gave other evidence of a constitutional basis for the anti-revising rule that immunizes the rule from waiver by Congress. First, Taney concluded that the independence- and prestige-protecting reasons that dictated the rule were the same reasons why the Convention had "not left [it] to Congress to create" the Supreme Court—namely, (1) that "the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by [the] General Government" and (2) that the Court's decisions might "conflict with individual ambition or interests, and powerful political combinations," causing Congress, e.g., at the behest of particular states, to "repeal[]" the act creating the Court "in order to establish another more subservient to the . . . passions of the day."⁵²⁹ Moreover, Taney took the position that the mandate to "'make all laws which shall be necessary and proper to carry [the Supremacy Clause] into execution' . . . [made it] the *duty of Congress*" to adopt "the 25th section of the act of 1789," providing for Supreme Court appeals in "arising under" cases in which state courts ruled against federal rights and permitting the Court to "award execution" when a state court refused to do so.⁵³⁰ Only in this way could Congress "make th[e federal] appellate power *effectual*, and altogether *independent* of the action of State tribunals."⁵³¹

Thus, none of the three ways in which the Wisconsin court had "obstruct[ed]" the "General Government[']s" . . . tribunals" that are "clothed with the judicial power" would seem to be within Congress's power to permit:

It has not only [1] reversed and annulled the judgment of the District Court of the United States, but it has [2] reversed and annulled the [supremacy and judiciary] provisions of the Constitution itself; *and* the act of Congress of 1789, and [3] made the superior and appellate tribunal the inferior and subordinate one.⁵³²

This analysis reveals how badly *Tarble's Case* mangled *Ableman's* rule—not by affirming the rule's constitutional status but by assuming that the rule governs state court interference with exercises of federal power besides "[t]he *judicial Power*."⁵³³ *Tarble's Case* notwithstanding, the Supremacy Clause does not stop Congress from allowing state courts to restrain federal official acts found to be unlawful—indeed, the Clause

528. *Id.* at 517–18 (some emphasis added).

529. *Id.* at 521.

530. *Id.* at 521–22 (quoting U.S. Const. art. I, § 8, cl. 18) (emphasis added).

531. *Id.* (emphasis added).

532. *Id.* at 522–23 (emphasis added); see *id.* at 515–17 (Wisconsin court violated Constitution when it undertook to "revise and correct" a federal district court judgment, "refuse[d] obedience to the writ of error, and regard[ed] its own judgment as final").

533. See *Tarble's Case*, 80 U.S. (13 Wall.) 397, 403–07, 411–12 (1872) (barring state court interference with military officer's induction of allegedly under-aged civilian into Army).

may require state court consideration if no federal court is available to restrain federal action offensive to federal law.⁵³⁴ The rule changes, however, when the federal action is an *Article III* court's decision—or even the formal triggering of that decisional process, as when a federal commissioner initiates criminal proceedings. In that situation, Article III's protection of the independence, finality, and effectualness ingredients of the judicial power, bolstered by the federal courts' supremacy-maintaining duties vis-à-vis state judges, creates a *constitutional* prohibition, evidently beyond Congress's power to alter, against state court interference with or revision of the federal court's judgment.⁵³⁵

Martin and *Ableman* thus appear to keep Congress from inviting state courts to do what cases from *Hayburn's* to *Plaut* keep Congress from doing itself. As Justice Scalia broadly stated in *Plaut*, Article III gives "the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review *only* by superior courts in the Article III hierarchy."⁵³⁶

d. *Separation of Powers/Federalism Parallels*. — Focusing on the constitutionally protected quality, not quantity, of federal judicial decisionmaking not only identifies the unitary principle binding the disparate strands of the anti-advising and anti-revising doctrine—protection of the "independence," "finality," "effectualness," and "reason, not will" ingredients of "[t]he judicial Power"—but also reveals that a doctrine traditionally understood in separation of powers terms extends as well to the federal-

534. See, e.g., Hart & Wechsler, *supra* note 37, at 463; Laurence Tribe, *American Constitutional Law* 513–14 (2d ed. 1988); Sager, *supra* note 17, at 41 n.70.

535. Compare *Hancock v. Train*, 426 U.S. 167, 179 (1976) (Congress may "affirmatively declare its instrumentalities or property subject to regulation" by the states (quoting *Mayo v. United States*, 319 U.S. 441, 447–48 (1943))), with *Second Employers Liability Cases*, 223 U.S. 1, 58 (1912) ("[A]s was so clearly shown . . . [by] *Ableman v. Booth*, . . . the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved."). See generally Hart & Wechsler, *supra* note 37, at 462 (prior to *Tarble's Case*, courts read *Ableman* only to bar state court interference with "actual federal judicial process"). As we read *Ableman*, Congress could permissibly authorize state courts to determine the legality of federal executive detention, with the absence of any such authorization explaining *Tarble's* holding (but not its language). Indeed, a careful review of the standard history of the subject reveals (1) that most pre-*Ableman* uses of the state writ on behalf of federal prisoners involved *executive* (usually military) detention, and (2) that unlike the state writ's generally uncontroversial use against executive detention, its infrequent use to interfere with federal *judicial* detention "caused considerable excitement" and opposition well before *Ableman*. Charles Warren, *Federal and State Court Interference*, 43 *Harv. L. Rev.* 345, 353–59 (1930).

536. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (some emphasis added). Subject to the Supreme Court's constitutional superiority, the "Article III hierarchy" to which *Plaut* refers is defined by Congress exercising its power to ordain and establish inferior courts. That Congress has empowered federal district courts (e.g., in the district of a prisoner's confinement) to review the judgments of other such courts (e.g., the one that sentenced the prisoner) in federal-prisoner habeas proceedings, see 28 U.S.C. § 2241(d) (1994), thus is not offensive to the *Plaut* rule.

ism context, where, indeed, it gains additional force from the Supremacy Clause. Paralleling nearly every strand of separation-of-powers-focused anti-advising and anti-revising doctrine are federalism-focused strands forbidding Article III court judgments that only serve to advise state courts because they: (1) have no practical effect on the outcome (the "adequate and independent state ground" cases); (2) do not decide the "whole case" but only a component of it, giving state courts effective control over the force and supremacy of federal law (decisions refusing to limit "arising under" jurisdiction to "pure" questions of law); (3) cannot be enforced effectually ("defunct territorial court" cases; *Cohens'* and *Ableman's* insistence that state courts obey federal mandates and writs); or (4) are subjected to purported state court revision or reopening (*Martin* and *Ableman*).

C. *The Whole Case and the Whole Law: Judicial Review Reconsidered*

In this section we show that a qualitative understanding of "[t]he Judicial Power" also helps make sense of—and uncovers important unifying principles that link—a number of classic decisions on the availability of judicial review of (1) federal law and federal administrative decisions and (2) state law and state judicial decisions.

1. *Denying Deference and the Choice of Law to Federal Decisionmakers: Hayburn's Case, Marbury, Klein, Crowell, St. Joseph, and Yakus.* — In three lower court statements in 1792—collected in the United States Reports in *Hayburn's Case* because they "involve a great constitutional question"—a substantial portion of the existing federal judiciary joined in invalidating an act of Congress on anti-revising grounds.⁵³⁷ The impertinence of doing so did not go unnoticed by the Justices and judges, who rued the "painful" task: "To be obliged to act contrary, either to the . . . directions of Congress, or to a constitutional principle . . . excited feelings in us, which we hope never to experience again."⁵³⁸ But despite their "inclination . . . [and] duty, to receive with all possible respect every act of the Legislature," the courts felt "obliged to object to the [statute's] execution": "[H]owever lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the *indispensable necessity of acting according to the best dictates of our own judgment*, after duly weighing every consideration"⁵³⁹

Thus, along with the independence, finality, and effectualness powers that (as we saw earlier) *Hayburn's* anti-advising holding read the Constitution to vest in Article III judges⁵⁴⁰ came three *responsibilities* that

537. 2 U.S. (2 Dall.) 409, 410 n.† (1792) (collecting statements (one opinion and two letters) joined by five of the nation's six Supreme Court justices, on circuit, and three of its sixteen inferior federal judges).

538. *Id.* at 411–12 n.† (reprinting letter of C.C.D. Pa. to President Washington).

539. *Id.* at 412 n.† (reprinting letter of C.C.D.N.C. to President Washington) (emphasis added).

540. See *supra* notes 403–406 and accompanying text.

those judges were "oblige[d]" to exercise: (1) "acting according to the best dictates of [their] own *judgment*," no matter how "difficult[]" the issue; (2) doing so *independently* of and without deference to the legislature, notwithstanding (a) the "respect [due] every act of Congress" and (b) the matter's status as a mere "difference in opinion" on a "difficult[]" issue on which reasonable minds could differ; and (3) not just "object[ing]" on constitutional grounds, but making their opinion *final* and *effectual* by "*act[ing]* contrary to the direction of congress" in declining "*execution*" of it.

Now, all this may have a tinny ring to the modern ear, attuned to the claim that judges live to strike down laws. But, in context, there is no reason to doubt that Chief Justice Jay and Justices Blair, Cushing, Iredell, and Wilson felt distress they "hope[d] never to experience again" at disagreeing with the constitutional judgment of Congress and the President (many Framers among them)—and, worse, at insisting that their "opinion" *trump* the law, thus depriving disabled veterans, widows, and orphans of pensions "founded on the purest principles of humanity."⁵⁴¹ We may, then, marvel at how strongly the Justices felt the independence, finality, and effectualness *duties* that led them to insist on those very same *powers*, for which *Hayburn's Case* stands.

The very same responsibilities more famously compelled exercise of the same powers in *Marbury v. Madison*⁵⁴² and *United States v. Klein*.⁵⁴³ Moreover, just as *Martin* and *Osborn* used Article III courts' supremacy-maintaining obligation to define the "whole *case*" that those courts must be able to decide,⁵⁴⁴ *Marbury* and *Klein* used the same obligation to define the "whole *law*" based on which the courts must be able to decide.

a. *Marbury*. — *Marbury* wanted his commission as justice of the peace for the county of Washington that the outgoing Secretary of State had signed and sealed but that the incoming Secretary of State (Madison) had refused to deliver. As carefully delineated by Chief Justice Marshall, the Court had to decide (1) whether *Marbury* had "a right to the commission"; (2) if so, "do the laws of his country afford him a remedy" for the Secretary's violation of the right; and (3) if so, is that "remedy . . . a *mandamus* issuing from this court?"⁵⁴⁵ The Court held that the signing and sealing established *Marbury's* right,⁵⁴⁶ and that "where there is a legal right, there is also a legal remedy."⁵⁴⁷

The decision is mainly famous for its treatment of the third question, which Marshall immediately divided in two, answering the first half—

541. *Hayburn's Case*, 2 U.S. (2 Dall.) at 412 n.† (reprinting letter of C.C.D.N.C. to President Washington).

542. 5 U.S. (1 Cranch) 137 (1803).

543. 80 U.S. (13 Wall.) 128 (1872).

544. See *supra* notes 467–474 and accompanying text.

545. *Marbury*, 5 U.S. (1 Cranch) at 154.

546. See *id.* at 154–62.

547. *Id.* at 163 (citation omitted).

whether mandamus could lie against a duty-defying executive *official*, despite the *sovereign's* immunity from suit—in *Marbury's* favor.⁵⁴⁸ Coming to the second half of the third question—“[w]hether [mandamus] can issue from this court”—Marshall again bifurcated: “[I]f this court is not authorized to issue a writ of mandamus to such an officer, it must be because [1] the law is unconstitutional, and . . . [2] [if so, is] absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.”⁵⁴⁹ Marshall thought the first issue easy: Article III makes the Court’s “jurisdiction . . . original” in only “one class of cases,” mandamus not included, so that section 13 of the 1789 Judiciary Act, which purported to confer original mandamus jurisdiction, was “not . . . warranted by the constitution.”⁵⁵⁰ Reaching the remaining question—“whether an act, repugnant to the constitution, can become the law of the land”—Marshall bifurcated yet again: (1) Does “the constitution control[] any legislative act repugnant to it”—a question Marshall answered affirmatively based on an argument about the nature of popularly ratified constitutions.⁵⁵¹ (2) “*If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?*”⁵⁵² Was Congress’s or the Court’s view of supreme law “operative” in the case before the Court?

Marshall began the answer to this truly last question with his most famous passage:

It is emphatically the province and duty of the judicial department to say what the law is. (Those who apply the rule to particular cases, must of necessity expound and interpret that rule.) If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to *regard* the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.⁵⁵³

548. See *id.* at 164–65, 170–71.

549. *Id.* at 173.

550. *Id.* at 174–76; cf. *supra* notes 204, 274 and accompanying text; *supra* text following note 222 (discussing support in Convention records for a congressional power to shift the Supreme Court’s original to its appellate jurisdiction).

551. *Marbury*, 5 U.S. (1 Cranch) at 176–77.

552. *Id.* at 177.

553. *Id.* at 177–78 (emphasis added).

The first sentence of this passage often is treated as declaring the Court's *interpretive independence* from Congress:⁵⁵⁴ The Court must "say what the law is," giving *it*, not Congress, the right to "say" what Article III's "original jurisdiction" clause means. In fact, what the first sentence and, indeed, the first two paragraphs say is more mundane: To decide a case dependent on the law, the court must first "say what the law is," and if two opposed legal provisions potentially apply, the Court must choose between them—which Marshall already had done in choosing Article III's "original jurisdiction" clause over the 1789 Act's section 13. Only implicitly, therefore, did the Court make the "independent determination" point—by *exercising* interpretive independence from Congress, thus rejecting a statutory implication or separation of powers requirement that the Court defer to Congress's presumed determination that section 13 was constitutional.⁵⁵⁵

The question that most troubled Marshall, thus, was not whether the Court could interpret the governing law independently but, rather, as his third quoted paragraph asks, whether Congress's adoption of section 13 imposed a *choice of law* requiring the Court to ignore—to fail to "regard"—the Constitution, leaving only section 13 to qualify as "what the law is." What troubled Marshall, as he said in his next paragraph, was the claim by "[t]hose . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, . . . that courts *must close their eyes* on the constitution, and see only the law."⁵⁵⁶ Rejecting this claim led Marshall to identify a second crucial ingredient of the judicial power in addition to interpretive independence, namely, the power to

554. See, e.g., *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring).

555. As Professor Van Alstyne has pointed out:

In *Marbury* . . . it could perfectly well be said that Congress was merely . . . "defining the content of" [] a provision in Article III . . . [by reading it as] authorizing Congress to place within the Court's original jurisdiction some additional cases it deems appropriate to so place, excepting them from its appellate jurisdiction . . . [S]uch a reading would not be, in any obvious way, "unreasonable." And if all that is required is that the Court be able to see "a reasonable basis" for the reading . . . Congress provided, then . . . the Court should have sustained the Judiciary Act provision that did precisely this very thing (though in its own view that reading of Article III was incorrect). [Instead], the Court inquired into the constitutional interpretation on which the Judiciary Act depended for its validity; it took Congress'[s] view into account . . . disagree[ing] with that interpretation (such as it was, as made by Congress); and it accordingly found that Congress had acted without authority . . .

Van Alstyne, *supra* note 441, at 319–20; see Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 6, 9 (1983) ("*Marbury* indicates that the court's interpretational duty is that of supplying the full meaning of the relevant constitutional provisions," which "requir[es] independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text."); cf. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 133–36, 154–55 (1893) (separation of powers compels judicial deference to Congress's—but not state legislatures'—implied constitutional interpretations).

556. *Marbury*, 5 U.S. (1 Cranch) at 178 (emphasis added).

apply the whole supreme national law to any case before the Court. The "province and duty of the judicial department to say what the law is" thus is not just the power and obligation to say what the applicable law means but to say what law applies—and to apply supreme national law whenever, as independently interpreted, it governs of its own force. As Professor Monaghan has written, "[t]here is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be 'jurisdictionally' shut off from *full consideration of the substantive constitutional issues*."⁵⁵⁷

Marshall rested this conclusion on four legs. One was the nature of all written constitutions, which could be "reduce[d] to nothing" if the legislature could compel their invisibility.⁵⁵⁸ Provisions "peculiar . . . [to] the constitution of the United States" provided the other three legs, starting with "[t]he judicial power of the United States" as it "extend[s] to all cases arising under the constitution."⁵⁵⁹ Pursuing his ocular metaphor and encapsulating the "whole supreme law" principle, Marshall wrote:

Could it be the intention of those who gave this ["arising under"] power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what parts of it are they forbidden to read, or to obey?⁵⁶⁰

Marshall's last two bases for the Article III judge's duty always to "look[] to" supreme law were the Oath and Supremacy Clauses. In regard to the latter, Marshall wrote: "[I]n declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank."⁵⁶¹

Having impliedly established the "independent interpretation," and having expressly established the "whole supreme law," aspects of the Article III court's "Power" and obligation to "say what the law is," Marshall concluded his opinion by recognizing a third aspect of the judicial

557. Monaghan, *supra* note 555, at 11 (emphasis added); see, e.g., Gunther, *supra* note 9, at 910; Wechsler, *supra* note 9, at 1006.

558. *Marbury*, 5 U.S. (1 Cranch) at 178.

559. *Id.*

560. *Id.* at 179.

561. *Id.* at 180. Unlike others, see Rakove, *supra* note 26, at 1036; Wechsler, *supra* note 303, at 5, we do not find it surprising that Marshall made the Supremacy Clause his last and weakest argument. The Clause is, manifestly, a choice of law provision making *federal* superior to *state* law—with potent "whole law" implications when state and federal law conflict. As Marshall noted, however, the Clause only impliedly prioritizes among "the Constitution . . . Laws . . . and . . . Treaties," making it less potent when the conflict is between federal law.

power—namely, the duty once having “read, . . . to obey” the Constitution. Just as the Court declined to read section 13 or separation of powers principles to make it give Article III’s “original jurisdiction” clause Congress’s instead of its own interpretation and to make it ignore that clause when applying the section, it also declined to read section 13 or interbranch comity to bar it from *effectuating* governing law as independently interpreted by the Court. Instead, the Court treated the statute found “unconstitutional . . . [as] *absolutely incapable* of conferring the authority, and assigning the duties which its words purport to confer and assign,” and “discharged” the petition filed under that statute.⁵⁶²

b. Klein. — Although Chief Justice Chase’s unruly analysis in *United States v. Klein*⁵⁶³—the opposite of Marshall’s careful architecture of *Marbury*—has obscured *Klein*’s importance, the case is no less definitive of “[t]he judicial Power” than is *Marbury*. For in the statute *Klein* ruled unconstitutional, the Radical Republicans made explicit very nearly all the interpretive, “choice of law,” and remedial limitations on the Court’s power that Marshall thought might be implied by Congress’s adoption of section 13 and accordingly rejected. Subjecting the *Klein* statute to our qualitative analysis not only reveals the decision’s importance but also tames Chase’s opinion. We first explain Congress’s reasons for wanting to use, but constrain, the courts. We then describe Congress’s “belt and suspenders” enactment towards that end. Finally, we use the inconsistency between the enactment’s four constrictive mechanisms and four qualitative aspects of the judicial power as the Rosetta Stone for deciphering Chase’s opinion.

During the Civil War, Congress passed several acts authorizing the Government summarily to seize, and to hold in trust, abandoned property encountered by the Union Army in the rebellious states, with individuals permitted to reclaim such property by convincing the Court of Claims that they (1) owned the property and (2) had not aided the rebellion.⁵⁶⁴ In *United States v. Padelford*, the Supreme Court held that owners of abandoned and seized property who *had* aided the rebellion, but who thereafter had signed a loyalty oath prescribed by certain presidential proclamations granting blanket pardons to oath signers, also could recover.⁵⁶⁵ *Padelford* at points based oath signers’ right to recover on the governing statutes, but elsewhere suggested that it was Article II of the Constitution that required it to treat presidential pardons as neutralizing prior disloyalty.⁵⁶⁶

In the Court of Claims, Klein, administrator of the estate of Wilson, owner of 600 bales of cotton seized as abandoned at Vicksburg, demon-

562. *Marbury*, 5 U.S. (1 Cranch) at 173, 180 (emphasis added).

563. 80 U.S. (13 Wall.) 128 (1872); see Hart & Wechsler, *supra* note 37, at 369 (Chase’s opinion is “not a model of clarity”).

564. See *Klein*, 80 U.S. (13 Wall.) at 136–37; see *id.* at 137–38, 142.

565. 76 U.S. (9 Wall.) 531, 542–43 (1870).

566. See *id.* at 542 (statutory theory); *id.* at 542–43 (constitutional theory).

strated Wilson's ownership and postseizure loyalty oath and pardon but admitted that Wilson had in fact been disloyal.⁵⁶⁷ Under *Padelford*, the Court of Claims ruled in 1871 that the oath neutralized Wilson's disloyalty and awarded \$125,300.⁵⁶⁸ The Government appealed, perhaps hoping to distinguish *Padelford* in which the presidential pardon had preceded the seizure (in *Klein*, the seizure came first).⁵⁶⁹

Radical Republicans in Congress were "[e]nraged by [*Padelford's*] treatment of the pardoned disloyal" and *Klein's* costly award.⁵⁷⁰ But they were in a bind. They had it in for "wealthy [cotton] planters who financed the rebellion but . . . [took] the oath necessary to receive Lincoln's blanket pardon."⁵⁷¹ But they also had to satisfy the compensation demands of loyal citizens and their own need to leave compensation to the courts to avoid being deluged by the flood of private bills that had prompted Congress's creation of the claims court in the first place.⁵⁷² Congress thus could not (as it had done for the first sixty years of the Republic, before creating the claims court) stand entirely on its powers to invoke sovereign immunity and withhold jurisdiction from compensation suits.⁵⁷³ But the combination of Lincoln's blanket pardons and *Padelford's* apparent grant to such pardons of a disloyalty-neutralizing effect called into question the Republicans' preferred approach of limiting compensation to claimants who could produce actual, "affirmative" evidence of continuous loyalty.⁵⁷⁴ Congress's bind was aggravated by *Klein's* progress into the Supreme Court, which meant that further efforts to limit compensation suits would have to constrain a Supreme Court hostile to the Republican agenda.⁵⁷⁵

The legislation Republicans initially proposed to satisfy their desire for a judicially administered compensation scheme that avoided *Padelford's* outcome made the existence of a pardon conclusive of *disloyalty* (unless the claimant's loyalty oath included a contemporaneous denial of prior disloyalty), and required the Supreme Court to "reverse"

567. See Professor Young's excellent history of *Klein*, Gordon G. Young, Congressional Regulation of Federal Courts' Jurisdiction and Processes: *United States v. Klein* Revisited, 1981 Wis. L. Rev. 1189, 1192-93, 1197-99.

568. *Wilson v. United States*, 7 Ct. Cl. 240, 247 (1871), *aff'd sub nom. United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

569. See *infra* notes 580-582 and accompanying text.

570. Young, *supra* note 567, at 1193; see *id.* at 1203-05.

571. *Id.* at 1204.

572. See *id.* at 1225-27. Evidencing the strength of the latter consideration was Congress's swift reformation of the claims court after *Gordon v. United States* had struck it down based on Congress's attempt to keep a hand in the compensation process. See *Klein*, 80 U.S. (13 Wall.) at 144; *supra* notes 408-424 and accompanying text.

573. Cf. *Klein*, 80 U.S. (13 Wall.) at 142 (acknowledging Congress's power to invoke sovereign immunity to bar suits for compensation for seized property held in trust by the Government).

574. See Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75, 75; *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 538, 542 (1870).

575. See Young, *supra* note 567, at 1207-08.

Court of Claims judgments favoring claimants who were pardoned based on loyalty oaths (absent the requisite disclaimer).⁵⁷⁶ Doubting that Congress could constitutionally direct the Court to "reverse" a lower court's decision, Senator Trumbull proposed (1) conditioning waiver of sovereign immunity in the claims court on the absence from the case of a loyalty oath and presidential pardon, and (2) withdrawing Supreme Court jurisdiction altogether.⁵⁷⁷ Because this approach would have left the *Klein* award (then pending in the Court) intact, the Republicans further revised the legislation to condition not only the sovereign immunity waiver, but also Supreme Court (and, eventually, Court of Claims) jurisdiction, on the absence from the case of a loyalty oath and pardon. In Senator Edmonds's words, the Supreme Court "shall dismiss the case out of court for want of jurisdiction; not dismiss the appeal, but dismiss the case—everything," upon becoming aware of a loyalty oath and pardon, thus denying any access to relief.⁵⁷⁸

As adopted, with four redundant means to the same end, the 1870 Act—

Provided, [1] That no pardon . . . granted by the President . . . shall be admissible in evidence on the part of any claimant in the court of claims . . . nor shall any such pardon . . . be . . . considered by said court, or by the appellate court . . . in deciding upon the claim . . . ; but the proof of loyalty required [to justify compensation], shall be made by ["affirmative" evidence of loyalty], irrespective of the effect of any . . . pardon [2] And in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required . . . the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction[.] [3] *And provided further*, That whenever any pardon shall have heretofore been granted . . . and such pardon shall recite . . . that such person . . . was guilty of . . . disloyalty . . . and such pardon shall have been accepted in writing, by the person to whom . . . issued, without an express disclaimer of . . . such fact of guilt . . . such pardon and acceptance shall be . . . deemed . . . in the said court of claims, and on appeal therefrom, conclusive evidence that such person did . . . give aid and comfort to the late rebellion . . . [4] and on proof of such pardon . . . the jurisdiction of the court [apparently, the Court of Claims and the Supreme Court] in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.⁵⁷⁹

576. See H.R. 974, 41st Cong. (1870), reprinted in Cong. Globe, 41st Cong., 2d Sess. 3809 (1870); Young, *supra* note 567, at 1205.

577. See Cong. Globe, 41st Cong., 2d Sess. 3816, 3824 (1870) (statements of Sen. Trumbull).

578. *Id.* at 3824 (statement of Sen. Edmonds); see *id.* (statement of Sen. Morton); Young, *supra* note 567, at 1206–08.

579. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

Klein addressed whether Article III forbade the 1870 Act's restrictions on the Court's decision of the case; if so, whether the preexisting statutes allowed compensation of owners like Wilson (in *Klein*), and unlike Padelford, who were disloyal when their property was seized and were only pardoned thereafter; and if the earlier statutes did not allow such compensation, whether they interfered with the Article II pardon power. In answer to the first question, the Court unanimously concluded that the 1870 Act violated Article III.⁵⁸⁰ The Court split on the remaining questions. The majority held that the prior statutes entitled subsequently pardoned owners of seized property to compensation, thus avoiding any question of the prior acts' validity under Article II;⁵⁸¹ Justices Miller and Bradley read the prior acts to deny compensation to subsequently pardoned owners and concluded that Article II did not require that pardons be given a retroactive effect.⁵⁸²

The whole supreme law, independence, and effectualness components of "[t]he judicial Power" as designed by the Framers and applied in *Marbury* make short work of the 1870 Act. The Act conferred jurisdiction on the Court of Claims and Supreme Court to resolve compensation claims based on whether the claimant owned the seized property and was loyal. If either court encountered evidence that the claimant had received a presidential pardon, the Act told the court to take three steps, each (in "belt and suspenders" fashion) obviating the others: (1) ignore the pardon insofar as it was asserted by the claimant (clause [1] in the quotation above); (2) treat the pardon as conclusively proving the government's case (clause [3]); and (3) treat the pardon as requiring the court to decline jurisdiction and dismiss the case (clauses [2] and [4]).

In effect (and rather nearly in terms), Congress said:

If offered evidence presenting the constitutional issue whether a pardon neutralizes prior disloyalty, do not admit it. Divert your eyes from the Constitution and treat only this statute as governing the decision. (Clause [1].)

580. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144-47 (1872); *id.* at 148 (Miller, J., concurring in part and dissenting in part). Although in an offhand paragraph near the end of Chase's majority opinion, he suggested that, in addition to the 1870 Act's Article III infirmities, the Act was "liable to . . . exception" as "infringing the constitutional power of the *Executive*," *id.* at 147 (emphasis added), he did not actually interpose an Article II objection to the Act, see *id.* at 147-48—perhaps because the Grant Administration had waived any Article II claim by urging reversal of the award in *Klein*, see Young, *supra* note 567, at 1204 n.83, 1210-12. Thus, *Klein* cannot be said to hold (much less *only* to hold) that the 1870 Act violated Article II. Cf. Hart & Wechsler, *supra* note 37, at 369 (suggesting an Article-II-focused reading of *Klein*).

581. See *Klein*, 80 U.S. (13 Wall.) at 142.

582. See *id.* at 148-50 (Miller, J., concurring in part and dissenting in part) (under the prior statutes, title to abandoned and seized property passed immediately to the government if the prior owner was then disloyal and unpardoned, and a subsequent pardon could not retroactively restore title).

If you admit the evidence of the pardon, raising the Article II issue, interpret that article as we do. Make the pardon "conclusive" proof of *disloyalty*. (Clause [3].)

If you reach the constitutional issue and decide it according to your own best judgment, then you "shall . . . have no further jurisdiction"—your "jurisdiction . . . shall cease"—and you "shall forthwith dismiss the suit." You lose authority either to decide the constitutional issue based on your own independent judgment or, at least, to grant the relief your judgment otherwise would require. (Clauses [2] and [4].)⁵⁸³

Or, more simply: "Look at the case but don't look at the Constitution. If you look at the Constitution, give it our interpretation. If you look at the Constitution and give it *your* interpretation, don't go on to decide the case or don't award relief."

To which the unanimous Court responded, refusing to enforce the Act:

You could have withheld jurisdiction. Instead, you told us to resolve the case. Once a statute makes us resolve a case, the Constitution makes us exercise "[t]he judicial Power." It makes us look to supreme law; interpret it independently; decide according to its dictates; and award the relief it requires.

This understanding of what the 1870 Act said, and what the Court did, solves the riddle of what Chief Justice Chase meant. On Congress's power to withhold jurisdiction *from the start*, Chase wrote: "Undoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect."⁵⁸⁴ On what the Act instead did, Chase noted that "the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end."⁵⁸⁵ Rather, "[i]ts great and controlling purpose is to deny to pardons granted by the President the effect which this court [in *Padelford*] had adjudged them to have . . . as equivalent to proof of loyalty."⁵⁸⁶

The Act's end was not to withdraw jurisdiction. Indeed, the Act *conferred* jurisdiction in compensation cases. Its midstream withdrawal of jurisdiction thus could only be a means to the end of keeping the Court from exercising "[t]he judicial Power"—from looking to Article II, as the Court independently interpreted it, to determine the pardon's actual legal effect on the Court's *decision* and on the parties via *relief*. In Chase's words:

The proviso declares that pardons shall not be considered by this court on appeal ["don't look at the constitutional issue"]. . . . It provides that whenever it shall appear that any

583. Cf. *supra* text accompanying note 579 (text of 1870 Act).

584. *Klein*, 80 U.S. (13 Wall.) at 145.

585. *Id.*

586. *Id.*

judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction ["don't decide" or "withhold relief"]. The proviso further declares that every pardon . . . shall, if accepted in writing without disclaimer . . . be taken as conclusive evidence . . . of the [disloyal] act ["adopt Congress's interpretation"]⁵⁸⁷

Chase then breached each of the 1870 Act's successive defenses to a court's giving pardons the Article II "effect which this court [in *Padelford*] had adjudged them to have."⁵⁸⁸ As to the "don't look" directive at which *Marbury* aims most of its fire, Chase wrote simply, "it [is] our duty to consider [pardons] and give them effect."⁵⁸⁹

On the independent interpretation point for which *Marbury* is famous, but which it only silently decided,⁵⁹⁰ *Klein* is explicit. In explaining why Congress cannot tell the Court how to interpret the Constitution, Chase cited *Wheeling Bridge*, one of the anti-revising decisions we discuss earlier.⁵⁹¹ Doing so linked rules forbidding non-Article III agencies *after the fact* to "reverse" (or render unenforceable) disagreeable federal court interpretations of federal law and rules forbidding those agencies to specify *in advance* how Article III courts must interpret the Constitution.⁵⁹²

What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we [enforce the Act] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not [In *Wheeling Bridge*] the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed [by the conclusive presumption] to give it an effect precisely contrary.

587. *Id.*

588. *Id.*

589. *Id.*; see Young, *supra* note 567, at 1193-94, 1222; *supra* notes 362, 557 and accompanying text.

590. See *supra* notes 553-555 and accompanying text.

591. See *supra* notes 432, 441-450 and accompanying text.

592. Likewise equating rules permitting a non-Article III agency to revise federal court judgments and rules requiring federal courts to adopt a non-Article III agency's interpretation of federal law are, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1647 & n.31 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 225 (1995) ("If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it . . . plain[ly] cannot do so directly, by setting aside their judgments, compelling them to grant new trials, [or] ordering the discharge of offenders" (citation omitted)); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 398 (1980).

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.⁵⁹³

Finally, with the "don't look" and "interpret it as we do" belt gone, Chase resolutely disregarded the "don't decide" and "withhold relief" suspenders:

The [Act gives the] court jurisdiction of the cause *to a given point*; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

....

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred [i.e., to decide and to order deserved relief], *because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor*? This question seems to us to answer itself.⁵⁹⁴

593. *Klein*, 80 U.S. (13 Wall.) at 146–47; see Hart, *supra* note 5, at 1373 (“[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it . . . [a point made] clear long ago in *United States v. Klein*.”); see also Christopher Eisgruber & Lawrence Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 471 (1994) (“*Klein* prohibits . . . the conscription of the Court by Congress to play a role in a charade . . . in which the Court is obliged to act as though its own judgment about a matter of consequence is different than it actually is.”). The clarity of the Act’s attempt through its conclusive presumption to tell courts how to read the Constitution makes up for the imprecision of Chase’s exposition, see *id.* at 470, which fails to distinguish permissible instructions to decide cases (even retroactively) according to Congress’s definition of the *statutory* requisites for relief, see *supra* note 362, from impermissible instructions on how to interpret the *Constitution*, see *supra* notes 552–561, 584–592 and accompanying text; *infra* notes 678–686 and accompanying text, or (much more rarely) on how to interpret statutes, see *supra* notes 448–450 and accompanying text.

594. *Klein*, 80 U.S. (13 Wall.) at 146–47 (emphasis added); see Sager, *supra* note 17, at 87–88 (locating an “objection to legislation that . . . deprives [Article III courts] of jurisdiction to provide effective relief . . . at the very heart of . . . *Klein*”; arguing that *Klein* would bar a statute giving federal courts jurisdiction to review government programs “and then direct[ing] them to dismiss for want of jurisdiction only those cases involving . . . programs they would otherwise find unconstitutional”; such a statute would improperly ask Article III courts “to participate in an adjudicatory ritual, the end result of which would be the preordained defeat of the [independently discerned] rights of constitutional claimants”); Van Alstyne, *supra* note 10, at 268. Because the 1870 Act clearly directed the Court to withhold—i.e., to surrender jurisdiction to grant—relief upon finding a federal right to it, and because the Court declined to follow the directive, *Klein* qualifies Fallon and Meltzer’s broad view of the remedial discretion that Article III courts may exercise at their own or Congress’s behest. See *supra* note 399; *infra* notes 697, 747, 774–799 and accompanying text.

Klein lacks *Marbury*'s elegance. But it just as powerfully forbade a more determined Congress, in the guise of regulating Article III courts' *jurisdiction* (the quantity of their authority), to regulate their *judicial power* (the quality of their authority).⁵⁹⁵ Congress may withhold jurisdiction. But it may not choose how much of the "whole supreme law" an Article III court may apply to a case it has told the court to decide. Nor may it tell the court how to interpret that law. Nor, at the point when the court's constitutionally mandated choice of law and independent judgment are about to generate a decision and relief, may Congress pull the jurisdictional plug. The judicial power thus must include the capacity (1) to apply the *whole supreme law* as the Article III court *independently interprets* it to *decide* the case and (2) to impose the relief needed to give the court's independent legal interpretation and its decision *effect*.

One thread is loose: What of the Government's (and Senator Trumbull's) sovereign immunity argument "that the right to sue the government in the Court of Claims is a matter of favor" that Congress may condition on a court's inability to consider or give effect to a pardon?⁵⁹⁶ Chase's response was to say that this argument "seems not entirely accurate," then to deem the Court of Claims an Article III court and explain why Congress's power over such courts' *jurisdiction* could not justify the statute.⁵⁹⁷ Others have found this response insufficient and posed alternatives,⁵⁹⁸ but it satisfies us: Assertions of sovereign immunity are sufficiently like denials of jurisdiction that an Article III analysis of the latter applies as well to the former. Congress has plenary authority to invoke immunity from the start and *in that way* forbid courts to "look" at suits against the sovereign. What Congress may not do, however, is *waive* immunity "to a given point; but [tell the court that,] when it ascertains that a certain state of things exists, [the waiver] is to cease and it is required to dismiss the cause" based on the now resurrected immunity.⁵⁹⁹

Under *Klein*, therefore, Congress may no more constitutionally use midstream assertions of immunity than midstream withdrawals of jurisdiction to deny Article III courts the power (1) *independently, finally, and effectually* to *look at* and *decide* constitutional questions raised by cases within their jurisdiction, or (2) to order the *relief* needed to *effectuate* those decisions, as long as denying either power would deprive the Constitution of the status in the case of supreme law. Clearly the so-called "greater power" to withhold jurisdiction or assert sovereign immu-

595. The Court and the Court of Claims soon extended the same conclusion to the Act's clause [4], which placed identical limits on a *lower federal court*. See *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155-56 (1872) (ordering claims court, contrary to clause [4], to give a pardon the effect that *Padelford* and *Klein* required); *Witkowski's Case*, 7 Ct. Cl. 393 (1872); see also *Klein*, 80 U.S. (13 Wall.) at 144-45 (identifying the claims court as an Article III court).

596. *Klein*, 80 U.S. (13 Wall.) at 144; see *supra* notes 577-578 and accompanying text.

597. *Klein*, 80 U.S. (13 Wall.) at 144-45.

598. See Young, *supra* note 567, at 1224-33.

599. *Klein*, 80 U.S. (13 Wall.) at 146 (emphasis added).

nity from the start does not include the so-called "lesser power" to grant jurisdiction and waive immunity conditioned on a court's particular choice of issues to address, law to apply, or legal interpretation, or on the court's remedial impotence.

c. *Law Versus Fact; Anti-Revising Versus the Whole Law.* — Because the power and duty to "decide the whole case based on supreme law" inheres in the judicial power as defined by the Convention and applied by *Marbury* and *Klein*, Congress may not oblige an Article III court to review or enforce government, including administrative, action while keeping the court from determining the action's legality under federal law and effectuating the determination insofar as it bears on the parties. "Congress may be free to establish [an administrative] scheme that operates without court participation. But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to [an administrative] decision the court has no authority to evaluate."⁶⁰⁰ In *Marbury* and *Klein*, the Court rejected implied and express choice-of-law rules taking the Constitution entirely out of cases within Article III courts' jurisdiction to which the document (as independently construed) applied of its own force. Two more Federal Courts classics, *Crowell v. Benson*⁶⁰¹ (as confirmed by *St. Joseph Stock Yards Co. v. United States*)⁶⁰² and *Yakus v. United States*,⁶⁰³ relied on the logic of the federal courts' supremacy-maintaining function to clarify two aspects of the *Marbury-Klein* rule—*Crowell* by extending the "whole case" aspect of the rule to "mixed," but withholding it from factual, questions; *Yakus* by identifying situations in which the "whole law" aspect of the rule gives way to the anti-revising principle.

(i) *Crowell and St. Joseph.* — In *Crowell*, a federal agency ordered Benson to compensate Knudsen under the Longshoremen's and Harbor Workers' Compensation Act,⁶⁰⁴ and Benson invoked the Act's provision for district court review, claiming that Knudsen was not employed in a maritime occupation as the Act required.⁶⁰⁵ In response to the claim that the Act's judicial review provisions offended "the judicial power of the United States," the district court decided it could address Benson's suit only if it had the power to give him a "hearing *de novo* upon the facts [of Knudsen's employment status] and the law."⁶⁰⁶ Based on such a hearing, the district court ruled that Knudsen was not employed in a maritime job and enjoined the agency award.⁶⁰⁷ The government appealed the *de novo* hearing ruling.

600. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 429–30 & n.6 (1995) (citing *Klein*; other citations omitted).

601. 285 U.S. 22 (1932).

602. 298 U.S. 38 (1936).

603. 321 U.S. 414 (1944).

604. Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424.

605. See *Crowell*, 285 U.S. at 36–37, 44.

606. *Id.* at 37.

607. See *id.*

Chief Justice Hughes began the Court's consideration of "the judicial power of the United States" with a "whole *case*" principle similar to that of *Marbury* and *Klein*: In a dispute over which Congress had conferred admiralty jurisdiction, it could not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at . . . admiralty."⁶⁰⁸ Hughes then approved two features of the Act's judicial review provisions: (1) The ordinary fact "findings of the deputy commissioner," if "supported by evidence and within the scope of his authority, shall be final"—there being "no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."⁶⁰⁹ (2) The agency's resolutions of "questions of *law* are *without* finality [and] . . . full opportunity is afforded for their determination by the Federal courts," giving those courts "complete authority to insure the proper application of the law."⁶¹⁰ Hughes justified the former feature based on the unreviewable status of many jury findings and the rule that appellate courts generally defer to the fact findings of trial courts.⁶¹¹ He justified the latter feature based on Article III courts' duty to protect the supremacy of federal law—i.e., on "the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions."⁶¹² Hughes reaffirmed *Crowell's* second, "whole supreme law" conclusion in *St. Joseph*: "[T]here is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."⁶¹³

Between questions of law and ordinary questions of fact, *Crowell* located a third category: questions "of facts . . . [decisive of] a constitutional right properly asserted," including "where the determinations of fact are . . . 'jurisdictional'" because they are critical to a constitutionally appropriate exercise of federal power.⁶¹⁴ Hughes put in this category the Act's limit of relief to maritime workers because "only where the relation of master and servant exists in maritime employment" could Congress constitutionally order workers' compensation.⁶¹⁵ Hughes thus ruled that, once required to review administrative action, Article III courts must be able to review all questions of law *or fact* decisive of the constitutionality of that action: "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independ-

608. *Id.* at 49 (citation omitted).

609. *Id.* at 46, 51.

610. *Id.* at 45-46, 54 (emphasis added); see *infra* notes 871-872 and accompanying text (discussing the consistency of this holding with the *Chevron* doctrine).

611. See *Crowell*, 285 U.S. at 51-54.

612. *Id.* at 56; see *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936); *id.* at 84 (Brandeis, J., concurring).

613. *St. Joseph*, 298 U.S. at 52.

614. *Crowell*, 285 U.S. at 46, 54.

615. See *id.* at 38-40, 55-56.

ent determination of all questions, both of fact and law, necessary to the performance of that supreme function."⁶¹⁶

In *Crowell* and *St. Joseph*,⁶¹⁷ Hughes gave various examples of ordinary fact questions as to which Congress could make Article III courts with jurisdiction defer to agencies: the scope of a maritime worker's injuries, his intoxication or suicidal intent (each a statutory defense), and the real property and "going concern" value on which administratively set rates had to give fair return.⁶¹⁸ Hughes also exemplified "fact" questions that Article III judges must determine *independently*: whether an agency finding "is . . . 'contrary to the indisputable character of the evidence'" (i.e., sufficiency of the evidence generally);⁶¹⁹ whether "the relation of master and servant exists in maritime employment . . . [where] that relation is the pivot of the statute and . . . underlies the constitutionality of [the Act]";⁶²⁰ whether lands the federal Land Department was attempting to sell "'never were public property'";⁶²¹ "whether a publication is a 'book' or a 'periodical'" for purposes of acts governing "carriage . . . [of] second class mail matter";⁶²² whether a rate is "confiscat[ory]";⁶²³ whether an individual subject to deportation is a "citizen[]";⁶²⁴ and, generally, any "'review of the law as applicable to facts finally determined below.'"⁶²⁵ Whatever one makes of Hughes's *linguistic* categories—"constitutional" or "jurisdictional" facts versus "subordinate or primary" facts bearing on the same issue—his examples manifestly distinguish historical fact questions (on which independent judgment is not required) from what today are commonly called "mixed questions of law and fact" (as to which Article III courts must exercise independent judgment).⁶²⁶

Much has been made of Justice Brandeis's dissent in *Crowell*. But less was in contention than has been suggested. As his concurrence in *St. Joseph* confirmed, Brandeis agreed with Hughes that "[t]he supremacy of law demands . . . the independent judgment of [the Article III] court on the ultimate question of constitutionality[]. . . [b]ut . . . does not demand that the correctness of every finding of fact to which the rule of law

616. *Id.* at 60.

617. *St. Joseph* reaffirmed *Crowell* after moderating *Crowell's* requirement of de novo hearings, see *id.* at 64, to let Article III courts rely on the administrative record and the administrator's "subordinate or primary findings," *St. Joseph*, 298 U.S. at 52–54.

618. See *St. Joseph*, 298 U.S. at 60, 62, 64; *Crowell*, 285 U.S. at 47.

619. *Crowell*, 285 U.S. at 50 (quoting *Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913)).

620. *Id.* at 56.

621. *Id.* at 59 (quoting *Smelting Co. v. Kemp*, 104 U.S. 636, 641 (1881)).

622. *Id.* (quoting *Smith v. Hitchcock*, 226 U.S. 53, 59 (1912)).

623. *Id.* at 60 (citing *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920)).

624. *Id.* (citing *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922)).

625. *Id.* at 53 (quoting *The Francis Wright*, 105 U.S. 381, 386 (1881)).

626. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 110 n.12 (1982) (White, J., dissenting).

is to be applied shall be subject to review by [the] court."⁶²⁷ Brandeis also agreed (using more modern terminology) that Congress may not withdraw questions from federal courts when they encounter "difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact," including "the weight of the evidence," the "citizenship" of an individual subject to deportation, whether "rate orders . . . [are] confiscatory," and other "difficult questions of mixed law and fact".⁶²⁸

[W]here what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State.⁶²⁹

Brandeis simply did not place the "maritime employment" question in the "mixed" category—largely because he did not think Congress's power to order injury compensation was limited to maritime workers, so that, for him, that question's resolution did not determine the boundary of Congress's regulatory power.⁶³⁰ The narrowness of Brandeis's disagreement with Hughes—over whether the existence of "maritime employment" was a mixed question, or instead a purely factual question—is illustrated by Brandeis's willingness, after initially thinking "confiscatoriness" a question entirely of fact, to accept the view of others on the Court that it instead was a mixed question requiring full Article III court consideration.⁶³¹

The harder question is one on which Hughes and Brandeis agreed: Why, if Article III courts must effectually decide the whole case, is there no Article III requirement of independent review of questions of pure

627. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); see *Crowell*, 285 U.S. at 68, 88 (Brandeis, J., dissenting).

628. *Crowell*, 285 U.S. at 80, 88, 89, 92 (Brandeis, J., dissenting).

629. *St. Joseph*, 298 U.S. at 74 (Brandeis, J., concurring).

630. See *Crowell*, 285 U.S. at 80–84 (Brandeis, J., dissenting).

631. Compare *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 299 (1920) (Brandeis, J., dissenting) (confiscatoriness is a fact question on which deference is owed to the trier of fact), with *St. Joseph*, 298 U.S. at 74, 83 (Brandeis, J., concurring) (confiscatoriness is a mixed question, which Article III courts must review independently), and *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443–44 (1930) (Brandeis, J.) (same). In his response to this Article, Mr. Scheidegger erroneously claims that the *Ben Avon* majority's conclusion (eventually accepted by Brandeis)—that confiscatoriness is a mixed question requiring independent federal court review—applies only to *agency*, as opposed to judicial, determinations of confiscatoriness. See Scheidegger, *supra* note 75, at 907–08. In fact, the Hughes Court (with Brandeis's concurrence) also affirmed its obligation of plenary review of *state court* determinations of confiscatoriness (and other mixed determinations), and gave the same explanation for the obligation as in *Crowell*, i.e., that plenary review was necessary so that the Court could "perform [its] own proper function in deciding the question of the law arising upon the findings which the evidence permits." *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 143 (1938); see *infra* note 671 and accompanying text.

fact on which the decision of the case turns? There are three sufficient answers. First, Article III expressly lets Congress declare "Exceptions," inter alia, to the Supreme Court's (and, by implication, the lower federal courts') appellate "Jurisdiction . . . as to Law *and Fact*," prompting the Court in *Wiscart*, its first Article III decision, to let Congress deny it jurisdiction over factual questions on appeal.⁶³² Second, a different reading would put Article III, Section 1 and the first two paragraphs of its Section 2 on a collision course with Article III, Section 2's last paragraph and the Sixth and Seventh Amendments, which embody constitutional rights to trial by jury with which judicial redetermination of facts (e.g., on appeal) cannot easily cohere.

Third, and most crucially, this treatment of facts is not truly an *exception* to the "whole case" rule, properly understood, but a *consequence* of it. As Hughes said, Article III imposes the "whole case" rule "to the end that the Constitution as the supreme law of the land may be maintained."⁶³³ The rule thus is not a postulate of judging itself, but of *Article III* judging as defined by the *Supremacy Clause*, i.e., of "the Federal judicial power in requiring the observance of constitutional restrictions."⁶³⁴ This aspect of the judicial power thus applies only (as, e.g., in *Marbury* and *Klein*) to those aspects of a case that implicate the normative content of some provision of federal law.⁶³⁵ If the question in *Crowell* had been whether Benson had paid Knudsen's wages each week, it would be hard to see any normative federal legal question at issue. But the question, instead, was the range of connection between Knudsen's work and the maritime aspects of Benson's business. Moreover, in Hughes's view (but not Brandeis's), the constitutionality of a federal workers' compensation program depended on a sufficient nexus between the employment relationship and maritime work. For Hughes (but not Brandeis), therefore, resolving that ("mixed") question required a determination not only of where, when, and how Knudsen worked, but also of what combination of those factors sufficed to cross the line between businesses within and without Congress's constitutional reach and, indeed, where that constitutional line *lies*.

It is no surprise, then, that the Court defines "mixed questions" requiring independent Article III review, and distinguishes them from purely "factual" questions as to which deference to an agency or subordinate court is allowed, based on whether "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case"⁶³⁶—i.e., whether "norm elaboration occurs"

632. U.S. Const. art. III, § 2, cl. 2 (emphasis added); see supra notes 254–257 and accompanying text (discussing role of Law and Fact Clause in Exceptions and Regulations Clause); supra notes 364–369 and accompanying text (discussing *Wiscart*).

633. *St. Joseph*, 298 U.S. at 51–52.

634. *Crowell*, 285 U.S. at 56.

635. See Van Alstyne, supra note 10, at 263.

636. *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

through the courts' "power to consider fully a series of closely related situations involving a claim of constitutional privilege."⁶³⁷ As we began to discern from *Martin* and *Osborn*, Article III courts do not sit "to decide on a mere hypothetical case—to give a construction to a [federal law] without first deciding whether there was any interest on which that [law], whatever be its proper construction, would operate"—but instead to decide the meaning of federal law as applied to, and as revealed by its application to, the actual facts.⁶³⁸ In Hughes's words in another classic case:

When a federal right has been specially set up and claimed . . . it is our province to inquire not merely whether it was denied in *express terms* but also whether it was denied in *substance and effect*. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. . . . [W]henever a conclusion of law . . . as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.⁶³⁹

637. Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 273–75 (1985); see *id.* at 264 ("independent judgment on the evidence is constitutionally mandated . . . when the application issue involves an appreciable measure of additional norm elaboration— . . . where it seems correct to state that the judicial duty to 'say what the law is' is implicated").

638. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 369–70 (1816) (Johnson, J., concurring); see *supra* notes 467–474 and accompanying text.

639. *Norris v. Alabama*, 294 U.S. 587, 590 (1935); see, e.g., *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996) ("reasonable suspicion" and "probable cause" are treated as questions of law because those constitutional concepts "acquire content only through application" to the facts); *Thompson v. Keohane*, 516 U.S. 99, 111–16 (1995) ("mixed question[s] of law and fact" are "ranked as issues of law" because "case-by-case elaboration when a constitutional right is implicated may more accurately be described as law declaration than as law application"); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945) (a question is mixed, and independent review is required, "where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied"); *Smith v. Allwright*, 321 U.S. 649, 662 (1944) ("federal courts must for themselves appraise the facts [when i]t is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the 'supreme Law of the Land.'"); cases cited *infra* note 671. Not to the contrary, of course, are Court decisions deferring to state court determinations of thoroughly fact-dependent questions whose independent resolution by a reviewing federal court "will do the cause of legal certainty little good," *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 176 (1983), e.g., because "the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor," *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (discussing juror-bias cases) (misdescribed in Scheidegger, *supra* note 75, at 904; see also *Ornelas*, 116 S. Ct. at 1663 (explaining that *Illinois v. Gates*, 462 U.S. 213 (1983) (misdescribed in Scheidegger, *supra* note 75, at 905), gives a decisive legal effect to a magistrate's before-the-fact issuance of a search warrant, irrespective of the validity of the magistrate's probable cause determination, and in no way undermines the longstanding rule requiring independent federal court review of another court's after-the-fact resolution of the probable cause question in a *warrantless* search case).

Vesting the judicial power in Article III courts thus does not assure them the power to decide the "whole case"—of which the facts obviously are part—but only those *aspects* of the case that implicate the courts' obligation to keep federal law supreme, i.e., only those facts revealing the normative meaning of that law.⁶⁴⁰

(ii) *Yakus*. — In *Yakus v. United States*, Justice Rutledge encapsulated the "independent judgment" and "whole law" principles that emerge from our history of the Convention and our discussion of *Marbury* and *Klein*:

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts . . . to enforce unconstitutional laws . . . or [enforce laws] without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. . . . [W]henver the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.⁶⁴¹

Although the Court, the canonical literature, and Congress have treated Rutledge's statement as authoritative,⁶⁴² he wrote in dissent. It is important, therefore, to see why Chief Justice Stone's majority opinion is not to the contrary.

A federal district court convicted *Yakus* of selling wholesale meat above price limits set administratively pursuant to emergency legislation during World War II. At trial, he claimed that the price limits were confiscatory. Because the statute barred federal courts before which enforcement actions were pending from ruling on the legality of the price-setting regulations, the trial court refused to consider *Yakus's* constitutional claim.

As in *Marbury* and *Klein*, the Supreme Court ruled that, given its jurisdiction to hear the appeal, it also had to determine the constitutionality of the statute under which the conviction occurred—"[e]ven [if] the statute should be deemed to require . . . a[] ruling at the criminal trial which would preclude the accused from showing that" the act was unconstitutional.⁶⁴³ The Court then reviewed, but rejected, several constitu-

640. See also *infra* notes 674–675 (additional qualification of the "whole case" principle).

641. *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting).

642. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392 (1980); Hart, *supra* note 5, at 1373; see also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995) (quoted *supra* text accompanying note 600); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290–91 & n.2 (1978) (Powell, J., concurring) (discussing Congress's attentiveness to "Mr. Justice Rutledge's eloquent dissent" in *Yakus*).

643. *Yakus*, 321 U.S. at 447.

tional attacks on the statute, including that it violated Article III by keeping Yakus from relying on the unconstitutionality of the price-setting regulations as a defense to the criminal action.⁶⁴⁴

The Court's reason for letting Congress deny it and the district court "jurisdiction" to consider the regulations' constitutionality was simple: Although the statute barred objections to the regulations in enforcement proceedings, it gave wholesalers like Yakus a fair *preenforcement* opportunity as of right to challenge the regulations by administrative protest and review (consistent with *Crowell* and *St. Joseph*) in the Emergency Court of Appeals (an Article III court) and to seek review by the Supreme Court.⁶⁴⁵ Relegating constitutional challenges to an Article III court other than the one in which enforcement actions later occurred did not violate Article III, the Court held, because such challenges need not be heard "in one [Article III] tribunal rather than in another, so long as there is an opportunity" for a fair challenge in *one* of them.⁶⁴⁶ True, Yakus had passed up the preenforcement remedy and was convicted at a trial at which he was prevented from raising constitutional objections. But "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."⁶⁴⁷

Recalling *Crowell's* procedural posture helps explain *Yakus's* holding. *Crowell* was not an enforcement action to compel Benson to compensate Knudsen but, rather, Benson's preenforcement action to enjoin the agency's compensation order. Suppose Benson had challenged the award as beyond Congress's power and confiscatory but the district court had ruled against him. If Benson had then refused to comply with the agency order and a statutory criminal enforcement proceeding had been brought in another district court, assumedly the prior court's decision of the relevant constitutional questions would have bound the later court—else the prior court's decision would have lacked the finality Article III itself requires.⁶⁴⁸ Even if Benson had made some, but not all of his constitutional challenges in the prior court, the later court quite properly could have treated the previously omitted (i.e., "waived") claims as well as the previously litigated ones as *res judicata*.⁶⁴⁹ Assuming, therefore, that (at least in the emergent circumstances of the War)⁶⁵⁰ Yakus was constitutionally required to challenge allegedly confiscatory price regulations in the period before the regulations went into effect, it only requires re-

644. See *id.* at 418, 429–31.

645. See *id.* at 428–29, 435–36.

646. *Id.* at 444.

647. *Id.*

648. See *supra* Part II.B; *supra* notes 605–607 and accompanying text.

649. See 18 Charles A. Wright et. al., *Federal Practice & Procedure* § 4414, at 111 (1981).

650. See *Yakus*, 321 U.S. at 420, 431–32, 442–43 (discussing "compelling public interest" in truncated procedures during wartime).

sort to that same *res judicata* principle to see how unexceptional *Yakus* was.⁶⁵¹ For, in keeping with good Article III policy, all the decision did was require one Article III court to respect the finality of the unappealed judgment of another such court or, more accurately, the final effect of a party's inexcusable failure to invoke that judgment in a timely fashion.

Yakus's treatment of the seller's waiver, like *Crowell's* treatment of pure fact questions, thus locates the "whole case" and "choice of law" aspects of the judicial power not in the inherent function of judges, as judges, but in the *Article III* judge's constitutional function of maintaining the *supremacy* of federal law. So far as *that* function is concerned, as Stone said, one Article III tribunal's "look" at the regulations' constitutionality is as good as another's, and *Yakus* had no constitutional right to choose between them. Also revealing is Stone's single caveat: "We have no occasion to decide whether one charged with criminal violation of a . . . price regulation may defend on the ground that the regulation is *unconstitutional on its face*."⁶⁵² If a preenforcement Article III court has looked (or was designated to look) at the regulation and found no constitutional violation, the enforcement tribunal need not do so when Congress forbids it—unless the later tribunal cannot *help* looking because the regulation's affront to the supremacy of federal law is manifest on its face, in which case the later court's supremacy-maintaining obligations may trump the congressional will *and* the first court's finality. In this light, the only—and, from our perspective, not very important—difference between the Rutledge and Stone positions is over whether the Article III supremacy-maintaining obligation trumps the Article III anti-advising and anti-revising protections in all cases (Rutledge's view) or in only those cases in which there is no blinking the constitutional violation (Stone's view).⁶⁵³

2. *Denying Deference and Applying the Whole Supreme Law to State Decisions*: Martin, Cohens, The Mayor, and the Mixed Question Cases. — Much

651. See Hart, *supra* note 5, at 1373–74; see also *Yakus*, 321 U.S. at 481 (Rutledge, J., dissenting) (assuming that majority opinion rested on "such notions as waiver and . . . *res judicata*").

652. *Yakus*, 321 U.S. at 446–47 (emphasis added).

653. Cf. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–39 (1987) (holding that a defendant charged with unlawful entry into the country following deportation who previously was *denied* a fair opportunity for judicial review of the deportation order has a due process right to challenge the deportation order in the later criminal proceeding). Anticipating *Yakus*, the Court has long treated its prior direct appeal judgments on the merits and waivers of writ of error review as of right as preclusive of later federal court habeas actions reprising the same claims. See, e.g., *Tinsley v. Anderson*, 171 U.S. 101, 105 (1898). Congress codified the same rule in 1948. See 28 U.S.C. § 2244(c) (1994). For a short time, the Court even treated its prior denials of direct appeal *certiorari* as preclusive of later habeas actions, see, e.g., *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (*per curiam*) (misdescribed in Scheidegger, *supra* note 75, at 933, 944), until abandoning the practice because *certiorari* denials are not merits rulings, see *Brown v. Allen*, 344 U.S. 443, 489–97 (1953); Liebman & Hertz, *supra* note 389, at 49–50, 55–56, 60–62 (explaining *Hawk* and discussing its revision by *Brown*).

as the *Marbury* Court confronted whether inter-branch comity required it to defer to Congress's implied interpretations of the Constitution in ruling on congressional enactments,⁶⁵⁴ the *Cohens* and *Martin* Courts faced Virginia's claim that federalism required the Court to defer to state court interpretations of federal law when reviewing their decisions. Even if, as Story said in *Martin*, the Constitution creates no absolute state court immunity from appeal—no "reason for giving [state court] judgments an absolute and irresistible force"⁶⁵⁵—should state judges' oaths and presumptive learning and integrity, and the sovereignty of the governments of which they are part, not at least warrant a presumption that their legal opinions are correct?⁶⁵⁶ *Cohens* and *Martin* rejected this logic as inconsistent with the independence and supremacy-maintaining ingredients of the Court's judicial power. *Martin* also rejected the implication that Congress could adopt a choice of law rule blinding the Supreme Court to otherwise applicable federal law in the course of reviewing state decisions. *The Mayor* and the Mixed Question Cases extended these same conclusions to lower federal court review of state decisions.

Virginia's argument for federal court deference or prudential abstention in the face of state court determinations of law went to the heart of the Framers' spot-checking approach to federal appellate jurisdiction in cases begun in state courts. Given the many "instances in which the constitution might be violated without" any federal court having "jurisdiction" to cure the problem, why, Virginia asked, should a federal court feel obliged to reverse a state court in any particular instance in which jurisdiction existed save, perhaps, in the "extreme and improbable" situation in which a state court blatantly disregarded federal law?⁶⁵⁷ Short of having lightning strike now and again, what good would reversal do when federal jurisdiction happened to exist but the case presented an infraction at a "gradation[] of opposition to the laws[] far short" of "extreme" and no worse than "violations of the constitution, of which the Courts can take no cognizance?"⁶⁵⁸ Marshall gave three answers to this question.

The first two answers—also given by Story in *Martin*—were "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States."⁶⁵⁹ On "correctness," Marshall juxtaposed Article III's requirement of federal judicial indepen-

654. See supra notes 553–555 and accompanying text.

655. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816) (emphasis added); see supra notes 475–501 and accompanying text.

656. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 302, 312–14, 318–20 (1821) (argument of counsel); *Martin*, 14 U.S. (1 Wheat.) at 343, 346 (quoted supra note 478, discussing Virginia's argument for Supreme Court deference to "state judges['] . . . oath" and "presumed . . . learning and integrity" and to "the sovereignty of the states[] and the independence of their courts").

657. *Cohens*, 19 U.S. (6 Wheat.) at 386–87, 404–05; see id. at 304–07 (argument of counsel).

658. Id. at 386, 405.

659. Id. at 416.

dence from political and parochial pressures, and the absence of any such assurance as to state judges, to explain the Constitution's evidently prophylactic reliance on the former's independent "re-examination" of the latter's judgments in the "few specified cases" in which "the legislature [chooses to] confer on the federal Courts appellate jurisdiction".⁶⁶⁰

It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. . . . When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a[n] . . . individual . . . claims the protection of an act of Congress.⁶⁶¹

On "uniformity," Story in *Martin* identified "the appellate jurisdiction . . . [as] the only adequate remedy for" the "truly deplorable" "public mischiefs" that arise when "[j]udges of [albeit] equal learning and integrity, in different states . . . differently interpret" national law.⁶⁶² Forty years later, in *The Mayor v. Cooper*, in upholding the constitutionality of Civil War-era statutes permitting *postjudgment* removal of state cases to federal district courts, the Court reiterated these same two reasons for rejecting an objection to Congress's conferral on *inferior* federal courts of nondeferential "*appellate* jurisdiction . . . extending . . . to the courts of the States."⁶⁶³

Marshall's third answer relied not only on Article III courts' supremacy-maintaining *power* but also—harkening back to the "painful obligation" analysis of *Hayburn's Case*⁶⁶⁴—on their "reason not will" *constraint*. True, Article III "does not extend the judicial power to every violation of the constitution which may possibly take place."⁶⁶⁵ But "if, in any controversy *depending* in a Court, the cause should depend on . . . [federal] law, that would be a case . . . to which the judicial power of the United States *would* extend"⁶⁶⁶—else the courts would forsake their crucial constitutional commitment to follow the supreme law wherever it leads, no matter (or, especially *given*) how doubtful, close, controversial, or difficult the federal question might be:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a

660. *Id.* at 410, 422.

661. *Id.* at 386–87; accord *Martin*, 14 U.S. (1 Wheat.) at 328–29, 346–47.

662. *Martin*, 14 U.S. (1 Wheat.) at 347–48; accord *Cohens*, 19 U.S. (6 Wheat.) at 377, 386, 415–16.

663. 73 U.S. (6 Wall.) 247, 252 (1868); see *id.* at 253 & n.*; *supra* note 380.

664. See *supra* notes 537–541 and accompanying text.

665. *Cohens*, 19 U.S. (6 Wheat.) at 405.

666. *Id.* (emphasis added).

measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason to the constitution*. Questions may occur which we would gladly avoid; but we cannot avoid them. *All we can do is, to exercise our best judgment, and conscientiously to perform our duty.*⁶⁶⁷

The Constitution's clear subordination of state to federal law has suppressed attempts to require federal courts to choose state over federal law in reviewing state decisions. In *Martin*, however, the question whether the 1789 Judiciary Act did or could be read to blind the Court to federal law applicable of its own force to a state decision arose because the Act limited appellate review to questions "apparent upon the record," and the state court had awarded the property in question without mentioning the federal treaties on which federal question jurisdiction was premised.⁶⁶⁸ To explain the Court's application of the treaties despite the statute's "apparent upon the record" limitation, Story recurred to *Marbury*'s ocular imagery of judges unable to divert their eyes from supreme law: "The treaty . . . was not necessary to have been stated [in the state record], for it was the supreme law of the land, of which all courts must take notice."⁶⁶⁹ A similar principle animates the Court's sedulous refusal to surrender jurisdiction over state judgments premised on state law that can be shown to be even the slightest bit dependent on, or decisive of, the meaning of federal law.⁶⁷⁰

667. *Id.* at 404 (emphasis added); see *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983); *McClellan v. Carland*, 217 U.S. 268, 282 (1910); *supra* note 345; *supra* notes 420, 537-540 and accompanying text. Compare *Wechsler*, *supra* note 303, at 3-10 (deeming crucial federal courts' duty to follow supreme law where it leads), with David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 547-74 (1985) (finding support for judicial power to abstain). The Court's (in our terms) "quantitatively" focused power to deny certiorari does not violate the "qualitative" duty that *Cohens* recognizes. See *Wechsler*, *supra* note 303, at 9 (certiorari "is addressed not to the measure of judicial duty in adjudication of a case but rather to the right to a determination by the highest . . . court[]"). Similarly operational at the threshold as bars designed to protect Congress's control over jurisdiction are the Full Faith and Credit, Anti-Injunction, Tax Injunction, and Norris-LaGuardia Acts discussed *supra* notes 378-389 and accompanying text.

668. See *supra* notes 467-469 and accompanying text (discussing *Martin*'s facts).

669. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 360 (1816); see *supra* notes 470-471 and accompanying text.

670. See, e.g., *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (although federal courts generally defer to state courts on questions of state law, they refuse to do so—and recognize a "duty to exercise our own judgment"—when the normative content of a federal legal provision depends in part on the meaning of state law (quoting *Appleby v. City of New York*, 271 U.S. 364, 380 (1926)) (citation omitted)); *Harris v. Reed*, 489 U.S. 255, 260 (1989) (although a state law ground is adequate to support a state decision, the ground cannot bar the decision's review by a federal court, including on habeas, if the state ground even marginally depended on the resolution of a federal claim); *Ward v.*

The "no deference" and "whole case/whole supreme law" principles have arisen in an even larger set of federal question appeals of state decisions, namely, the Mixed Question Cases. Extending the efforts of *Martin*, *Osborn*, and *Crowell* to define the issues to which federal courts must "look" in order to keep control over supreme law, these cases ask whether a state court's resolution of an assertedly "factual" issue actually implicates the normative scope, and thus the supremacy, of federal law. Depending on the answer to this question, the cases exercise sharply divergent levels of federal review. When faced with state court determinations that appreciably elaborate the normative content of federal law, the Court repeatedly has held that Article III courts have a "solemn duty to make *independent* inquiry and determination of [any] disputed facts."⁶⁷¹ Otherwise, "in recognition of [state courts'] superior opportunity to appraise conflicting testimony, [the cases] give *deference* to [state court] conclusions on disputed and essential issues of what actually happened."⁶⁷² Again, we encounter a supremacy-based qualification on the "whole case"

Board of County Comm'rs, 253 U.S. 17, 23 (1920) (when an adequate state ground is asserted, the Court—to keep from "neglecting or renouncing a jurisdiction . . . designed to protect and maintain the supremacy of the Constitution and [federal] laws"—"inquire[s] not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support").

671. *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (emphasis added and citation omitted); accord, e.g., *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group*, 515 U.S. 557, 567–68 (1995); *Miller v. Fenton*, 474 U.S. 104, 115–18 (1985) (habeas case applying same distinction to lower federal court review of state court decisions); *Brewer v. Williams*, 430 U.S. 387, 403–04 (1977) (same); *Townsend v. Sain*, 372 U.S. 293, 318 (1963) (same); *Feiner v. New York*, 340 U.S. 315, 316 (1951); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946); *Chambers v. Florida*, 309 U.S. 227, 228–29 (1940); *Truax v. Corrigan*, 257 U.S. 312, 325 (1921); *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912); cases cited *supra* notes 631, 639. Although a plurality of Justices in *Burns v. Wilson*—distinguishing military from state courts on separation of powers grounds—deferred to a military tribunal's fairly considered conclusion that a confession was voluntary, 346 U.S. 137, 140–42, 144 (1953) (plurality opinion), a majority of the Court declined to reach that conclusion, see *id.* at 146 (Minton, J., concurring in the judgment) (concluding that Court lacked jurisdiction); *id.* (Jackson, J., concurring in the judgment without explanation); *id.* at 149 (Frankfurter, J.) (concluding that due process requires less in military than other contexts); *id.* at 153–54 (Douglas, J., dissenting) (Court must review voluntariness independently). The Court's recurrent description and consistent exercise of its "duty" to review mixed questions, as defined *supra* note 639 and accompanying text, belies the claim that "[a] federal court may, consistently with Article III, decline to reexamine any question previously decided between the same parties by any tribunal with the authority to finally decide it, whether the tribunal be federal, state, or Spanish," Scheidegger, *supra* note 75, at 908—unless, of course, the word "finally" is meant to turn the statement into a tautology.

672. *Gallegos v. Nebraska*, 342 U.S. 55, 61 (1951); see, e.g., *Thomas v. Texas*, 212 U.S. 278, 281–82 (1909) (direct appeal decision treating existence of racial discrimination in jury selection as a question of historical fact and deferring to a state court finding on the issue); *In re Wood*, 140 U.S. 278, 285–87 (1891) (same on habeas review) (misdescribed in Scheidegger, *supra* note 75, at 932–33, as providing less review of the jury discrimination question on habeas than was then available on direct review); Liebman & Hertz, *supra* note 626, § 2.4d, at 51 & n.186.

principle. Although Marshall's broad language in *Cohens* and *Osborn* might suggest that a federal court with jurisdiction commits "treason to the constitution" by declining to resolve factual issues determinative of the outcome, the Court (going back to *Wiscart*) has limited that principle to questions implicating the normative content, hence the supremacy, of national law.⁶⁷³

3. *The Overriding Supremacy-Maintaining Objective of "[t]he Judicial Power"*. — The omission of questions of historical fact from the issues that Article III courts must consider in cases within their jurisdiction illustrates a more general qualification. Article III appellate courts need not address the "whole case" and instead need only address such "whole questions" as implicate the normative content, and thus the supremacy, of national law. Also exemplifying this qualification are (1) the rule limiting the nonconstitutional federal claims over which federal courts exercise habeas "jurisdiction" to nontechnical violations, (2) the Court's willingness to limit grants of certiorari to fewer than all federal questions presented, and (3) other limitations that rescue federal courts from a sea of questions "concerned with . . . mere etiquette, . . . formalities and minutiae of procedure."⁶⁷⁴

This exception to the "whole case" principle, and *Yakus*'s exception to the "whole law" principle when another Article III court already has discharged the judiciary's supremacy-maintaining duty,⁶⁷⁵ in turn suggest a more basic point: The decisionmaking qualities that define "[t]he judicial Power" are not inherent attributes of judges as *judges*. Instead, they are the Framers' chosen qualitative means to the supremacy-maintaining objective to which the Constitution most fundamentally commits *federal* judges. Although the capacity and duty to achieve that supremacy-maintaining objective through those qualitative means in a case over which jurisdiction has been conferred *does* absolutely inhere in the constitutional status of Article III judges, once that structural objective has been achieved in the case, the previously sacrosanct qualitative means lose their absolute protection.

673. See *supra* notes 364–389, 467–474, 632–639 and accompanying text; *infra* notes 674–675, 774–799 and accompanying text.

674. *Bruno v. United States*, 308 U.S. 287, 293–94 (1939); see, e.g., *Felker v. Turpin*, 116 S. Ct. 2333, 2337 (1996) (noting limited grant of certiorari); *Reed v. Farley*, 512 U.S. 339, 344–46, 350, 357 (1994) (plurality and concurring opinions) (discussing rule of *Hill v. United States*, 368 U.S. 424, 428 (1962), barring habeas relief for "technical violation[s]," or "failure[s] to comply with the formal requirements," of federal statutes absent "aggravating circumstances," "prejudice to the . . . defendant," or a showing that the statute "effectuates a constitutional right"); cf. *Hart & Wechsler*, *supra* note 37, at 1215–16 (under Johnson Act, 28 U.S.C. § 1342 (1994), federal court with jurisdiction to assess claim that state utility commission order interferes with interstate commerce or is preempted by federal law may not consider order's legality under other federal provisions).

675. See *supra* notes 643–653 and accompanying text.

D. *Resisting Interpretive Revision and Remedial Manipulation*

Suppose Congress or a state court does not purport to bind an Article III court to its view of federal law in a case before the court, or to divert the court's attention from the Constitution, or to revise the court's judgment in the case, but instead seeks to neutralize the impact of the Article III court's interpretation of federal law by denying a remedy in similar cases that thereafter reach the courts. Is the judicial power violated? Two recent cases, *City of Boerne v. Flores*⁶⁷⁶ and *Reynoldsville Casket Co. v. Hyde*,⁶⁷⁷ suggest that it is.

1. *No Congressional Precedential Revision or Remedial Manipulation: Boerne.* — In 1963, in *Sherbert v. Verner*, the Supreme Court read the Free Exercise Clause to forbid imposition of substantial legal burdens on religious practice absent a compelling state interest.⁶⁷⁸ In 1990, in *Employment Division v. Smith*, the Court substituted a more lenient test, allowing legal constraints on religious practice that apply equally to all citizens.⁶⁷⁹ In the Religious Freedom Restoration Act of 1993 (RFRA), Congress invoked its Fourteenth Amendment enforcement power as a basis for affording individuals whom *Sherbert* but not *Smith* would exempt from state or federal restrictions on religious practice a statutory right to enjoin the restrictions' enforcement.⁶⁸⁰ RFRA had two possible interpretations—that it "overruled" *Smith* and restored *Sherbert* in subsequent cases (but not prior ones, avoiding a direct anti-revising violation) or, as its proponents claimed, that it supplemented the constitutional remedy available under *Smith* with a statutory remedy coextensive with the remedy previously available under *Sherbert*.⁶⁸¹ Either way, RFRA in effect neutralized *Smith's* reading of the First Amendment by affording a new (statutory) remedy in all and only those cases in which *Smith* had purported to withdraw the same (constitutional) remedy.

Commentators argued that RFRA violated the *independent interpretation* and *finality* aspects of the judicial power as applied not to the result of a particular past or pending case but to the precedent set by the case.⁶⁸² But, assuming that RFRA creates a new cause of action, rather than correcting the Court's view of how to resolve an existing one, and assuming that Section 5 of the Fourteenth Amendment does not let Congress impose its view of the Amendment on the courts, RFRA is perhaps more accurately charged with violating the *effectualness* requirement. To assure effectualness, the Court has forbidden congressional and state court withdrawal of a prior decision's *res judicata* effect (*Plaut* and

676. 117 S. Ct. 2157 (1997).

677. 514 U.S. 749 (1995).

678. 374 U.S. 398, 403, 406-09 (1963).

679. 494 U.S. 872, 882-90 (1990).

680. 42 U.S.C. § 2000bb, § 2000bb-1(c) (1994).

681. See Van Alstyne, *supra* note 441, at 307-09.

682. See, e.g., Eisgruber & Sager, *supra* note 593, at 469-70; Van Alstyne, *supra* note 441, at 314 n.61, 319-20.

Ableman) and their frustration of a federal court's power to enforce its opinion, as, for instance, when Congress disbanded a territorial court needed to carry out the Court's mandate, state courts refused to enforce the Court's mandate (*Martin and Ableman*), or a statute aborted federal jurisdiction as soon as a remedy became appropriate (*Klein*). Analogously, RFRA denied stare decisis effect to *Smith* by making available a *statutory* remedy in all and only those cases in which *Smith* purportedly had withdrawn a *constitutional* remedy, notwithstanding that Congress (by assumption) had no Section 5 (or other) power to make new law to replace the constitutional law the Court previously had made and thus could only be exercising a supposed power to withdraw the effect of the constitutional law the Court had made.

Boerne struck down RFRA on Article I grounds, concluding that neither Section 5 of the Fourteenth Amendment nor any other constitutional provision authorized Congress to provide remedies for state laws regulating behavior that was not itself protected by the Bill of Rights as construed by the Court.⁶⁸³ In large measure, however, the Court premised its Article I conclusion on an Article III consideration—that Congress had rejected an early draft of Section 5 because it had threatened the supremacy-maintaining aspect of the judicial power “by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation.”⁶⁸⁴ Section 5's drafters thus intended “[t]he power to interpret the Constitution in a case or controversy [to] remain[] in the Judiciary,” and RFRA's substitution of a constitutional interpretation different from the Court's—or, more accurately, its extension of remedies precisely commensurate with those that a different interpretation would require—would violate that judicial-power-preserving intention.⁶⁸⁵ The Court's penultimate paragraph emphasized the point, strongly intimating that Article III does not tolerate attempts by Congress to withdraw the stare decisis effect of the Court's constitutional interpretations:

Our national experience teaches that the Constitution is preserved best when each part of the government respects . . . the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177 When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but

683. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

684. *Id.* at 2166.

685. *Id.*

. . . it is this Court's precedent, not RFRA, which must control.⁶⁸⁶

2. *No State Court Remedial Manipulation: Reynoldsville.* — In *Reynoldsville*, the analogous remedial nullification of a prior Supreme Court decision occurred at the hands of the Ohio Supreme Court, not Congress.⁶⁸⁷ In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court read the Commerce Clause to bar Ohio from applying a longer statute of limitations to suits by in-staters against out-of-staters than to suits between in-staters.⁶⁸⁸ In a separate case, an Ohio trial court then dismissed as untimely Hyde's suit against Reynoldsville Casket Co., denying her the longer statute of limitations for suits against out-of-staters that *Bendix* had invalidated.⁶⁸⁹ On appeal, the Ohio Supreme Court reinstated the action because, under Ohio law, *Bendix* "may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision."⁶⁹⁰

Just before *Reynoldsville* reached the United States Supreme Court, that Court had held—on Supremacy Clause grounds—that its own, not state, retroactivity rules govern the applicability of new Court decisions in cases pending when the new decisions were announced.⁶⁹¹ For that reason, and because the Court's retroactivity rules made *Bendix* applicable to Hyde's suit, she abandoned the Ohio high court's reasoning when she reached the Supreme Court and "ingeniously argue[d] that . . . [the Court should] look at what the Ohio Supreme Court has done, not through the lens of 'retroactivity,' but through that of 'remedy'"—"as if [the Ohio decision] were simply an effort to fashion a remedy that takes into consideration [Hyde's] reliance on pre-*Bendix* law."⁶⁹² As the Court noted, "the remedy [the Ohio court assertedly fashioned] would actually consist of *no remedy* for the constitutional violation or, to put the matter more precisely, of continuing to toll the [usual] 2-year statute of limitations in pre-*Bendix* cases . . . as a state law 'equitable' device for reasons of reliance and fairness."⁶⁹³ In the mirror image to RFRA's restoration on Section 5 grounds of a remedy that *Smith's* interpretation of superior law

686. *Id.* at 2172. The analogy between *Plaut's* ban on Congress "reversing" and *Boerne's* ban on Congress "overruling" the Court suggests that Congress's impermissible exercise of a Section 5 power to alter Fourteenth Amendment rights declared by the Court may be distinguished from its permissible creation of remedies for those rights, see *id.* at 2163, in part by asking whether or not a statute (as did RFRA) conveys a clear message that Congress disagrees with and can nullify Court precedent, see *supra* notes 441–450 and accompanying text. If (unlike in RFRA) Congress clearly acts within its commerce or other Article I power to declare new *statutory* law, the chance that it will convey the message Article III forbids is slim.

687. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

688. 486 U.S. 888, 889, 891–94 (1988).

689. See *Reynoldsville*, 514 U.S. at 751 (1995).

690. *Id.* at 751–52.

691. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993).

692. *Reynoldsville*, 514 U.S. at 752, 753.

693. *Id.* at 753.

had withdrawn, the Ohio court thus, by hypothesis, had withheld on equitable grounds the remedy (nullification of Ohio's statute) that *Bendix* had required.

The Court made short work of Hyde's argument: "[W]e do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy."⁶⁹⁴ Although relying entirely on the Supremacy Clause, the Court seems implicitly to have reached an intermediate conclusion that *Boerne* made explicit—that because *Bendix* was declaratory of supreme national law, *Article III* gave it a stare decisis effect in subsequent cases that the state courts could not withhold. As was true of Congress in *Boerne*, the Ohio court could not deny stare decisis effect to the Court's interpretation of supreme law either (assumedly) by reading the Commerce Clause differently from the way *Bendix* previously had done or by accepting *Bendix*'s reading but denying a remedy for violations of it.

Reynoldsville's separate ruling, also premised on the Supremacy Clause, that Ohio could not invoke its retroactivity law as a kind of "adequate state ground" for denying relief to out-of-state victims of *Bendix* violations furnished another important bar to state court remedial manipulation nullifying the stare decisis effect of Court precedents in later cases.⁶⁹⁵ The Court likewise has refused to let states rely on local harmless error law to deny relief for violations that are prejudicial under federal law.⁶⁹⁶

Notably, Hyde did not build her "ingenious" theory out of whole cloth. Instead, her lawyers drew heavily on Professor Fallon and Meltzer's view that Article III courts have broad discretion to withhold relief in individual cases over which they have jurisdiction and in which they have found violations of federal law—based, for example, on the novelty of the legal principle on which the winning party prevailed—as long as the overall structure of judicial remedies is capable as a general matter of keeping the government within the bounds of law.⁶⁹⁷ Following Fallon and Meltzer, Hyde distilled this principle from three of the Court's own "remedial" doctrines. The first gives states "leeway in designing a remedy" for previously collected unconstitutional taxes.⁶⁹⁸ The second gives state

694. *Id.*

695. See *id.* at 752; *Harper*, 509 U.S. at 97; *supra* note 691 and accompanying text.

696. See, e.g., *Chapman v. California*, 386 U.S. 18, 21 (1966).

697. See Brief for Respondent at *12, *16, *20, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) (No. 94(-3) (available in 1994 WL 699710) (citing Fallon & Meltzer, *supra* note 37, at 1765, 1789, 1798); *supra* note 399; *infra* notes 747, 774–799 and accompanying text. Fallon and Meltzer discuss the remedial discretion of federal courts faced with violations of federal law. Hyde asked that the Court permit the Ohio high court to exercise the same discretion, or that the Court exercise its own remedial discretion and impose the same remedy as the Ohio court had. See Brief for Respondent at *46–*50.

698. *Reynoldsville*, 514 U.S. at 755.

officials sued under section 1983 a qualified immunity from damages for actions in violation of federal legal principles that were not clearly established when the official allegedly harmed the plaintiff.⁶⁹⁹ The third withholds "retroactive" habeas relief (under the doctrine of *Teague v. Lane*) from prisoners relying on constitutional claims about the validity of which reasonable judges could have disagreed when the prisoners' convictions became final after direct review.⁷⁰⁰

The Court easily distinguished the tax cases because there the state courts provided a remedy, just not the one the claimant sought.⁷⁰¹ The qualified immunity and *Teague* analogies presented a harder question: If the Supremacy Clause does not require relief against public officials or courts that harmed or convicted individuals in violation of constitutional principles announced in intervening Court decisions, why insist on a remedy for a discriminatory statute of limitations that the Ohio Legislature adopted and the plaintiff sued under before *Bendix* held it unconstitutional? In answering this question, the majority first noted that the official action shielded from redress by the qualified immunity and *Teague* doctrines arguably rests on "a previously-existing, separate constitutional legal ground"—i.e., that when the action occurred there was no "clearly established" law barring it.⁷⁰² Any discretionary withholding of relief, that is, benefited only state officials and courts that had not demonstrably departed from their Supremacy Clause duties when they acted, thus evidently moderating an Article III court's constitutionally mandatory remedial response.

As we will soon see, this first explanation does not distinguish the actions of the Ohio Legislature in *Reynoldsville*, and does not always justify the official actions protected by the qualified immunity doctrine.⁷⁰³ Perhaps for this reason, the Court offered another explanation. Accepting that qualified immunity's and *Teague*'s choice of constitutional law in favor of that in existence when the official action occurred "does reflect certain remedial considerations," the Court simply deemed those "policy justifications"—a fear of dampening the ardor of public officials in the discharge of their duties in the qualified immunity context; "finality-related concerns" in the *Teague* context—more "special . . . as a basis for . . . an exception" to the Supremacy Clause than Hyde's "simple reliance" on prior law.⁷⁰⁴ This explanation also is unsatisfying. Although it takes ac-

699. See *id.* at 757–58 (discussing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

700. See *id.* at 758–59 (discussing *Teague v. Lane*, 489 U.S. 288 (1989)).

701. Compare *id.* at 755 (to cure discriminatory tax, state need not refund taxes to disfavored group and instead may choose to collect additional taxes from previously favored group (citing cases)), with *id.* at 753 (Ohio ruling "provid[ed] no remedy"); *infra* notes 735, 775–777 and accompanying text (distinguishing effectualness implications of denying all, and choosing among, remedies).

702. *Reynoldsville*, 514 U.S. at 757–58 (citation omitted); see *id.* at 758–59.

703. See *infra* text following note 704; *infra* notes 757–760, 775–789 and accompanying text.

704. *Reynoldsville*, 514 U.S. at 759.

count of Hyde's interests, it ignores those of the Ohio Legislature, which presumably left its preexisting statute of limitations in effect and forbore selecting among alternatives (e.g., lengthening the limitations period for *all* plaintiffs to accommodate those suing out-of-staters) in reliance on preexisting constitutional law. A concern for Ohio's ability to devise its own compensatory scheme within the confines of the Constitution as the Legislature reasonably understood it at the time arguably warrants the same dispensation as qualified immunity gives public officials, and *Teague* gives state judges, who forbore acting differently based on preexisting law.

Hyde's ingenuity thus presented the Court with a conundrum it did not entirely solve: How can its entrenched qualified immunity and *Teague* rules coexist with the Supremacy Clause and (in cases in which they deny the Court's prior decisions stare decisis effect) Article III? If Congress and the state courts cannot force Article III courts, in deciding cases within their jurisdiction, to choose law other than the constitutional law of the matter, and if Chief Justice Marshall was right that a judge-made decision to do the same thing is "treason to the Constitution," how can the Court justify choosing "old" as opposed to "new" constitutional law in adjudicating civil rights and habeas cases? Recall *Klein*, which forbade Congress to rely on sovereign immunity to deny federal courts the power to remedy violations of supreme law that the Court's grant of jurisdiction and the judicial power otherwise forced the Court to notice.⁷⁰⁵ If sovereign immunity acted as an unconstitutional remedial manipulation in *Klein*, how can qualified immunity and *Teague* escape the same conclusion?

Justice Scalia's concurring opinion begs the same question. Writing separately to record his "doubt that the case . . . presents any issue of remedies or of remedial discretion at all" and resorting to *Marbury*'s ocular imagery, Justice Scalia took a hard line on the Court's Supremacy Clause duty to attend to supreme law and disregard—i.e., void—contrary state law, thus ensuring that the latter does "not withstand" the former.

A court does not—in the nature of things it *can* not—give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not in itself a cognizable "wrong." (If it were, every citizen would have standing to challenge every law.) In fact, what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case, "*disregarding the [unconstitutional] law*," *Marbury v. Madison*, 1 Cranch 137, 178 (1803) (emphasis added), because a law repugnant to the Constitution "is void, and is as no law[.]"⁷⁰⁶

Scalia relied on a distinction between (1) unconstitutional state "law" (e.g., Ohio's unconstitutional statute of limitations), which federal courts

705. See *supra* notes 596–599 and accompanying text.

706. *Reynoldsville*, 514 U.S. at 759–60 (Scalia, J., concurring) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880); *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923)).

always are obliged to "void," and (2) mere "cognizable 'wrong[s],' " or official torts, which judges may properly be forbidden to "remedy" by qualified immunity and like doctrines. Scalia failed, however, to say why the distinction *justifies* the difference in treatment of unconstitutional laws and torts and, particularly, how a court avoids constitutional treason when an official's unconstitutional act is "cognizable"—i.e., when, as in the qualified immunity cases,⁷⁰⁷ the court has the act before its eyes—and yet denies relief. He also failed to explain why (under his analysis) unconstitutional state court decisions of the sort reviewed in the *Teague* context fall in the "official tort," not the "state law," category.

Reynoldsville thus confirms the principle that Article III courts must effectuate their independent federal legal determinations in reviewing state decisions, but it does not adequately explain how qualified immunity and *Teague* can coexist with that principle. We answer that question in Part III, after completing our exegesis of the doctrine through which the Court has carried into operation the qualitative judicial protections on which the Framers relied to cure the "vices" of state law.

E. *Preserving Spot-Checking Practicalities: Northern Pipeline*

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held in violation of Article III a bankruptcy act giving Article I judges jurisdiction over all civil matters "'related'" to bankruptcy proceedings, subject to independent Article III court review of legal and mixed conclusions and "clear error" review of factfindings.⁷⁰⁸ At issue was a bankruptcy judge's adjudication of contract, coercion, and misrepresentation claims under state law that a bankruptcy petitioner had asserted against a creditor.⁷⁰⁹

The decision's limits on Article I court jurisdiction are not clear. The plurality applied a rule that, although broad—all adjudicatory acts encompassed by "the judicial power of the United States must be exercised by courts having the [independence-assuring] attributes prescribed in Art. III"—was riddled with exceptions—e.g., territorial and District of Columbia courts, courts martial, and administrative adjudication of "public rights" (roughly statutory rights lacking close constitutional or common law analogues).⁷¹⁰ The plurality also acknowledged Congress's power to assign "virtually all matters that might be heard in Art. III courts . . . to state courts," but dismissed this qualification as unimportant because it raised no "separation of powers threat[]."⁷¹¹ Two concurring Justices adopted a narrower approach, objecting only to the act's assign-

707. See *infra* notes 753–760, 774–800 and accompanying text.

708. 458 U.S. 50, 55 & n.5, 69 (1982) (plurality opinion) (relying on dicta in, e.g., *Crowell v. Benson*, 285 U.S. 22, 48–49, 56–58 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)).

709. See *id.* at 56.

710. *Id.* at 59, 63–70 & n.25 (plurality opinion).

711. *Id.* at 64 n.15 (plurality opinion).

ment to Article I judges of broad categories of *state law* claims.⁷¹² Since *Northern Pipeline*, the Court has taken a still narrower approach, letting administrative agencies adjudicate certain private state law disputes, albeit ones generated entirely by agency proceedings.⁷¹³ Interestingly, if the disputes at issue in these later cases had been excluded from Article I courts, they probably would have been shifted by Congress to Article III courts. The disputes accordingly presented a choice of federal forums that *did* have significant separation of powers—but no important federalism—implications.

Without precisely teasing out the rule of *Northern Pipeline* and its progeny, it is possible to discern several principles: (1) Article III places some limits on Congress's ability to assign federal questions to Article I courts lacking the independence "attributes prescribed in Art. III." (2) An Article III court's ability independently to review the Article I court's conclusions does not suffice to avoid the Article III problem, because "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal."⁷¹⁴ (3) Congress may, though, leave virtually any federal question to the state courts, despite their lack of Article III attributes *and* absent appellate review by Article III courts. And (4) factors weighing against allowing Article I court authority are the breadth of the grant of adjudicatory power, the proximity of the questions assigned to ones that have long existed at common law, as opposed to ones exclusively of Congress's creation, and the intermingling of the questions assigned with, or their encompassing of, state law questions.

Scholars on both sides of the debate over whether Article III requires federal court review of federal questions have found solace in one or another of the principles that emerge from *Northern Pipeline* and its progeny, without, however, accounting for the remaining implications. Professors Amar and Sager note *Northern Pipeline's* reasoning that adjudication by Article I judges lacking "independence from political forces" neutralizes Article III's insistence upon politically immunized judges and use that reasoning to support a constitutional rule requiring federal *appellate* review of state court federal question decisions.⁷¹⁵ But a *Northern Pipeline* analogy should push Amar and Sager to the view—which both reject⁷¹⁶—

712. See *id.* at 90–91 (Rehnquist, J., concurring in the judgment).

713. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 858 (1986) (permitting administrative agency to entertain state law counterclaims in federal reparation proceedings); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985) (permitting Congress to require submission to private arbitrators of certain disputes between private companies arising out of an administrative pesticides registration process in which one company piggy-backs on data submitted by another).

714. *Northern Pipeline*, 458 U.S. at 86 n.39 (plurality opinion); see *id.* at 79–81 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment).

715. *Id.* at 60 n.10 (plurality opinion); see Amar, *supra* note 17, at 225–26 & nn.78 & 81, 234–38; Sager, *supra* note 17, at 62–65.

716. See Amar, *supra* note 17, at 212–13, 230; Sager, *supra* note 17, at 34–35.

that federal appellate review cannot suffice because federal question cases must *begin* as well as end before independent Article III judges. In contrast, Professor Redish argues that the Constitution's independence-protecting "provision means only that if and when Congress employs judges of the federal courts as . . . enforcers of federal law, it may not interfere with their independence."⁷¹⁷ But, if so, why forbid Congress to employ Article I judges (as *Northern Pipeline* did) when doing so does not undermine Article III judges' independence in cases *within their jurisdiction*?

Assimilating *all* of the principles that emerge from the *Northern Pipeline* cases, our analysis identifies a previously unacknowledged mechanism through which the doctrine enables independent judges to discharge their Article III duties. Contrary to the plurality's justification of *Northern Pipeline* on separation of powers, not federalism, grounds,⁷¹⁸ and contrary to Amar's and Sager's use of the decision to justify *decreasing* exclusive state court jurisdiction, the doctrine actually protects the Framers' chosen federal structure by *increasing* Congress's incentive to rely on state court jurisdiction—*subject, however, to Article III court review*—whenever Congress resists exclusive Article III court jurisdiction. The doctrine thus provides a modest constitutional assurance of the practical conditions on which the Framers relied to make their federal supremacy-assuring mechanism work, by impelling Congress to give Article III courts jurisdiction to review state court decisions often enough to provide a credible supremacy-maintaining "spot check." If Congress wants to use nationally committed tribunals to decide broad swaths of cases with common law analogues but affecting federal interests (cases the Framers might have expected to arise in state courts but then to prompt federal appeals), yet does *not* want to use Article III courts alone (e.g., because those courts are too insulated from conditions "on the ground"), *Northern Pipeline* makes Congress place those matters initially in state courts ("on the ground"), subject to appeal to nationally committed Article III courts.

In this light, what triggers the *Northern Pipeline* doctrine is not the assignment to Article I courts of any and all state law claims but, rather, the assignment to those courts of particular types of state law claims that, but for their conferral on Article I courts, almost assuredly would have been conferred on state courts subject to later federal appeal. *Northern Pipeline* thus creates a modest impetus to use the hybridized state-federal adjudicatory mechanism that was one of the Framers' most important innovations and that the Court so strenuously defended in *Martin*, *Cohens*, and *The Mayor* against attacks *premised* on its novelly hybridized structure.

717. Redish, *supra* note 9, at 150 (emphasis omitted); see Velasco, *supra* note 8, at 681–84 & n.52.

718. See *supra* notes 708–712 and accompanying text.

F. *Revisiting Hart's Dialogue*

At the tail end of Henry Hart's famous *Dialogue*, he briefly discusses a principal topic of this Article—the relative constitutional responsibilities of state and federal courts in federal question cases—in identifying an all-purpose back-up to supremacy-maintaining federal courts.

A. The state courts. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.

A. Congress can't do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.

Q. But the Supreme Court could reverse their decisions.

A. Not lawfully, if the decisions were in accordance with the Constitution. Congress can't shut the Supreme Court off from the merits and give it jurisdiction simply to reverse. Not, anyway, if I'm right . . . that jurisdiction always is jurisdiction only to decide constitutionally.⁷¹⁹

Slightly recasting this passage reveals how deeply unsettling was the note on which Hart ended his influential analysis of federal jurisdiction:

Q. You said the Constitution lets state courts hear nearly all federal questions. Why is that a good way to protect federal law?

A. Because the Supremacy Clause binds state courts to exercise that jurisdiction in accordance with the Constitution.

Q. Gee, that seems like a thin reed. Why can't Congress give the Supreme Court appellate jurisdiction and require it to reverse state court decisions made in accordance with the Constitution?

A. Congress can't keep the Supreme Court from deciding cases in accordance with the Constitution. In the appeal you describe, the Court would have to ignore Congress's manipulation of its jurisdiction and affirm.

Q. What a relief! But may Congress give state courts the *final* say in most or all federal questions cases?

A. Yes, it may.⁷²⁰

Q. What if Congress did that and the state courts shirked their Supremacy Clause duty?

719. Hart, *supra* note 5, at 1401–02.

720. See *id.* at 1363–64 (“Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.”).

A. We'd be sunk.

When written, a year before *Brown v. Board of Education*,⁷²¹ as the federal administrative state was expanding and federal judicial review appeared to be contracting,⁷²² Hart's assurance of review by state courts that Congress could not keep from enforcing federal rights *was* a relief. But after 45 years of federal court protection of federal rights to which state courts have been less sympathetic, Hart's untempered concession that, if Congress gives the state courts the final say over federal questions and they shirk their Supremacy Clause duties, "we really would be sunk" is *not* a relief. This has led Hart's disciples—relying on his admonitions not to "read[] the Constitution as authorizing its own destruction" and to read it instead to preserve "the essential role of the Supreme Court in the constitutional plan"—to argue that Article III must require (at least appellate) federal jurisdiction over all federal questions, else the federal judiciary's essential role in the constitutional plan would be destroyed.⁷²³ The problem, of course, is that Article III does *not* require federal "arising under" jurisdiction—as Hart was quick to point out.⁷²⁴ Our analysis provides a *different* response to Hart's unsettling conclusion, based not on the mandatory *quantity*, but on the mandatory *quality*, of Article III court review of state decisions.

We begin where Hart began, with the principle that a constitution generally should not be read to empower an agency the constitution creates and constrains to *reconstitute* itself so as to neutralize the constraints. Although most observers accept this point, many roundly criticize Hart for advocating an "essential role of the courts" limitation on Congress's power to control the courts that (in Hart's own word) is "indeterminate"—i.e. (in his critics' words), "absolutely [lacking in any] indication of exactly what [federal judicial] functions were deemed 'essential,' how anyone was to answer that question, or on what basis [Hart] found a limitation in the Constitution."⁷²⁵ This criticism is wrong in two senses. First, "essential functions" analysis is determinate enough to have generated huge chunks of American constitutional law, including all separation of powers doctrine and much doctrine devoted to federal-state relations. Consider, for example, Chief Justice Marshall's analysis of state taxation of the National Bank:

How far [the states' power to tax federal entities is] controlled by [the Constitution] must be a question of construction. In making this construction, no principle not declared, can be ad-

721. 347 U.S. 483 (1954).

722. See Hart, *supra* note 5, at 1377–81, 1391–95.

723. *Id.* at 1365; see, e.g., Eisenberg, *supra* note 17, at 522, 527; Ratner, *supra* note 18, at 160–61; Sager, *supra* note 17, at 42–68; see also Amar, *supra* note 17, at 248–49 (advocating a similar position but not linking it to Hart).

724. See *supra* note 720.

725. Hart, *supra* note 5, at 1365; Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 Vill. L. Rev. 900, 906 (1982).

missible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.⁷²⁶

Second, Hart *did* specify the essential judicial functions and where they and their limitations on Congress are found in the Constitution. That specification is the subject of his entire article. The reasons those "essentialities" are obscure to writers focused on the quantity of federal jurisdiction vis-à-vis the states are that (1) Hart discussed them entirely in the context of federal jurisdiction vis-à-vis other federal branches, and (2) they have nothing to do with the essential *quantity* of federal jurisdiction and everything to do with the essential *qualities* that Article III requires federal judges to exhibit in exercising whatever jurisdiction Congress gives them to review federal official behavior.

What are those qualities? If Hart's *Dialogue* were instead a list it would look something like this:

1. Congress's power to declare exceptions to federal jurisdiction to review federal agency action is plenary, unless so little is left that the exceptions "engulf the rule."⁷²⁷
2. Congress also has nearly plenary control over whether to waive sovereign immunity and permit itself to be sued and over the appropriate remedy for wrongs in cases in which it has conferred jurisdiction.⁷²⁸
3. There are, however, a number of *practical* and *quality*-focused limits on Congress's power that, taken as a whole, entail the federal courts' essential function:⁷²⁹
 - a. Pragmatically, Congress often cannot immunize the United States from suit or withdraw federal jurisdiction to review its behavior because (i) doing so is politically untenable; (ii) sovereign

726. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); see, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997) (barring congressional commandeering of state executive officials, on "consideration of the structure of the Constitution . . . [and] its 'essential postulate[s]'" (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934))); *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (federal statute setting minimum voting age in state elections interferes with states' "essential function"); *Principality of Monaco*, 292 U.S. at 322, 328–29 (withdrawing states' sovereign and Eleventh Amendment immunity when they are sued by the United States or another state for reasons "inherent in the constitutional plan" and "essential to the peace of the Union"); *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900) (voiding federal statutory qualifications for state office because they usurp a power "obviously essential to the independence of the states").

727. Hart, *supra* note 5, at 1364, 1367–68, 1372–73. Hart focuses at some points on Supreme Court jurisdiction, see, e.g., *id.* at 1363–65, and at other points on lower federal court jurisdiction, see *id.* at 1387–88, 1396.

728. See *id.* at 1366–74.

729. See *id.* at 1365.

immunity only immunizes the United States itself and not individual officers from suit and, once its employees are sued, the government has an incentive to protect them by providing a remedy against itself; and (iii) cutting out the courts deprives Congress of too important a tool for enforcing its policies.⁷³⁰

- b. If Congress gives federal courts criminal or civil enforcement,⁷³¹ or even preenforcement, jurisdiction over agency behavior—including merely a “general” grant of federal question or habeas jurisdiction⁷³²—Congress may not then (i) forbid the Court to apply the whole constitutional law in deciding the validity of the government acts before it;⁷³³ (ii) tell the court how to decide the constitutional question thus presented;⁷³⁴ or, apparently, (iii) withhold particular remedies for violations thus found “without [providing] *other* modes of redress.”⁷³⁵

Hart’s application of the very last set of principles to cases covered by a general grant of habeas jurisdiction to review federal custody under federal law illustrates his overall conclusions:

The great and generating principle of this whole body of law [is] that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus. For then the court has always to inquire, not only whether the statutes have been observed, but whether the petitioner before it has been “deprived of life, liberty, or property, without due process of law,” or injured in any other way in violation of the fundamental law.

....

That principle forbids a constitutional court . . . from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if *Marbury v. Madison* still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ which informed it that the applicant . . . lay

730. See *id.* at 1367, 1370; *id.* at 1397 (“Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions? Is there some new science of government that tells how to do it in some other way?”).

731. See *id.* at 1372, 1378–83.

732. See *id.* at 1373–75, 1387–88, 1396.

733. See *id.* at 1379–80, 1383.

734. See *id.* at 1373 (“[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. Rutledge makes that point clearly in the *Yakus* case, as the Court itself made it clear long ago in *United States v. Klein*.” (footnotes omitted)).

735. *Id.* at 1368 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 250 (1845) (emphasis added)); see *id.* at 1366 (“The power of Congress to regulate jurisdiction gives it a pretty complete power over remedies . . . [and] to deny rights,” but the grant of jurisdiction and “[t]he denial of *any* remedy” is constitutionally problematic.).

stretched upon a rack with pins driven in behind his finger nails pursuant to authority duly conferred by statute⁷³⁶

The extent to which Hart's *Dialogue* foreshadows our idea of the judicial power should now be clear. The insight we claim is this: Hart's brilliant conception of the "essential functions" of the federal courts and the federal system—developed entirely in service of a separation of powers constraint on the capacity of the national administrative state to subvert the supremacy of federal law—was in fact the brilliant conception of those courts and that system that the Framers and Supreme Court previously had developed in service of a separation of powers *cum* federalism constraint on the power of Congress *and* the states to subvert the supremacy of federal law. Hart, simply (brilliantly) retooled the Framers' conception, and we (embarrassing to say, this far into a long article) have simply re-retooled it back to its original conception.

III. "THE JUDICIAL POWER" AND THREE CONSTITUTIONALLY EXCLUSIVE CHOICE OF LAW RULES: QUALIFIED IMMUNITY, *TEAGUE*, AND SECTION 2254(d)(1)⁷³⁷

The Framers' gamble paid off. Except for Congress's temporary withdrawal of appellate (but not original) habeas jurisdiction in the *McCardle* affair,⁷³⁸ and despite recent proposals to withdraw jurisdiction over desegregation, school prayer, abortion, and other cases,⁷³⁹ the jurisdiction-preserving practicalities on which the Framers relied (boosted modestly by *Northern Pipeline*) have sustained (1) federal jurisdiction over controversial federal questions and (2) credible supervision of state judges' Supremacy Clause functions. As *Hayburn's Case*, *Marbury*, *Gordon*, *Klein*, *Crowell*, *Plaut*, and *Boerne* reveal, *the bigger threat is not that Congress will withhold jurisdiction over important federal questions but that it will confer jurisdiction and try to control its exercise*. *Martin*, *Cohens*, *Ableman*, *The Mayor*, and *Reynoldsville* reveal a similar temptation on the part of the states and state courts to frustrate aspects of "[t]he judicial Power." Moreover, through the influence of the states in Congress,⁷⁴⁰ the latter threat may intensify the former one. Posing this last danger is the gloss that three circuit courts recently have placed on 28 U.S.C. § 2254(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996,

736. *Id.* at 1393–94.

737. Some of the ideas in this Part were initially developed by Professor Liebman in briefs for the petitioner in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd, 117 S. Ct. 2059 (1997), relief granted on remand, 124 F.3d 899 (7th Cir. 1997), cert. denied, 118 S. Ct. 739 (1998) (discussed *infra* notes 822–848 and accompanying text).

738. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); see Liebman & Hertz, *supra* note 389, § 2.4d, at 47–48 (discussing 1885 restoration of Court's appellate habeas jurisdiction); *supra* note 361.

739. See Hart & Wechsler, *supra* note 37, at 350–51 nn.15–16 (listing proposals).

740. See *supra* note 353 and accompanying text.

which obliges Article III courts (1) to consider the legality under federal law of state decisions upholding custody but (2) to give effect to state decisions found to *conflict* with federal law, unless the conflict with supreme law is "more than clear" or is "grave."⁷⁴¹

Analyzing section 2254(d)(1) requires us first to resolve an issue left open by *Reynoldsville*: whether the Court (in Marshall's terms) commits constitutional treason when it (1) gives state officials qualified immunity for acts violating federal law that was not "clearly established" when the acts occurred, or (2) (under the *Teague* rule) denies state prisoners habeas relief based on "new rules" of federal law that are in effect when the habeas petition is adjudicated but were not in effect when the prisoners' convictions became final in state court.⁷⁴² Section 2254(d)(1) similarly compels a temporally focused choice of law forbidding relief based on a federal court's reading of federal law when it rules and requiring it instead to apply law from an earlier time. If "[t]he judicial Power" forbids *all* constitutionally exclusive choices of law, then important lines of recent Court precedent are invalid. And if some such rules can coexist with the Framers' and the Court's conception of that Power, it becomes important to know *which* rules are permissible and why.

A simple answer might be that legal blinders Congress *imposes* on the courts present separation of powers problems that blinders the courts *volunteer* to wear do not—much as the President's, Congress's, or a state court's "revision" or "overruling" of a federal district court's decision presents problems that reversal or overruling by the same or a superior federal court does not.⁷⁴³ Although it is arguable that strategic exercises of judicial restraint might sometimes enhance the prestige and thus the checking capacity of the federal courts vis-à-vis the other branches and the states, we are unwilling so easily to abandon the Framers' and Marshall's belief that the federal courts' prestige and authority depend above all else on their unstinting exercise of supremacy-maintaining responsibility in every case within their jurisdiction, no matter how difficult.

741. See decisions cited *supra* note 33; *infra* note 822.

742. See *supra* notes 667, 688–707 and accompanying text.

743. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (distinguishing reversal by superior federal court from reversal by Congress); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 525–26 (1859) (distinguishing reversal by superior federal court from reversal by state courts); Amar, *supra* note 17, at 267 (suggesting that self-imposed limit on jurisdiction when Court denies certiorari is less serious than congressional denial of jurisdiction); Friedman, *supra* note 25, at 11–27 (describing qualified immunity and *Teague* as permissible self-imposed constraints). Compare *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (declining to adhere to *stare decisis* and overruling prior constitutional holding), with *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Congress may not order or expect the Supreme Court to "treat its [constitutional] precedents with [less than] the respect due them under settled principles, including *stare decisis*").

A. *Qualified Immunity and Teague*

Under the qualified immunity rule, "government officials performing discretionary functions [] generally are shielded from [damages] liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷⁴⁴ Analogously, *Teague* "prevents a federal court from granting habeas corpus relief to a state prisoner based on a [new] rule announced after his conviction and sentence became final."⁷⁴⁵ A rule is "new" and thus unavailable for application on habeas if, at the time the prisoner's conviction became final, the rule was one about which "'reasonable jurists [could] disagree.'"⁷⁴⁶

Our analysis suggests three possible understandings of each doctrine. First, each might require the reviewing court to "defer" to the public official's or state court's "reasonable" interpretation of federal law. Second, as Fallon and Meltzer's account of the doctrines suggests, each may require the reviewing court to deny relief, despite concluding that a constitutional violation occurred, because the official or court acted "reasonably" in believing that the behavior or decision at issue was legally permissible.⁷⁴⁷ Third, both doctrines may require the reviewing court to apply the governing federal rule independently and to afford necessary relief, while (a) imposing a choice of law in favor of the rule in effect when the public official or state court acted, and (b) defining that rule as the one that "all reasonable actors" would have understood to be in effect at that time. The first two understandings treat qualified immunity and *Teague* as addressing the merits, i.e., whether a violation occurred and, if so, what remedy should be imposed. In doing so, the first understanding threatens the "independent interpretation" ingredient of "[t]he judicial Power"; the second understanding preserves independent interpretation but threatens the "remedial effectualness" ingredient. The third understanding treats the "reasonableness" test as addressing not the merits but the threshold question of what federal legal standard the reviewing court will apply when it eventually reaches the merits. It thus preserves the independence and effectualness ingredients but threatens the "whole supreme law" principle.

An example illustrates the three approaches. Assume that A is falsely convicted based on her own confession. Assume further that, after being released upon conclusive proof of her innocence, A brings a federal sec-

744. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

745. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). The doctrine has exceptions for new rules that (1) immunize behavior from criminal sanction or (2) create "watershed" criminal procedure protections against convicting the innocent. See *id.* at 396.

746. *Id.* at 395 (quoting *Sawyer v. Smith*, 497 U.S. 227, 234 (1990)) (alteration in original). A conviction becomes final upon completion of direct review in the state courts and certiorari review in the Supreme Court. See *id.* at 390.

747. See Fallon & Meltzer, *supra* note 37, at 1813-24 (discussed *infra* notes 774-799 and accompanying text).

tion 1983 action for damages against the police officers who interrogated her, claiming they violated her Fifth and Fourteenth Amendment rights by using a series of psychological stratagems to make her confess "involuntarily," in contravention of the 1936 rule of *Brown v. Mississippi*,⁷⁴⁸ which asks "whether under the totality of the circumstances the defendant's will was overborne."⁷⁴⁹ The Court repeatedly has defined the test as posing a mixed question of law and fact that Article III courts are duty-bound to answer independently.⁷⁵⁰ Assume, finally, that the defendant police officers claim qualified immunity. Switching to a habeas scenario, assume that, instead of being released, A is convicted at trial and her conviction is affirmed by the state's high court on direct appeal over her "involuntary confession" objection. Assume that A then seeks federal habeas relief on the same ground, and the state invokes *Teague*.

Now assume that in each case the reviewing federal court finds the "voluntariness" question (quoting Marshall in *Cohens*)⁷⁵¹ "difficult[]" or "doubtful" under the totality of circumstances but, applying its best judgment, would conclude that A's will was overborne by the interrogation. Under the first (deference) approach above, the reviewing court would defer to the police officers' or state court's reasonable judgment that the officers committed no constitutional violation under the circumstances, though the reviewing court's independent judgment on that question was to the contrary. Under the second (remedial limits) approach, the result would be the same but the analysis would differ: The reviewing court would reach its own independent judgment that a violation occurred but would withhold relief because the officers' or state court's judgment, although in error, was not "unreasonably" so. Under the third (choice of law) approach, the outcome as well as the analysis would differ. Because the "voluntariness" test was well-established when the interrogation took place (all reasonable police officers should have known of that standard based on *Brown* and subsequent decisions), the court would "choose" *Brown's* voluntariness test as the law to apply, independently conclude that A's will was overborne, and grant relief.⁷⁵²

1. *Interpretive Independence and Remedial Effectualness*. — In the qualified immunity context, after initially toying with the third (choice of law)

748. 297 U.S. 278 (1936).

749. *Veilleux v. Perschau*, 101 F.3d 1, 3 (1st Cir. 1996) (per curiam); see, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

750. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 694 (1993).

751. See supra notes 664–667 and accompanying text.

752. The choice among these approaches matters. Compare *Lindh v. Murphy*, 96 F.3d 856, 876–77 (7th Cir. 1996) (en banc) (Easterbrook, J.) (applying second of three approaches described in text and concluding that denial of cross-examination into potential bias of prosecution witness, although unconstitutional in the opinion of "some members" of the court, was not sufficiently grave or "unreasonable" to warrant habeas relief), rev'd, 117 S. Ct. 2059 (1997), with *Lindh v. Murphy*, 124 F.3d 899, 902 (7th Cir. 1997) (Easterbrook, J.) (on remand, after reversal, applying third of three approaches described in text and granting relief), cert. denied, 118 S. Ct. 739 (1998).

approach, the Court has opted for the second (remedial limits) approach. In the *Teague* context, the Court has rejected the second and opted for the third approach. We first consider how this happened and then why.

a. *Qualified Immunity*. — In applying qualified immunity, the Court repeatedly has told federal courts to resolve as a threshold matter—before reaching “the merits”—the question whether the constitutional rule under which the plaintiff claims relief was “clearly established” when the defendant official allegedly harmed her.⁷⁵³ Only if the rule was clearly established may the reviewing court reach the merits. In *Mitchell v. Forsyth*, in 1985, the Court further ruled that a defendant official may take an immediate, interlocutory appeal when a trial court denies her motion to dismiss a complaint that, she claims, relies on a rule that was not clearly established when the violation allegedly occurred.⁷⁵⁴ Such rulings are immediately appealable, the Court concluded, because they fall within the “‘small class [of interlocutory orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action . . . [and are] too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.’”⁷⁵⁵ *Mitchell* thus concluded “that a claim of immunity is *conceptually distinct* from the merits of the plaintiff’s claim that his rights have been violated”—it does not turn on “the correctness of the plaintiff’s version of the facts, nor even . . . [on] whether the plaintiff’s allegations actually state a claim . . . [but only on] whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.”⁷⁵⁶

Mitchell thus seemed to adopt the third approach to qualified immunity, requiring a choice of law in favor of “the legal norms . . . [that] were clearly established at the time of the challenged actions.” Eschewing the first (deference) approach, reviewing courts were not to say, in effect: “In our judgment, a violation of the governing constitutional norm has occurred. But, deferring to the defendant’s ‘reasonable’ judgment, we will not find a violation.” Nor, pursuant to the second approach, were courts to say: “The defendant’s alleged conduct violates the governing federal legal standard, but damages are unavailable, even so, because the question is so close under the circumstances that the violation is not ‘unreasonable.’” Instead, the reviewing court had only to say: “The constitutional norm that applies—the rule all ‘reasonable’ officials would have known applied at the time the incident occurred—is X. Relief is denied because the plaintiff does not claim the defendant violated X (or be-

753. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

754. *Mitchell*, 472 U.S. at 524–29.

755. *Id.* at 524–25 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

756. *Id.* at 527–28 (emphasis added).

cause, when we 'look to' the merits under rule X, we see that defendant did not violate the governing law)."

In *Anderson v. Creighton*,⁷⁵⁷ in 1987, the Court took a different tack (albeit without expressly overruling *Mitchell*). The plaintiffs alleged that the defendant officer lacked probable cause for mistakenly believing that a bank robber was hiding in their home when the officer searched it. Because the "probable cause" standard was well established, the lower court and Supreme Court dissent deemed qualified immunity inapplicable and called for consideration of the merits.⁷⁵⁸ The majority ruled, however, that a police officer who had "reasonably but mistakenly conclude[d] that probable cause [was] present . . . should not be held personally liable" for damages.⁷⁵⁹ Adopting the second approach above (making damages unavailable in close cases), the Court ruled that the officer deserved immunity—though he could not reasonably have mistaken the governing standard when he acted—if he could show that "a reasonable officer could have believed [the particular] . . . search to be lawful, *in light of* [the] clearly established law and the information [he] possessed."⁷⁶⁰

b. *Teague*. — The *Teague* doctrine requires federal courts to treat as a "threshold" question—prior to the merits—whether the legal rule the habeas petitioner seeks to apply is "new" (i.e., was not in effect when the petitioner's conviction became final) and thus is unavailable in habeas cases.⁷⁶¹ In *Wright v. West*, in 1992, the Court addressed the question whether *Teague* requires either interpretive or remedial deference to reasonable state court interpretations of the constitutional law governing the suit (the first or second approach) or, rather—as the doctrine's "threshold" status suggests—imposes a choice of preexisting law, while obliging the reviewing court to apply that law independently and award any relief the law warrants (the third approach).⁷⁶² The answer *Wright* gave left the *Teague* doctrine about where *Mitchell* had initially located the qualified immunity doctrine, in the third, choice of law category.

The habeas petitioner in *Wright* claimed that Virginia had convicted him unconstitutionally based on evidence insufficient to convince a rational juror of his guilt beyond a reasonable doubt⁷⁶³—a standard the Court had adopted 15 years earlier and identified as a "mixed question" requiring independent federal court review.⁷⁶⁴ The "sufficiency" issue in

757. 483 U.S. 635 (1987).

758. See *id.* at 637–38; *id.* at 663–64 (Stevens, J., dissenting).

759. *Id.* at 641.

760. *Id.* (emphasis added). Confusion in the lower courts, see Fallon & Meltzer, *supra* note 37, at 1752–53 & n.111, suggests that *Anderson's* and *Mitchell's* analyses persist in uneasy tension.

761. See, e.g., *O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997); *Goeke v. Branch*, 514 U.S. 115, 117 (1995).

762. 505 U.S. 277, 284 (1992) (plurality opinion).

763. See *id.* at 283.

764. See *Jackson v. Virginia*, 443 U.S. 307, 323–24 (1979).

Wright presented a close question under the circumstances—the court of appeals having granted relief, the Supreme Court ultimately denying it. Virginia argued that, under *Teague*, the Court had to defer to the state court's reasonable answer to that close question, whether or not the Court independently agreed with it.⁷⁶⁵ The prisoner argued that *Teague* merely defined the appropriate legal rule—the “rational juror” insufficiency test that was in effect when the case became final—which the Court then was obliged to apply independently to the facts.⁷⁶⁶

Presented with these arguments, three Justices interpreted *Teague* to require the federal habeas court adjudicating the issue to “defer” to the state court ruling on the question as long as reasonable minds could differ on whether the evidence in the case was sufficient to convince a rational juror beyond a reasonable doubt.⁷⁶⁷ Four Justices wrote or joined opinions concluding that *Teague*'s “reasonableness” test comes into play only when a court is trying to decide which rule to apply, obliging the court thereafter to deploy the rule independently and grant the relief it warrants no matter how close the case.⁷⁶⁸ And the Court as a whole proceeded to adjudicate the “sufficiency” claim independently (and to deny relief).⁷⁶⁹ Since *Wright*, the Court repeatedly has granted habeas relief based on its own independent resolution of “close” mixed questions, and no Justice has recurred to the three Justices' contrary suggestion in *Wright*.⁷⁷⁰

In her opinion in *Wright*, *Teague*'s author, Justice O'Connor, rejected the first understanding of *Teague*—requiring a federal court to defer to reasonable, if (by the court's lights) erroneous, state court legal and mixed conclusions. Evoking *Marbury*, Justice O'Connor wrote:

[T]his does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.⁷⁷¹

Justice Kennedy's opinion in *Wright* then rejected the second approach to *Teague*—imposing remedial limits à la *Anderson* in the qualified immunity arena—in favor of the third approach—imposing a choice

765. See *Wright*, 505 U.S. at 281–82, 294 (plurality opinion).

766. See *id.* at 294–95.

767. *Id.* at 291 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

768. See *id.* at 304–05 (O'Connor, J., concurring, joined by Blackmun and Stevens, JJ.); *id.* at 309 (Kennedy, J., concurring).

769. See *id.* at 295–97 (plurality opinion) (concluding, upon independently considering the question, that the evidence was sufficient to support the conviction—a view adopted by all nine Justices).

770. See, e.g., *Thompson v. Keohane*, 116 S. Ct. 457, 460 (1995); *Kyles v. Whitley*, 514 U.S. 419, 454 (1995); *Withrow v. Williams*, 507 U.S. 680, 694 (1993).

771. *Wright*, 505 U.S. at 305 (O'Connor, J., concurring).

of law à la *Mitchell*. As explained by Justice Kennedy, *Teague* requires independent review and relief (if merited) when the prisoner relies on a legal rule that was in effect at the time the state courts ruled and that was intended from the start to apply to a wide range of situations, including the one before the court—no matter how susceptible to reasonable disagreement that “mixed” question might be in the particular case:

Whether the prisoner [is *Teague*-barred] . . . depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The [constitutional sufficiency of the evidence] rule . . . is an example. By its very terms it provides a general standard which calls for some examination of the facts. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule⁷⁷²

Justice Kennedy's approach divides rules relied on in habeas cases into two types—general rules designed for a myriad of situations (e.g., the involuntary confession rule) and specific rules governing narrow categories of behavior. If long in effect, general rules make the habeas choice of law easy. Not so specific rules, because the established ones often do not cover the behavior actually before the court and only supply a basis for extrapolating an appropriate rule by analogy. If the proper analogy when the state court ruled was uncertain, as often will be the case, the rule the state court chose is likely to seem “reasonable” and, if so, under Justice Kennedy's analysis, will bind the federal court to the same choice. Only occasionally will extrapolation from preexisting rules reveal that the one the prisoner advances on habeas review was clearly the correct one and that the different rule the state court chose was “unreasonable.”⁷⁷³

772. *Id.* at 308–09 (Kennedy, J., concurring); *supra* note 770 (citing recent decisions utilizing Justice Kennedy's approach).

773. An example is Justice Kennedy's opinion for the Court in *Stringer v. Black*, 503 U.S. 222 (1992). Before *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Court had left open whether the Eighth Amendment requires resentencing when a court invalidates one of several aggravating factors that a jury balanced against mitigating factors to reach a death verdict. The Court previously had held that where the statute required the jury to consider but not to “weigh” aggravators and mitigators, the invalidity of one of the aggravators did *not* require resentencing; and the Mississippi Supreme Court had followed the latter rule in the “weighing” context. See *Stringer*, 503 U.S. at 229–30. In *Clemons*, however, the Court reversed the Mississippi court, ruling that, in “weighing” contexts, invalidation of one of the aggravators *does* require resentencing. To decide whether *Clemons* adopted a “new rule” that was *Teague*-barred in cases then pending on habeas, the Court first considered whether the *Clemons* subrule had “emerge[d] . . . from any single case.” *Id.* at 232. Because no case had “dictated” the subrule, the Court considered the impact of more general precedent, holding that the interplay of two lines of authority left “no arguable basis to support the view . . . that at the time petitioner's sentence became

c. *Why the Difference?* — In our involuntary confession example, the “reasonableness” of the officer’s constitutional error immunizes him from section 1983 damages, suggesting a “remedial limits” approach. But the “reasonableness” of the state court decision finding no error does *not* bar habeas relief under *Teague*, ruling out a “remedial limits,” and adopting a “choice of law,” approach. Thus, Fallon and Meltzer’s account, which assimilates both doctrines to a “remedial limits” approach and overlooks differences in the outcomes they generate, is incomplete.⁷⁷⁴

Our analysis suggests two reasons why the Court has required Article III courts in the qualified immunity, but not the *Teague*, context to deny relief after reaching the merits and finding a violation of established federal law. First, in Hart’s words, “[t]he denial of *any* remedy is one thing But the denial of one remedy while another is left open . . . can rarely be of constitutional dimension.”⁷⁷⁵ Article III does not demand a remedy for every effect of every violation of federal law but only a remedy that preserves the law’s supremacy by depriving contrary state action (over which a court has jurisdiction) of official sanction. For that purpose, a declaration or injunction serves as well as damages—and qualified immunity bars neither of the former.⁷⁷⁶ Because qualified immunity often leaves some relief available, it poses less of a threat to the remedial effectualness ingredient of the judicial power than *Teague*, which almost *always* bars the *only* available relief.⁷⁷⁷ This is not the whole answer, how-

final the Mississippi Supreme Court was permitted to apply a rule of automatic affirmance . . . when one [of several aggravators] is invalid.” *Id.* at 231. Accordingly, because, even before *Clemons*, no “reasonable minds could differ” about its rule, the rule applied in habeas. *Id.* Also holding unreasonable a state court’s application of clearly established Supreme Court precedents that were merely relevant to, but did not directly govern, the issue at hand are, e.g., *Tuggle v. Netherland*, 516 U.S. 10, 13–14 (1995) (*per curiam*); *Stansbury v. California*, 511 U.S. 318, 322–26 (1994) (*per curiam*).

774. Cf. Fallon & Meltzer, *supra* note 37, at 1813–24 (discussed *supra* notes 37, 697 and accompanying text; *supra* note 399; *infra* note 797).

775. Hart, *supra* note 5, at 1366.

776. See, e.g., *Ryder v. United States*, 115 S. Ct. 2031, 2037 (1995); Fallon & Meltzer, *supra* note 37, at 1749 n.88, 1751 n.103, 1821. Because qualified immunity for state officials is not jurisdictional, it potentially imposes qualitative constraints on the exercise of jurisdiction that the Eleventh Amendment’s outright withdrawal of jurisdiction over suits against states does not. Both types of immunity, however, limit available relief in a similarly weak manner—forbidding one set of remedies (mainly damages) but allowing others (mainly injunctions) that generally “permit the federal courts to . . . hold state officials responsible to ‘the supreme authority of the United States.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 208 U.S. 123, 160 (1908)).

777. Because petitioners may only seek federal habeas relief after exhausting state remedies through state decisions that thereafter are *res judicata* in subsequent state actions, see 28 U.S.C. § 2254(b) (1994), and because section 1983 relief in actions challenging state procedures leading to conviction are barred unless the plaintiff first overturns the conviction in state court or in federal habeas proceedings, see *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), a denial of habeas relief under *Teague* virtually assures that no other relief is available. That state court remedies *previously* were available to the prisoner might be dispositive of the due process question whether the prisoner had

ever, because standing to secure, and the standards for, prospective relief require a showing that unlawful acts are likely to occur and injure the plaintiff in the future. These factors might possibly combine with qualified immunity to preclude relief for section 1983 plaintiffs injured by official action in violation of then-existing federal law.⁷⁷⁸

This leads to our second point. Recall that Madison's central goal at the Convention was *not* to secure the supremacy of federal over state "*authority*," but—in the words of the Supremacy Clause that emerged from the August revisions conforming it and the "arising under" clause—that "[t]his Constitution and the laws of the United States . . . shall be the supreme *law* of the Land; and the judges in the several States shall be bound thereby in their *decisions*; any thing in the *constitutions* or *laws* of the several States to the contrary notwithstanding."⁷⁷⁹ Repeatedly and consistently in Madison's and his allies' writings, speeches, and design of the national judiciary and national negative, and in Rutledge's and Martin's Supremacy Clause substitutes for the negative, it was the "injustices" and "mutability of the *laws* of the States," and the capacity of the "*decisions*" of "the Judges of the several States" to control them, on which the Constitution focused.⁷⁸⁰ It is that "state *law*" and those state "*decisions*" that may "not[]withstand" contrary federal "*law*."

Moreover, it was the role of state "*judgments*" in making and controlling state "*law*" on which Chief Justice Marshall premised judicial review of the former in *Cohens*.⁷⁸¹ Thus, after noting the federal judiciary's duty to treat as "absolutely void" the "*laws* of a State, so far as they are repugnant to the constitution and laws of the United States," Marshall asked: "Is it unreasonable that [the judiciary] should also be empowered to decide on the *judgment* of a State tribunal enforcing such unconstitutional

a fair opportunity to challenge his conviction, but is not dispositive of the Article III question whether federal courts with jurisdiction can properly effectuate their conclusion that state decisional law conflicts with supreme law.

778. The Court has denied constitutional standing to section 1983 plaintiffs seeking prospective relief who failed to show an alleged "threat of injury . . . [that was] both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969)); see also decisions cited *infra* note 788 (discussing similar limits on the availability of section 1983 injunctions). Notably, however, the Court has never directly held that Article III permits a federal court to deny requested monetary *and* prospective relief to a plaintiff who *has* constitutional standing to sue an official for actual injuries caused by the official's violation of existing constitutional law—i.e., to a plaintiff capable of obliging a federal court to "look" at that violation. Cf. *Hunter v. Bryant*, 502 U.S. 224, 226 (1991) (*per curiam*) (denying damages on qualified immunity grounds to plaintiff who did not seek other relief); *Lyons*, 461 U.S. at 105 n.6 (dismissing injunction action for lack of constitutional standing after damages action was voluntarily severed for subsequent separate trial); Hart & Wechsler, *supra* note 37, at 267–68 & nn.4 & 5 (suggesting that issue is open).

779. See *supra* notes 53–55, 238–239, 247–249 and accompanying text.

780. 10 Madison Papers, *supra* note 55, at 212 (emphasis added); see *supra* notes 53–62, 109–113, 142–147, 152–154, 159–163, 166–173, 312 and accompanying text.

781. See *supra* notes 489–498, 664–667 and accompanying text.

law?"⁷⁸² He elsewhere answered that "[t]here is . . . nothing in . . . our constitution . . . which would justify the opinion, that the confidence reposed in the States was so implicit, as to leave in them *and their tribunals* the power of resisting or defeating, *in the form of law*, the legitimate measures of the Union."⁷⁸³ The Court's numerous decisions enforcing a "duty" of "independent" federal review of "mixed" legal and factual state court determinations because of their capacity to make "*law*" rest on the same principle, that state judicial decisions making unconstitutional law are no less "void" than state statutes doing the same.⁷⁸⁴

These considerations explain the Court's devotion to the independence and remedial effectualness principles in the *Teague*/habeas context. Habeas cases require federal judges to review the "law" made by state "Judges . . . in their *decisions*." Such cases accordingly subject to federal judicial scrutiny the constitutionally crucial behavior of the very state actors to whom the Supremacy Clause entrusts the central structural function of maintaining the fidelity of all state law and state action to supreme law—the very behavior and actors that Article III gives the national judiciary the central structural function of superintending through the jurisdiction that Congress finds it necessary and proper to confer.

Qualified immunity differs from *Teague* in this regard. "Law" as the Framers understood it is not made at the end of a police officer's baton, nor is the officer's stroke of the baton behavior to which the Constitution entrusts a supremacy-maintaining function. Structural supremacy-based concerns—concerns that override all others to which "[t]he judicial Power" attends⁷⁸⁵—thus are not implicated if a federal court in a section 1983 action "looks" at the case, finds a violation of then-existing constitutional law, but denies damages on qualified immunity grounds and prospective relief on standing and equitable grounds.⁷⁸⁶ Moreover, when an officer's swing of the baton *does* make state law—when it constitutes "[official] policy or custom"⁷⁸⁷—then *for that reason*, existing doctrine *does* permit injunctive relief⁷⁸⁸ and, if the law, custom, or policy is that of a

782. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821) (emphasis added).

783. *Id.* at 388 (emphasis added); see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

784. See *supra* notes 639, 671 and accompanying text.

785. See *supra* notes 674–675 and accompanying text.

786. See *supra* note 778 and accompanying text.

787. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (quoting *Monell v. Department of Social Serv.*, 436 U.S. 658, 694 (1978)).

788. Injunctions against state officials, which are not barred by qualified immunity, see *supra* note 776 and accompanying text, are available upon proof that unconstitutional harms are likely to injure the plaintiff in the future, i.e., *inter alia*, that the unconstitutional acts are mandated by state law, constitute official policy, or are customary in the plaintiff's situation. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 106–08 & n.7 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Allee v. Medrano*, 416 U.S. 802, 812, 814–15 (1974) (enjoining "conduct [that] was . . . part of a single plan . . . [and] a pervasive pattern of intimidation" by state officials); *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *Hague v. CIO*, 307 U.S. 465, 505–06 (1939). So, although qualified immunity and a low probability

municipality, even suspends immunity and allows an award of *damages*.⁷⁸⁹ Thus, when state "law"—and particularly state law made by a "decision" of one of "the Judges in every State"—is under review, neither qualified immunity nor *Teague* requires deference to a state actor's interpretation of law or denial of effectual relief.

2. *The Whole, Supreme Law*. — But, having avoided the "interpretive deference" and "remedial ineffectualness" frying pan in the manner just described, does *Teague* nonetheless succumb to the "ignore supreme law" fire? Does it require what *Marbury* and *Klein* forbid—that Article III courts avert their eyes from their best judgment of the Constitution's current dictates? Granted there are strong policy reasons to protect the finality of state criminal judgments against the vagaries of unpredictably developing constitutional law.⁷⁹⁰ But what of the Article III judge's duty, upon pain of "treason to the Constitution," to apply the whole supreme law, no matter how "painful," "difficult," or "doubtful" doing so might be?

The answer to these questions comes directly from the Convention's and Court's particular conception of Article III judges' duty to decide the "whole question" based on the "whole law" in exercising "[t]he judicial Power." Professor Wechsler has distinguished three views of this duty in the process of endorsing the third:

The duty, to be sure, is not that of [1] policing . . . legislatures or executives, nor even . . . [2] of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty [3] to decide the litigated case and to decide it in accordance with the law⁷⁹¹

As we repeatedly have shown,⁷⁹² and as *Teague* confirms, Wechsler's preferred view of the duty to decide the "whole question" based on the "whole law" is not the Framers' or the Court's preferred view. An Article III judge's duty under the Supremacy Clause as adopted and interpreted is *not* the deontological one to do the right thing under the judge's best

of future harm might possibly bar damages and an injunction, at *least* an injunction is available when the challenged behavior amounts to "law."

789. See, e.g., *Board of County Comm'rs v. Brown*, 117 S. Ct. 1382, 1388 (1997); *id.* at 1403 (Breyer, J., dissenting) (distinguishing "a police officer's decision about how much force to use when making a particular arrest and a police chief's decision about how much force to use when making a particular *kind* of arrest"); *Monell*, 436 U.S. at 690–91 (a municipality is liable for damages if it "unconstitutional[ly] implements or executes a policy statement, ordinance, regulation, or [official] decision," or a "governmental 'custom' even though such a custom has not received formal approval through the body's official . . . channels"). Even when qualified immunity applies, the closer the defendant comes to being a policymaker, the weaker her protection. See Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 598 (1989) (under sliding-scale of "unreasonableness" that all circuit courts use, the greater the defendant's legal sophistication, the more likely it is that her deviations from well-established law as the court independently applies it are "unreasonable").

790. See, e.g., *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758–59 (1995).

791. Wechsler, *supra* note 303, at 6.

792. See *supra* notes 364–369, 399, 632–653, 674–675 and accompanying text.

current view of the law but, rather, the deterrent or *structural* duty to ensure that state judges “toe the constitutional mark”;⁷⁹³ to “serve[] as a necessary additional incentive [additional to the Supremacy Clause itself] for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards”;⁷⁹⁴ to engage in “independent judicial review . . . to the end that the Constitution as the supreme law of the land may be maintained.”⁷⁹⁵ Accordingly, although the “whole supreme law” and other qualitative ingredients of “[t]he judicial Power” are the constitutionally mandated means to Article III’s overriding supremacy-maintaining end, once that end is achieved, the means’ constitutional protection lapses.⁷⁹⁶

The Framers’ and the Court’s supremacy-focused conception of “[t]he judicial Power” consequently is not offended when, for good policy reasons, the Court insulates state judges from reversal and makes their decisions final—no matter how differently federal law *thereafter* develops—as long as those judges held up their end of the constitutional bargain by faithfully applying supreme law *at the time*. “The judicial Power” then consists of the independent resolution of the whole question based on the whole supreme law at the time the state court ruled and an effectual ability to nullify state decisions that violated state judges’ duty to subordinate state law to federal law. Once the federal court satisfies itself that state judges acted in accord with clearly established national law at the time, the *constitutional-structural mechanism* for preserving the supremacy of national law—i.e., the state judicial filter and the federal judicial spot-check—has functioned adequately, even if (for good policy reasons) the federal court’s best current understanding of federal law and the individual litigant’s rights under that law have not been enforced.

Fallon and Meltzer are thus correct that policy concerns properly affect the decision whether to confer federal jurisdiction over suits to remedy federal wrongs and, if so, whether to immunize official acts from damages or assess them under then-existing or current law. But they omit a crucial *qualitative limit* on remedial discretion that the supremacy-focused ingredients of “[t]he judicial Power” impose and that Congress and the Court traditionally have observed: Once jurisdiction is conferred, federal courts must possess and exercise an effectual remedial power to nullify state law contrary to federal law and state decisions con-

793. *Teague v. Lane*, 489 U.S. 288, 306–07 (1989) (quoting *Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J., concurring in the judgment)).

794. *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

795. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51–52 (1936) (emphasis added); see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (The judicial power “is a *structural safeguard*,” not “a remedy to be applied . . . when specific harm . . . can be identified. . . . [I]t is a prophylactic device . . .”).

796. See *supra* text following note 675.

trary to the obligation of "the Judges in every State" to maintain federal legal supremacy.⁷⁹⁷

There is another reason why habeas review under *Teague*, in the process of holding state judges to their constitutional obligation to effectuate the whole supreme law when they rule, cannot be said to divert federal judges from their structural obligation to effectuate that law. Recall (1) the core Madisonian aspiration of a large number of cases in which Congress provides for federal judicial spot-checking of state decisions, and (2) the crucial Madisonian decision to empower Congress to "ordain and establish" lower federal courts—even at a cost of surrendering mandatory Supreme Court review—in order to expand the federal judiciary's appellate capacity beyond what the Court could manage on its own.⁷⁹⁸ As we discuss below, habeas review under *Teague* follows precisely this Madisonian plan. It shifts the Court's appellate responsibilities to the lower federal judiciary (1) in quantities of state cases far broader than the Court could manage by itself and (2) in types of state cases in which there is a particularly high risk that state court enforcement of national rights will succumb to "the bias of local views and prejudices and . . . the interference of local [laws]."⁷⁹⁹ Understanding federal habeas judges as repositories and extensions of the Court's judicial power on direct review helps explain why it is not constitutionally problematic for *Teague* to hold those judges to the law in existence when the direct review for which habeas substitutes would have occurred. Rather than limiting the federal courts' exercise of "[t]he judicial Power" on review of state decisions, habeas (quantitatively) expands the occasions for the equivalent of the Court's own review of those decisions, while—even under *Teague*—(qualitatively) replicating the scope of that review.

797. Fallon and Meltzer do discern a limit on remedial discretion—that Congress and the Court must leave litigants with enough opportunities for judicial relief from officials' violations of federal law to keep government within legal bounds. See Fallon & Meltzer, *supra* note 37, at 1736. There are three difficulties with this approach: (1) It provides no measure of how much opportunity to enforce particular federal laws is "enough," nor do the authors cite any decisions purporting to undertake such an analysis. (2) The approach substitutes this unadministrable test for, and risks neutralizing, the Framers' own measure of how much enforcement is "enough"—a measure to which they devoted their full attention at the Convention toward the same supremacy-maintaining goal as Fallon and Meltzer identify—i.e., that "enough" enforcement occurs when Article III courts effectuate federal legal supremacy in every case over which Congress has found it necessary and proper to confer federal jurisdiction. Finally, Fallon and Meltzer cannot explain the absence of an authoritative statutory or judicial precedent for the view—tolerated by their analysis but not (as we read the cases) by, e.g., *Marbury*, *Martin*, *Cohens*, *Gordon*, *Ableman*, *Klein*, *Crowell*, *Reynoldsville*, and the Mixed Question Cases—that a federal court with jurisdiction to review a state law or decision that harmed a party in violation of then existing federal law may be denied the remedial power to nullify, and may even be forced to give full legal effect to, the illegal law or decision.

798. See *supra* note 95, 125–133, 162–163, 226 and accompanying text.

799. The Federalist No. 22, *supra* note 305, at 182; see *infra* notes 886–895 and accompanying text.

We are finally ready to answer the question we left open when we discussed *Reynoldsville*, namely, why the Ohio courts could not deny remedial effect to the Court's prior constitutional invalidation of an Ohio statute of limitations that was more onerous for out-of-state than for in-state tort defendants.⁸⁰⁰ Because the plaintiff and the Ohio Legislature had the same "retroactivity" concerns as defendants and state courts in the qualified immunity and *Teague* contexts, the answer is not (as the *Reynoldsville* majority suggested) the absence of good policy reasons to exercise remedial discretion. Nor does Justice Scalia's answer suffice. He correctly pointed out that federal courts must be able to effectuate their conclusion that state law is unconstitutional by nullifying it, though they need not always neutralize state action *short* of law in the same way. But his analysis does not explain why *Teague* gives state *decisional* "law" more favorable treatment than *Reynoldsville* gave state *statutory* law, i.e., why *Teague* scrutinizes state decisions under federal law in effect when the decision was made, while *Reynoldsville*, on Scalia's theory, scrutinized the state statute under federal law developed after the statute was enacted.

The answer to the *Reynoldsville* puzzle instead seems to be that the offending "law" there was not only the Ohio statute (which might arguably escape a retroactive remedy because it was adopted before the constitutional doctrine that invalidated it) but also the Ohio Supreme Court *decision*, which in reviewing that enactment failed to give effect to supreme law that had become well-established in the meantime. Thus, through the intervening *Bendix* case, the Court not only had invalidated Ohio's statute but also had prescribed the appropriate response—nonenforcement of the special statute of limitations for out-of-state defendants⁸⁰¹—which the Ohio high court had then undertaken to revise. What was intolerable under the Supremacy Clause, that is, was the Ohio court's default of its central structural duty to give effect to then-existing supreme law and deny effect to inconsistent state law.

B. Section 2254(d)(1)

1. *Two Statutory Meanings.* — Since 1867, habeas corpus has been statutorily available in "all cases where [a state prisoner was] restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."⁸⁰² The existing statute provides that "a district court

800. See *supra* notes 687–707 and accompanying text.

801. See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750–52 (1995) (discussing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988)).

802. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–87 (codified at 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994)); see, e.g., *Herrera v. Collins*, 506 U.S. 390, 403 (1993); *In re Converse*, 137 U.S. 624, 631 (1890); *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 325–26 (1868) (1867 Act provides a remedy "for every possible case of privation of liberty contrary to the National Constitution, treaties, or laws"; its scope is coextensive with "arising under" jurisdiction and thus "is impossible to widen"). Mr. Scheidegger, whose Legal Foundation seeks the repeal of the modern habeas writ, uses the opportunity provided by his response to this Article to reprint some of the Foundation's inaccurate broadsides on the subject.

shall entertain an application for a writ of habeas corpus in behalf of a [prisoner]" alleging that he is in custody due to a violation of federal law.⁸⁰³ Since 1989, the principal limit on habeas adjudication has been the *Teague* rule requiring federal courts to apply the law in effect when the prisoner's conviction became final. As is described above, *Teague* allows access to previously established "rule[s] of . . . general application . . . designed for . . . a myriad of factual contexts," but makes problematic reliance on narrower rules, not previously applied to the acts at issue and advanced by analogy to established rules governing different behavior.⁸⁰⁴

Between 1807 and 1879, the Court treated habeas jurisdiction as "clearly appellate" when the custody under review was court ordered.⁸⁰⁵ The Court had to do so to sustain its jurisdiction under the 1789 Act—still retained today—to entertain so-called "original" habeas writs, which are not encompassed by Article III, Section 2's delineation of the Court's original jurisdiction and thus are unconstitutional under *Marbury* unless they qualify (despite their name) as appellate. In Chief Justice Marshall's words four years after *Marbury*, "so far as that case has distinguished between original and appellate jurisdiction, th[e habeas jurisdiction.] which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."⁸⁰⁶ During this century, the Court has cited an 1883 habeas decision—which, importantly, involved executive, not judicial, detention so that the "appellate" description did not apply—for the proposition that habeas jurisdiction is "a new suit brought . . . to enforce a civil right."⁸⁰⁷ The view that "[h]abeas corpus is not an appellate proceeding, but rather

See Scheidegger, *supra* note 75, at Part IV. Where inaccuracies actually bear on this Article, we point them out. See *supra* notes 389, 639, 653, 672. Consider also Mr. Scheidegger's discussion of the statistic that "40% of state death row inmates are granted federal habeas relief," a "figure [he claims] has dropped off dramatically with time," to "15%," or even "8%," as of "the mid-1990s." Scheidegger, *supra* note 75, at 943 & n.390. The cases to which Mr. Scheidegger refers are in the federal reporters and can be either counted in *toto* or, as in Mr. Scheidegger's and the other study he cites, sampled for selected courts and years. One of the authors of this Article and colleagues are conducting a comprehensive study of all capital habeas cases that were finally decided in this country between the reinstitution of the death penalty after *Furman v. Georgia*, 408 U.S. 238 (1972), and the first Monday in October 1995 (the day each year when the largest number of habeas cases become final with the Court's denial of certiorari petitions filed in the summer). In that period, there were 603 such cases. In 232, or 38.5%, of them, relief was granted. The corresponding figures for the last year of the study, 1995, are that relief was granted in 9 of 21, or 42.9%, of the cases.

803. 28 U.S.C. § 2254(a) (1994); see *id.* § 2243.

804. *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in the judgment); see notes 761–773 and accompanying text.

805. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 374 (1880); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97 (1869); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807).

806. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100–01.

807. *Ex parte Tom Tong*, 108 U.S. 556, 559–60 (1883) (reviewing lower federal court's denial of writ to review detention by sheriff, absent court order).

an original civil action in a federal court,"⁸⁰⁸ is now the black-letter of the matter—on the "technical[]" ground that "the federal court is not formally reviewing a [state] judgment, but is determining whether the prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.'"⁸⁰⁹

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, section 2254(d)(1) of the Judicial Code provides:

An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States⁸¹⁰

Section 2254(d)(1)'s kinship with *Teague* (which the section seems to subsume and supplant) is obvious.⁸¹¹ As did *Teague*, section 2254(d)(1) requires federal habeas courts to apply the federal law in effect during direct review and distinguishes two types of claims. When a claim the state court adjudicated was governed by "clearly established Federal law" to which the state decision can meaningfully be described as "contrary"—i.e., law designed specifically for the situation at issue or for many situations including the one at issue—the federal habeas court must ascertain whether the state court "decision . . . was contrary to . . . [that] clearly established Federal law." "Contrary to law" review is a statutory term of art for one court's independent review of another court's legal and mixed rulings under governing law.⁸¹²

When there was *no* clearly established law to which the state court decision of the claim could meaningfully have been "contrary"—because the rule governing the situation at issue was *not* established and had to be extrapolated by applying clearly established law governing *different* situa-

808. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting).

809. *Lambrix v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (quoting 28 U.S.C. § 2254(a) (1994)). But see *Felker v. Turpin*, 116 S. Ct. 2333, 2338–39 (1996) (reaffirming Court's jurisdiction to grant so-called "original," but jurisdictionally *appellate*, habeas writs); *O'Neal v. McAninch*, 513 U.S. 432, 440, 442 (1995) (federal court's function in habeas is to "review errors in state criminal trials"); *Rose v. Mitchell*, 443 U.S. 545, 579 (1979) (Powell, J., concurring) ("federal [habeas] court is asked to review not only a state trial court's judgment, but almost invariably the judgment of the highest court of the State as well").

810. 28 U.S.C.A. § 2254(d) (West Supp. 1998).

811. See, e.g., *Zuern v. Tate*, 938 F. Supp. 468, 475–76 (S.D. Ohio 1996) ("This new standard is a codification and . . . modification of the . . . doctrine in *Teague v. Lane* . . .").

812. See 28 U.S.C. § 636(b)(1)(A) (1994) (providing district court "contrary to law" review of certain magisterial decisions); Fed. R. Civ. P. 72(a) (similar). On the "plenary" nature of "contrary to law" review of legal and mixed questions, see, e.g., *Salterelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 385 (9th Cir. 1994); *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992).

tions—the federal court must ascertain whether the state “decision . . . involved an unreasonable application of [the] clearly established Federal law.” As used as a judicial term of art in *Teague* and like cases, a “reasonable” or “unreasonable application” connotes a legal rule that another tribunal properly or improperly extrapolated from whatever noncontrolling law was available.⁸¹³ If the extrapolated rule “involved an unreasonable application of [] clearly established Federal law,” the federal court applies current federal law. Otherwise, it applies the rule the state court fashioned. In either event, the federal court exercises plenary review of legal and mixed rulings under the governing law and grants the relief that law requires.⁸¹⁴

Despite this kinship, there are four ways in which section 2254(d) (1) accords more respect to state court finality than did *Teague*. First, under the statute, only *Supreme Court* precedent may clearly establish federal law; *Teague* let *circuit* precedent do so as well.⁸¹⁵ Second, under the statute, law must be clearly established by the date of the *state* decision; under *Teague* it could become established thereafter, while certiorari was pending.⁸¹⁶ Third, the statute recognizes no exceptional situations in

813. See, e.g., *Thompson v. Keohane*, 116 S. Ct. 457, 469 n.1 (1995) (Thomas, J., dissenting) (*Teague* validates “reasonable applications of then-existing law”); *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O’Connor, J., concurring) (*Teague* disapproves rules fashioned through a “begrudging or unreasonable application of [analogous] principles”) (emphasis added); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (validating “objectively reasonable application of relevant precedents”); *Wright v. West*, 505 U.S. 277, 304 (1992) (O’Connor, J., concurring) (*Teague* doctrine analyzes whether state court’s “deviation” from analogous but “factual[ly] distinct[]” precedent is or “is not reasonable”); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (*Teague* rule “validates reasonable, good-faith interpretations of existing precedents”).

814. Mr. Scheidegger’s effort to use legislative history to support a contrary interpretation of section 2254(d) (1) illustrates the hazards of such history. His main way of explaining the provision is to quote its opponents’ demonizing it. See Scheidegger, *supra* note 75, at 945, 946, 948, 951–52. And his selective quotation of the provision’s proponents conveys the opposite of what they said. See *id.* at 945. For example, consistent with our analysis, Orrin Hatch, the bill’s floor leader in the Senate, said that section 2254(d) (1) “essentially gives the Federal court the authority to review, *de novo*, whether the State court decided the claim in contravention of Federal law”; “it just means that we defer to the state courts if they have properly applied Federal law.” 142 Cong. Rec. S3446–47 (daily ed. Apr. 17, 1996) (emphasis added). After Senator Biden made one of the attacks on the provision that Scheidegger cites as authoritative, see Scheidegger, *supra* note 75, at 946, 951–52, Hatch replied: “[Senator Biden] says [section 2254(d) (1)] requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution. That is absolutely false.” 141 Cong. Rec. S7846 (daily ed. June 7, 1995) (emphasis added); see also 142 Cong. Rec. H3602 (daily ed. Apr. 18, 1996) (similar statement of House floor leader Henry Hyde).

815. Compare *Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997) (“we are no longer permitted to apply our own jurisprudence, but must look exclusively to Supreme Court caselaw”), with, e.g., *Ciak v. United States*, 59 F.3d 296, 302–03 (2d Cir. 1995) (pre-*Teague* case treating circuit precedent as clearly establishing a rule the Supreme Court had not endorsed).

816. Compare *Blankenship v. Johnson*, 106 F.3d 1202, 1205–06 (5th Cir. 1997) (under section 2254(d), “review is limited to whether the law was ‘clearly established’ at

which postfinality law applies; *Teague*, in contrast, established two exceptions.⁸¹⁷ Finally, the statute makes the state "*decision*" the focal point of review and dispositive of the case unless found to violate federal law, thus restoring the writ's nineteenth century status as merely "appellate" because "it revises and corrects the proceedings in a [judicial] cause already instituted"; the prior regime treated habeas (at least technically) as an independent civil suit requiring "full reconsideration of . . . constitutional claims" from scratch and relegating state high court decisions to the lowly status of mere relevant authority from "another jurisdiction."⁸¹⁸

Reading section 2254(d)(1) (as a number of lower courts have done)⁸¹⁹ to codify and strengthen *Teague* avoids Article III problems. True, the habeas statute obliges "a district court . . . [to] entertain an application for a writ of habeas corpus in behalf of a person in [state] custody . . . on the ground that he is in custody in violation of [federal law]," then binds the court to a choice of the federal law in effect when the state court ruled.⁸²⁰ But this choice of preexisting law is no different from *Teague's*, which, as we noted, respects Article III's supremacy-focused "whole law" principle.⁸²¹ Because the federal court independently applies the whole supreme law in effect when the state court ruled—allowing it to assess whether the state judges faithfully discharged their Supremacy Clause obligation—while retaining an effectual ability through the writ to nullify state decisions that *failed* to discharge that obligation, the federal court can discharge *its* supremacy-bounded Article III function and thereby exercise "[t]he judicial Power."

The Fifth, Seventh, and Eleventh Circuits have given section 2254(d)(1) another reading—not as strengthening *Teague's* temporal choice of law but, instead, as barring independent federal interpretation of federal law or relief from state judgments violating that law.⁸²² In the

the time the [state high court] entered its judgment"), with *O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997) (case became final for *Teague* purposes when Supreme Court denied certiorari).

817. See *supra* note 745.

818. Compare *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803), with *Stone v. Powell*, 428 U.S. 465, 477 (1976), and *Brown v. Allen*, 344 U.S. 443, 458 (1953) (all quoted in text). See generally *supra* notes 802–809 and accompanying text.

819. See, e.g., *O'Brien v. Dubois*, No. 97-1979, 1998 WL 257206, at *4–*9 (1st Cir. May 26, 1998); *Berryman v. Morton*, 100 F.3d 1089, 1102–05 (3d Cir. 1996); *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996); *Dickerson v. Vaughn*, 90 F.3d 87, 89, 92 (3d Cir. 1996); *Ayala v. Speckard*, 89 F.3d 91, 92, 97 (2d Cir. 1996); *Nevers v. Killinger*, 990 F. Supp. 844, 853 (E.D. Mich. 1997); *Zuern v. Tate*, 938 F. Supp. 468, 475 (S.D. Ohio 1996); see also Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 435–37 (1996) (similar interpretation); cf. *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997) (noting this reading without adopting or rejecting it).

820. 28 U.S.C. § 2254(a) (1994); see 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998).

821. See *supra* notes 761–773, 790–799 and accompanying text.

822. See *Lindh v. Murphy*, 96 F.3d 856, 877 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997) (discussed *supra* note 752) (followed in *Neelley v. Nagle*, 138 F.3d 917, 923–25 (11th Cir. 1998); *Drinkard v. Johnson*, 97 F.3d 751, 767–68 (5th Cir.

Seventh Circuit's formulation, "[t]he first phrase of § 2254(d)(1) . . . authorizing a federal court to issue the writ when the state court's decision is 'contrary to . . . clearly established Federal law . . . ' preserves . . . federal courts' independent interpretive power" only in the review of "pure" legal questions, but does *not* "authorize issuance of a writ whenever a [state] court err[ed]" in deciding a *mixed* question under clearly established law.⁸²³ Rather, "when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is . . . a 'mixed question of law and fact'—sec. 2254(d)(1) restricts . . . relief to cases in which the state's decision reflects 'an unreasonable application of' the law."⁸²⁴

On this reading, the statute calls for "[d]e novo . . . review for core legal issues, such as whether the Confrontation Clause applies [to a type of proceeding], and *deferential review* for operational decisions [such as whether a trial court violated the Clause by barring a particular line of cross-examination]."⁸²⁵ A state court's "fact-specific answer [to a mixed question] cannot be called 'unreasonable' [simply because] it is wrong."⁸²⁶ Rather, "unreasonable[]" . . . is stronger than 'erroneous' and maybe stronger than 'clearly erroneous,'"⁸²⁷ and requires "grave" error.⁸²⁸ Apparently for the first time in American history, therefore, federal judges (in these circuits) are reviewing but letting stand state court decisions that, in Article III courts' independent judgment, are contrary to clearly established federal law as of the time the state (and federal) courts ruled.⁸²⁹

1996), overruled on other grounds, *United States v. Carter*, 117 F.3d 262 (5th Cir. 1997)); see also Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 Vand. L. Rev. 103, 106–17 (1998) (arguing that section 2254(d)(1) requires federal habeas courts to accept "reasonable" state court resolutions of mixed questions, but advocating a less deferential standard of reasonableness than did the Seventh Circuit in *Lindh*); Sharad Sushil Khandelwal, Note, The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1), 96 Mich. L. Rev. 434, 446–47 (1997) (endorsing *Lindh* interpretation); Note, Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254, 110 Harv. L. Rev. 1868, 1879–81 (1997) (endorsing *Lindh* interpretation); cf. *Green v. French*, No. 97-25, 1998 WL 237506, at *2–*7 (4th Cir. May 18, 1998) (rejecting some, and adopting other, aspects of the Fifth, Seventh, and Eleventh Circuits' interpretation). Dissenting judges in the Fifth and Seventh Circuits favored an interpretation of section 2254(d)(1) similar to the one advanced in this Article. See *Drinkard*, 97 F.3d at 778–79 (Garza, J., dissenting); *Lindh*, 96 F.3d at 888–89 (Ripple, J., dissenting) (raising constitutional objection to majority's interpretation).

823. *Lindh*, 96 F.3d at 868–70.

824. *Id.* at 870.

825. *Id.* at 877 (emphasis added).

826. *Id.* at 876–77.

827. *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997).

828. *Lindh*, 96 F.3d at 870.

829. See *supra* notes 639, 671, 771 and accompanying text (longstanding rule of independent Article III court determination of mixed questions in habeas and other

The three circuits' reading of section 2254(d)(1) is troublesome for several reasons. First, the statute asks whether the state "*decision*" was contrary to law. A judicial "*decision*" is a "determination arrived at after consideration of facts, and . . . law"⁸³⁰—in lay terms, a "final and definite result of examining a question; a conclusion" or "resolution."⁸³¹ Thus, as the Convention recognized in rejecting the Pinckney and New Jersey Plans, and as the Court held long ago in *Martin* and *Osborn*, a legal "*decision*" is *not* the articulation of a legal rule without more but the application of a rule to the facts of a case to reach a conclusion.⁸³² As a matter of plain construction, therefore, a "*decision* [is] . . . contrary to . . . law" whenever the conclusion it reached upon applying the law to the facts is wrong. The statutory text thus warrants relief if there is "clearly established . . . law" to which a "*decision*" might potentially be "contrary" (i.e., if there is law designed for just that kind of case), and if the "*decision*"—the application of the law to the facts to reach a resolution—is contrary to (i.e., *wrong* under) that law.⁸³³

Second, the statute requires relief if the state court decision was contrary to clearly established federal "*law*." As exemplified by *Martin*, *Crowell*, and scores of other decisions, "mixed question[s] of law and fact" have long been "ranked as issues of *law*"⁸³⁴—"what purport[] to be . . . finding[s] upon questions of fact [but are] so involved with and dependent upon such questions of law as to be *in substance and effect* . . . *decision[s] of the latter*."⁸³⁵ The Seventh Circuit's premise that "the meaning of the Constitution" can never emerge from the Constitution's "application to a particular set of facts" thus is plainly wrong.⁸³⁶ Indeed, if a question is "mixed," then *by definition* "the relevant legal principle can be given meaning *only* through its application to the particular circumstances of a case."⁸³⁷

contexts); *infra* notes 867–885 and accompanying text (absence of precedent for the three circuits' approach).

830. Black's Law Dictionary 407 (6th ed. 1990); see *id.* at 842 (equating "*decision*" and "*judgment*" and defining latter as a "[c]onclusion of law upon facts").

831. 4 Oxford English Dictionary 332 (2d ed. 1989); see Webster's Third New Int'l Dictionary 585 (1986).

832. See *supra* notes 80, 137, 139, 201, 222, 250–252, 467–474 and accompanying text.

833. See *supra* notes 812, 823 and accompanying text (as the Seventh Circuit acknowledged in *Lindh* and as statutory antecedents establish, "contrary to law" connotes plenary review).

834. *Thompson v. Keohane*, 516 U.S. 99, 111–12 (1995) (emphasis added) (citation omitted) (*habeas case*).

835. *Kansas City S. Ry. Co. v. C.H. Albers Comm'n Co.*, 223 U.S. 573, 591 (1912) (emphasis added); see *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (applying same definition in *habeas case*); decisions cited *supra* note 639.

836. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *rev'd* on other grounds, 117 S. Ct. 2059 (1997); see Note, *supra* note 822, at 1880.

837. *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (emphasis added) (*habeas case*); see *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996); *Bose Corp. v. Consumers Union of*

Third, the Seventh Circuit misreads the phrase "an unreasonable application of[] clearly established . . . law" as if it said something else, namely, "an unreasonable application *to the facts* of clearly established law." The phrase "application *to the facts*"—with the italicized words obsessively included—is the one the legal culture uses to refer to mixed questions.⁸³⁸ But the phrase Congress *actually* used—omitting the italicized words and including the "clearly established" qualification—has a different source, namely, *Teague* and related cases, which use "unreasonable application of law" to connote a rule improperly extrapolated from peripherally relevant precedent in the absence of clearly controlling law.⁸³⁹

Fourth, there is an especially strong reason why section 2254(d)(1)'s actual distinction—between "decisions contrary to clearly established federal law" and "decisions involving unreasonable applications of that law"—cannot be read as distinguishing, instead, between "improper *interpretations* of clearly established federal law" and "unreasonable applications *to the facts* of that law": In the course of considering section 2254(d)(1), Congress expressly *rejected* the latter distinction in favor of the former.

As originally adopted by the House, section 2254(d) forbade habeas relief unless the state decision was based on an improper "*interpretation* of clearly established Federal law as articulated . . . [by] the Supreme Court" or "was based on an arbitrary or unreasonable application *to the facts* of [that] law."⁸⁴⁰ In the provision as thereafter carefully revised and introduced in the Senate, however, in the form in which it became law, the House's distinction between invalid "interpretations" and unreasonable "applications to the facts" was replaced by a distinction between "decision[s] . . . contrary to . . . clearly established federal law" and "unreasona-

the United States, Inc., 466 U.S. 485, 508 (1984); *supra* notes 636–639, 671 and accompanying text.

838. It is an "application-of-legal-standard-to-fact sort of question . . . [that is] commonly called a 'mixed question of law and fact.'" *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (emphasis added); see, e.g., *Ornelas*, 116 S. Ct. at 1664 (Scalia, J., dissenting) ("application of an objective legal standard *to the facts* . . . is properly characterized as a mixed question" (emphasis added)); *Thompson*, 516 U.S. at 111–12; *Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

839. See *supra* note 812 and accompanying text.

840. H.R. 729, 104th Cong. (1995); see 141 Cong. Rec. H1424–28, H1433–34 (daily ed. Feb. 8, 1995) (emphasis added). Under the House proposal, a state court adjudication permitted relief only if it:

- (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court . . . ; [or]
- (2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court

Id. at H1424.

ble application[s]" of that law.⁸⁴¹ The three circuits thus read section 2254(d) (1) not only as if its actual "decision contrary to law" and "unreasonable application" terms of art were *not* present but also as if it included "*interpretation*" and "*application to the facts*" terms of art that Congress *deleted*.⁸⁴²

Fifth, the Seventh Circuit's reading apparently makes the "decision contrary to law" clause superfluous. Under that reading, the contrary to law clause applies when the state "opinion . . . [in]correctly states" the governing rule.⁸⁴³ But can stating the wrong rule, by itself, "authoriz[e]" relief,⁸⁴⁴ though the state "*decision*," i.e., the outcome upon applying law to fact, "was [*not*] contrary to law"? If so, the statute has "advising" problems; it makes federal courts do what the "adequate state ground" doctrine (for one) forbids—review things state judges *said* in their opinions that make no difference to what they *did* in their *decisions*.⁸⁴⁵ Nor could a habeas court remand to the state court to reconsider under the correct standard, as might occur on direct appeal, because such remands are forbidden in the habeas context.⁸⁴⁶ Nor, apparently, could relief be granted only when (1) the state court decision articulates an incorrect rule *and* (2) its application of law to fact is erroneous in the federal court's judgment. For that would undermine the Seventh Circuit's view that misapplications of law to fact do not fall within the "decisions contrary to law" clause and only fall within the "unreasonable application" clause when the error is "more than clear" or "grave." To avoid these problems, relief would have to be reserved for state decisions that involve (1) an interpretation that was contrary to established law *and* reached a conclusion that, under the right rule, was an unreasonable application of the law to the facts, *or* (2) an unreasonable application of the law to the facts. But "relief only if X and Y, or if Y" means "relief only if Y"—i.e., only if the "unreasonable application" clause is satisfied—thus rendering the "decision contrary to law" clause a cypher.

Finally, as Chief Justice Hughes said in *Crowell*, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt

841. S. 735, 104th Cong. § 704 (1995); see 142 Cong. Rec. H3599 (daily ed. Apr. 18, 1996) (House's approval of the Senate habeas title of the Antiterrorism bill without alteration); 141 Cong. Rec. S7803 (daily ed. June 7, 1995) (Sen. Specter discussing Senate's careful redrafting of House habeas bill); 141 Cong. Rec. S5842 (daily ed. Apr. 27, 1995) (introduction of S. 735).

842. Cf. Lonchar v. Thomas, 116 S. Ct. 1293, 1300 (1996) (the Court will not read a habeas statute to impose a requirement that Congress "*rejected*, by removing [it] from . . . [an earlier draft]").

843. *Lindh v. Murphy*, 96 F.3d 856, 877 (7th Cir. 1996) (en banc), rev'd, 117 S. Ct. 2059 (1997).

844. See *id.* at 868–69.

845. Cf. *Powell v. Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting) ("'Our job . . . is to review judgments, not to edit opinions . . .'") (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (Stevens, J., concurring in part and dissenting in part)); *supra* notes 390–402 and accompanying text.

846. See *Pitchess v. Davis*, 421 U.S. 482, 489–90 (1975) (per curiam).

of constitutionality is raised, it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."⁸⁴⁷ As we discuss below, the Fifth, Seventh, and Eleventh Circuits' reading of section 2254(d)(1) raises *at least* a serious doubt about the provision's constitutionality. Accordingly, because the different reading we give section 2254(d)(1) above is *at least* "fairly possible," that reading is an imperative antidote to the constitutional doubts raised by the three circuits' interpretation.⁸⁴⁸

2. *One Constitutional Meaning.* — Read as we propose above, section 2254(d)(1) presents the same Article III issues as *Teague*, which are not fatal to a supremacy-bounded notion of "[t]he judicial Power."⁸⁴⁹ The Fifth, Seventh, and Eleventh Circuits' alternative reading, however, poses more serious—we think fatal—Article III problems. We first show why the three circuits' reading deprives federal courts of "[t]he judicial Power." We then explain why the Seventh Circuit's (which is the only sustained) constitutional defense of that interpretation fails.

After first directing federal habeas judges and justices to "look at" state court decisions upholding incarceration to see whether they "violat[e] the Constitution or laws or treaties of the United States," and whether they are "contrary to . . . Federal law,"⁸⁵⁰ the three circuits' interpretation requires those Article III judges to do one of the following: (1) "defer" to state court interpretations of supreme law that in the Article III judges' independent estimation offend that law (unless the offense is "grave"); (2) in deciding which rule to apply, choose the statute (insofar as it directs the federal court to apply the state court's "reasonable" reading of supreme law) over the Constitution;⁸⁵¹ or (3) interpret federal law independently and acknowledge violations of it, but then deny all relief—i.e., (a) withhold effect from a federal decision finding that supreme law was violated, (b) give effect to a state decision contrary to that law (by

847. *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see *United States v. Locke*, 471 U.S. 84, 92 (1985); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

848. See *supra* notes 810–821 and accompanying text. In his response, Mr. Scheidegger asserts, but he fails to explain why, it would be a "shell game" for the Court—having concluded in *Wright v. West*, 505 U.S. 277 (1992), see *supra* notes 762–773 and accompanying text, that it could not "amend" the existing habeas statute's plenary-review standard with a judge-made "deference" rule—to conclude that the Fifth, Seventh, and Eleventh Circuits should not have "amended" the recently enacted section 2254(d)(1) with the same (constitutionally problematic) deference gloss. See Scheidegger, *supra* note 75, at 889–91.

849. See *supra* notes 364–369, 399, 632–640, 674–675, 790–799, 819–821 and accompanying text.

850. 28 U.S.C. § 2254(a) (1994); see 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998).

851. That is, to choose the statute over the Constitution as the federal court independently interprets it at all relevant times. See *supra* notes 790–799 and accompanying text.

treating it as the reason to deny relief from unconstitutional custody), and, as such, (c) let state decisional law "withstand" contrary federal law. As we have shown, however, Congress may not give Article III courts these commands because they all oblige the exercise of less than "[t]he judicial Power."

Approach (1)—defer to state court constructions of federal law that are not gravely wrong—offends Article III's independent interpretation rule and thus the Framers' sedulous effort to shield Article III judges from the influence of "will" rather than "reason" and from revision by anyone save superior Article III judges.⁸⁵² It conflicts with *Marbury's* refusal to defer to Congress's construction of Article III; *Martin's* and *Cohens's* rejection of the Virginia high court's demand for deference to its reasonable applications of federal treaties and acts; *Klein's* invalidation of the directive in the 1870 Act that the Court assume the correctness of Congress's reading of Article II; *Crowell's* rebuff of a statutory command to accept agency findings of constitutional fact absent clear error; the Mixed Question Cases forbidding federal courts to treat mixed questions as matters of fact requiring deference to state court findings absent clear error; and a strong American legal consensus that deference on legal questions is intolerable.⁸⁵³

Furthermore, approach (1) is conceptually no different from letting Congress, the President, or state supreme courts hear "appeals" of Article III court decisions and reverse them when, say, reasonable minds can, and the reviewing agency does, disagree. Approach (1) thus violates anti-revising cases from *Hayburn's* forward; *Martin's* and *Ableman's* invalidation of state court reversals of the Court's interpretation of two treaties, and of a federal district court's ruling that the Fugitive Slave Act was constitutional; *Plaut's* conclusion that Article III court decisions are immune from revision save by superior Article III courts; *Boerne's* invalidation of RFRA's effort to overrule *Smith*; and *Reynoldsville's* rejection of the Ohio Supreme Court's effort to modify *Bendix*.⁸⁵⁴

Approach (2)—requiring federal courts to choose the statute over the Constitution (insofar as the statute directs them to adopt the state court's reasonable interpretation of federal law)—violates Article III's and the Supremacy Clause's "whole supreme law" principle, as most classically exemplified by *Marbury's* refusal to choose the 1789 Act over the Constitution when the two conflicted. In diverting federal courts' attention from supreme law, or from the aspect of the question presented to which that law applies, this approach also conflicts with *Martin's* refusal to ignore federal treaties because they were not visible on the face of the state decision; *Osborn's* insistence that the Court decide not only relevant interpretive issues but also the effect of the appropriate interpretation on

852. See *supra* notes 330–342, 403–458, 467–536 and accompanying text.

853. See *supra* notes 537–640, 654–673 and accompanying text.

854. See *supra* notes 403–458, 475–536, 678–718 and accompanying text.

the facts and the outcome of the case; *Klein's* invalidation of statutory requirements to ignore evidence of a presidential pardon raising a constitutional question or, if the Court considered the evidence, to relinquish jurisdiction at the point where it otherwise would be obliged to privilege the Article II pardon power over the statute's direction to deny pardons any effect; *Yakus's* refusal to read the statute to keep it from reviewing the statute's (as opposed to the previously reviewable regulations') constitutionality; and the core principle of Hart's *Dialogue* that Congress may withhold jurisdiction from federal courts but may not grant it and forbid them to subject the underlying statute or official action to scrutiny based on the whole, supreme law.⁸⁵⁵

Approach (3)—letting federal courts independently review state decisions under federal law but making them deny relief from any constitutional error that cannot be called "unreasonable"—offends Article III's "effectualness" requirement. That requirement—and the defect of a rule directing Article III courts with jurisdiction to let violations of supreme law lie—are most powerfully revealed by the Framers' rejection of proposals (a) to limit "arising under" jurisdiction to interpreting the law not deciding cases, (b) to require judicial advising of political actors, and (c) to let Congress control the "manner" of federal adjudication.⁸⁵⁶

Approach (3) also conflicts with *Marbury's* express refusal to give effect to the mandamus statute after finding it unconstitutional; *Martin's* denial that considerations of federalism permit state courts to decide whether the Court's rulings are valid and enforceable; *Cohens's* rejection—as "constitutional treason"—of a request to forgo exercising the jurisdiction Congress accorded Article III courts to review and, if necessary, reverse state decisions raising "difficult[]" or "doubtful" issues of federal law; the refusal of *Osborn, Crowell*, and the Mixed Question Cases to limit the federal courts' role to providing abstract interpretations of federal law, and insistence that those courts give federal law effect under the circumstances by applying it to the facts; the "defunct territorial court" cases' denial of jurisdiction when the Court had no way to effectuate its judgment; *Gordon's* and the declaratory judgment decisions' denial of Article III status to any court lacking the power to bind the parties by its judgment either directly or by binding another court with power over the parties; *Ableman's* denial of a state court claim of authority to neutralize a lower federal court's judgment of conviction by second-guessing the federal court's judgment that the conviction was constitutional and by releasing the convict; *Klein's* voiding of a statutory command to exercise jurisdiction over compensation cases but to treat the resolution of a constitutional question against the Government as triggering a mid-stream interposition of sovereign immunity or cut-off of the jurisdiction to grant relief; *Plaut's* ban on statutory denials of res judicata effect to

855. See supra notes 467–474, 563–599, 641–653, 731–735 and accompanying text.

856. See supra notes 65, 80, 84–85, 104–108, 137, 139, 201, 222, 250–252, 259, 268–271 and accompanying text.

Article III court judgments; *Boerne's* rejection of a statutory denial of stare decisis effect to the *Smith* decision or creation of a right to relief in every case in which *Smith's* overruling of *Sherbert* forbade relief; *Reynoldsville's* denial of state court "remedial discretion" to apply a statute of limitations to pending cases after the Supreme Court struck down the statute in another case; and Hart's point that Congress may with impunity deny jurisdiction or invoke sovereign immunity at the threshold, or even grant jurisdiction and make a choice among remedies, but may not grant jurisdiction and waive sovereign immunity, yet withhold *all* relief.⁸⁵⁷ Nor does the qualified immunity doctrine provide a precedent for denying any effectual relief when, as here, what is under review is not intermittent official misconduct, but the making of state "law" through the unconstitutional "decision" of one of the "judges in every State" to whom was entrusted the structurally central role of keeping state law in conformity with "the supreme Law of the Land."⁸⁵⁸

Approach (3) does fourfold damage to the Constitution's core structure. It lets Congress withhold "an essential part of . . . the exercis[e] of judicial power"—the capacity to effectuate judgments—leaving judicial decisions "inoperative and nugatory, . . . a dead letter . . . without any operation upon the rights of the parties. . . . Such is *not* the judicial power."⁸⁵⁹ It tolerates an adjudicated malfunction of a crucial structural mechanism for maintaining federal supremacy, namely, the service of "the Judges in every State" as ever-ready filters of state law and state action in violation of federal law. It lets stand—indeed, it gives *decisive effect* to—state decisional law that is (and, when made, was) contrary to national law, reversing the Supremacy Clause command to forbid state law to "withstand" contrary national law. And it stymies the other crucial structural mechanism for maintaining the supremacy of federal law. For it thwarts the exercise by Article III courts of an "arising under" jurisdiction that the Framers expressly made "conformable" to the Supremacy Clause so as to provide a means, whenever Congress found it expedient to confer jurisdiction, of (1) spot-checking state judging for conformity to the judges' Supremacy Clause duty and state decisions for conformity to supreme law, and (2) voiding judging and judgments found wanting.

What then can be said in *favor* of reading section 2254(d)(1) to require Article III courts to adjudicate the constitutionality of incarceration and consistency of state decisions with federal law but then to (1) defer to the state court's interpretation of federal law, (2) give priority to the statute's (i.e., the state court's) decision rule over the one mandated by supreme law, or (3) deny relief and give effect to state decisions in conflict with that law? The Seventh Circuit offered three explanations. First,

857. See *supra* notes 401, 407–458, 472–474, 502–536, 549–599, 604–640, 654–667, 671, 678–707, 727–735 and accompanying text.

858. See *supra* notes 753–760, 774–800 and accompanying text.

859. *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, reported 1885) (emphasis added).

when a dispute is over the Constitution's "application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact'"—the rule that "Congress lacks power to . . . require federal judges to 'defer' to the interpretations reached by state courts" is suspended because "the dispute lies *not* in the meaning of the Constitution."⁸⁶⁰ But as the Framers recognized in rejecting the Pinckney and New Jersey Plans' limitation of federal question jurisdiction to abstract interpretations of federal law, and as the Court affirmed in *Martin*, *Osborn*, *Crowell*, and the Mixed Question Cases, it is the "solemn duty" of Article III courts to answer mixed questions independently⁸⁶¹ precisely *because* the answers define the meaning of the Constitution—because "the relevant legal principle can be given meaning *only* through its application to the particular circumstances of a case."⁸⁶²

The Seventh Circuit also reasoned that, as long as "[f]ederal courts are free to express an independent opinion on all legal issues in the case," Congress, in "[r]egulating relief," can make federal judges *deny* all relief and leave in effect state decisions that in an Article III judge's "independent opinion" conflict with supreme law.⁸⁶³ But *Marbury*, *Martin*, *Cohens*, *Gordon*, and *Klein* all forbid Congress, or even constitutionally grounded separation of powers and federalism policies, to force (or permit) Article III courts to surrender jurisdiction at the moment at which their independent interpretation of supreme law calls for relief sufficient to nullify law in conflict with the supreme law.⁸⁶⁴ That the law in conflict here is *state decisional law* made by state judges in default of their crucial structural function under the Supremacy Clause aggravates the problem. For it confounds the core constitutional mechanism that the Framers struggled so hard to design to keep state law in line with federal law.⁸⁶⁵ Nor is the problem solved by letting Article III courts "express an independent opinion on all legal issues in the case." The insult of being relegated to advising cannot repair the injury of statutorily mandated ineffectualness in the face of state decisions in conflict with federal law.⁸⁶⁶

860. *Lindh v. Murphy*, 96 F.3d 856, 870, 872 (7th Cir. 1996) (en banc) (emphasis added), rev'd, 117 S. Ct. 2059 (1997).

861. *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939).

862. *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (emphasis added); see supra notes 80, 137–139, 201, 222, 250–252, 467–474, 604–653, 671, 834–837 and accompanying text.

863. *Lindh*, 96 F.3d at 869, 872 (emphasis added).

864. See supra notes 408–424, 537–599, 654–673 and accompanying text.

865. See supra notes 53–55, 80, 137, 139, 201, 222, 238–239, 247–252, 348–349 and accompanying text.

866. Our conclusion would be different if the federal court's "independent opinion" thereafter had a binding effect in some still available state or federal (e.g., section 1983) action between the same parties in which an effective remedy could be imposed. See supra notes 641–653, 775–777 and accompanying text. The Seventh Circuit, however, did not contemplate a *res judicata* effect for the "opinion[s]" invited by its interpretation of section 2254(d)(1). Nor may the constitutional problems with the three circuits' interpretation of section 2254(d)(1) be avoided by reading it to require federal judges to look at whether the state decision's deviation from supreme law is "reasonable" while *forbearing* (advisory)

Finally, the Seventh Circuit concluded that its interpretation of section 2254(d)(1) places no greater constraint on federal judges than other, accepted doctrines.⁸⁶⁷ Unlike the Seventh Circuit's interpretation of that provision, however, none of the doctrines the court mentioned impugns federal judges' power and duty "not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—[nor the] understanding . . . that . . . 'a "judicial Power" is one to render *dispositive* judgments.'"⁸⁶⁸ Indeed, some of the doctrines the Seventh Circuit cites positively assure that federal judges render "dispositive" judgments, not ineffectual advice—including the adequate state grounds and harmless error rules and the *res judicata* effect of prior federal decisions.⁸⁶⁹

As we also already have shown, two other doctrines the Seventh Circuit cites—the Full Faith and Credit and Anti-Injunction Acts—do not exercise a *qualitative* congressional power to determine the manner in which the judicial power is exercised when federal courts have jurisdiction to review state court decisions. Rather, they preserve Congress's *quantitative* power to decide whether, when, and on what courts to *confer* federal jurisdiction to review state judgments.⁸⁷⁰

Two additional cited doctrines—*Chevron* and political questions—conform to the judicial power in ways the Seventh Circuit's reading of section 2254(d)(1) does not. As Professor Monaghan has shown, *Chevron*

to look at whether the state decision in fact deviates from supreme law. First and foremost, the statute itself tells the federal court that it *must* "look at" the constitutional question—i.e., that it "*shall entertain*" any claim that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States" and shall determine whether, in upholding the federal legality of that custody, the state "decision . . . was contrary to . . . Federal law . . ." 28 U.S.C. § 2254(a) (1994); 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998) (emphasis added). Second, a court can hardly calibrate the "reasonableness" of a decision's deviation from federal law without confronting either the deviation itself or, at least, the category or level of deviation into which the case fits. Third, even if a court somehow could decide whether an "assumed" violation was "reasonable" without placing the actual violation before its eyes, that *assumption* still would trigger the crucial Article III duties. Unlike denials of relief in the adequate and independent state grounds and harmless error situations, moreover, in which Article III duties are satisfied by a conclusion that *proceeding further*, and imposing a remedy *without effect* on the outcome, would involve the federal court in rendering an advisory opinion, see *supra* note 399 and accompanying text, in the habeas situation, in which the court confronts (or assumes) a *dispositive* violation, it is the *refusal* to go further and to impose relief needed to effectuate federal law and to neutralize the effect of conflicting state law that makes its decision impermissibly advisory and ineffectual. Finally, this proposal would require exactly what *Marbury* and *Klein* forbid, namely, that an Article III court on which Congress has conferred jurisdiction over an issue at the heart of which lies a constitutional question be required to *skirt*, or refuse to "*look at*," the constitutional question. See *supra* notes 545–599 and accompanying text.

867. See *Lindh*, 96 F.3d at 871–73.

868. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (quoting Easterbrook, *supra* note 407, at 926 (emphasis added)).

869. See *supra* notes 399, 419, 451–458, 648–653, 866 and accompanying text.

870. See *supra* notes 376–389 and accompanying text.

identifies situations in which, by leaving terms in an agency's organic statute undefined, Congress delegates to the agency the task of defining the terms through supplementary positive law that has the same force as the organic statute.⁸⁷¹ The federal court thus does not give effect to agency definitions of statutory terms that it believes are wrong but, instead, independently decides whether the agency has acted within a statutorily delegated power to make supplementary law and, if so, complies with the statutory command to treat the law Congress's delegate has made as it treats the law Congress itself makes.⁸⁷² Professor Wechsler has applied the same analysis to the "political question" doctrine, except that there, the Article III court independently interprets the *Constitution itself* to see if it has given Congress the duty to define an ambiguous constitutional provision and, if so, independently applies Congress's definition as the constitutional law of the matter.⁸⁷³ Unless the Constitution somehow can be read to give, or to let Congress give, state courts final authority to define the Constitution in cases over which Congress has given the federal courts jurisdiction to review state decisions—unless, that is, Article III, *Martin*, *Cohens*, and *Ableman* are read out of supreme law—*Chevron* and political questions do not illustrate the constitutionality of the Seventh Circuit's interpretation of section 2254(d)(1).

Nor, as we have shown, do qualified immunity and *Teague*—or, for that matter, a plausible reading of section 2254(d)(1) short of the Seventh Circuit's—violate Article III's supremacy-bounded "whole law" principle.⁸⁷⁴ Rather than denying *all* relief from state law in conflict with supreme law at *all* relevant times, all three doctrines merely make a choice *among* remedies (qualified immunity), apply to state action short of the making of law (same), or keep state judging and decisions in line with supreme law when the state judge acted, rather than at a later time, in fulfillment of the federal courts' overriding supremacy-maintaining function (*Teague* and, when properly interpreted, 2254(d)(1)).

Nor is *Stone v. Powell*⁸⁷⁵ (also cited by the Seventh Circuit) analogous. *Stone* bars federal habeas relief on most Fourth Amendment exclusionary rule claims premised on *Mapp v. Ohio*.⁸⁷⁶ As the Court repeatedly has explained, however, in refusing to extend *Stone* to any other federal claim,⁸⁷⁷ the critical (and also *sui generis* and controversial) feature of the "right" the Court announced in *Mapp* and withdrew from habeas enforcement in *Stone* is that it is "not a personal constitutional right" but a

871. See Monaghan, *supra* note 555, at 27–31; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

872. See Monaghan, *supra* note 555, at 27–31.

873. See Wechsler, *supra* note 303, at 7–8; *Baker v. Carr*, 369 U.S. 186, 211 (1962).

874. See *supra* notes 753–821 and accompanying text.

875. 428 U.S. 465 (1976).

876. 367 U.S. 643 (1961).

877. See, e.g., *Reed v. Farley*, 512 U.S. 339, 348 (1994) (plurality opinion) ("We have 'repeatedly declined to extend the rule in *Stone* beyond its original bounds.'" (citations omitted)).

"judicially created' structural remedy 'designed to safeguard Fourth Amendment rights [of the public generally] . . . through its deterrent effect.'"⁸⁷⁸ The *Mapp* remedy (and right) thus does not belong to the defendant but to the "public" for whom the defendant merely serves as proxy. *Stone* then withholds the *Mapp* remedy on habeas because of its "minimal [deterrent] utility" on behalf of the public when applied years after the police officer acted.⁸⁷⁹

Because, at any given time, the "public" owning the *Mapp* right has available to it alternative remedies (also operative through proxies), mainly the rule's ongoing enforcement at criminal trials and on direct review, the *Stone* doctrine qualifies as merely a choice among remedies—which, as we have seen, is of no Article III interest as long as some remedy remains.⁸⁸⁰ Indeed, the *Stone* rule is expressly predicated on ongoing access to alternative remedies by the public holder of the *Mapp* right, because the rule only bars habeas consideration when the relevant state's criminal procedure provides a generally available "opportunity for full and fair litigation" of *Mapp* claims at "trial and on direct review."⁸⁸¹ When, on the other hand, the public right holder's principal remedial alternative is *not* available on an ongoing basis, *Stone* lets the public use habeas petitioners as proxies to give it access to an ongoing habeas remedy. The message *Stone* sends Article III judges thus is not: "'Look at' the prisoner's custody. But when you find that it violates *her* constitutional rights, and notwithstanding that *she* has no other remedy available, deny relief and leave the violation in effect." Rather, the message is: "If the 'public' owner of the right has an alternative ongoing process through which it can secure an effective remedy, it must choose that process and is not then before you in the guise of the 'rightless' habeas petitioner."

The Court supported this interpretation when it refused to extend *Stone* to bar habeas enforcement of the *Miranda* rule, even though that

878. *Kimmelman v. Morrison*, 477 U.S. 365, 375–76 (1986) (quoting *Stone*, 428 U.S. at 486 (citation omitted)).

879. *Stone*, 428 U.S. at 494–95 n.37; see *Kimmelman*, 477 U.S. at 379. We do not defend *Mapp* or its limitation in *Stone*, cf. Henry P. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 3–10 (1975) (discussing the uncertain constitutional status of *Mapp*), but merely take at face value the Court's persistent description of both as crucially dependent on the nonpersonal status of the underlying right. Because of the indispensability of that description to *Stone*'s adoption in the first place, and to the Court's sedulous refusal to extend the doctrine to other federal, even "prophylactic," rights, see *supra* notes 877–878 and accompanying text, it seems likely that but for the Court's capacity to rely on the description, it would abandon *Stone* and probably *Mapp*.

880. See *supra* notes 775–777 and accompanying text. To like effect are the exhaustion of state remedies limitation on habeas relief and other abstention doctrines that forbid federal remedies when, but only when, state remedies actually remain available. See Liebman & Hertz, *supra* note 389, at 427 n.18, 653–54; cf. *supra* note 777 and accompanying text (after exhaustion occurs and state court relief is denied, habeas relief generally is the petitioner's only remaining state or federal remedy).

881. *Stone*, 428 U.S. at 494–95 & n.37; see *id.* at 480, 489.

rule also creates only "prophylactic" or "federal common law" rights.⁸⁸² *Miranda* and *Mapp* rights differ, the Court held, because the former are "personal" to the defendant—giving *her* a right to keep potentially unreliable evidence from being used against *her* at "trial"—while the latter rights belong to the public.⁸⁸³ This personal-public distinction is the one Article III would suggest. Because it is the defendant's own federal rights that are violated when a statement she made in violation of *Miranda* is prejudicially introduced against her at trial, denying her a remedy for the violation of her right in a case as to which the Article III court has jurisdiction would pose an Article III problem that is absent in the *Stone* context. For then the message to the Article III judge would be: "Adjudicate the legality of the prisoner's custody. But in deciding whether it is illegal under the federal *Miranda* rule, defer to the state court's interpretation of that rule, or choose that court's rule over the federal rule, or, after concluding that the custody is illegal under federal law, deny all relief."

So far as we can tell, in the Court's 209-year history, it has never upheld a statute or adopted a doctrine with the drastic effect of the Fifth, Seventh, and Eleventh Circuits' interpretation of section 2254(d)(1). There is no precedent for obliging Article III courts to decide whether state judicial decisions approving state action are contrary to established federal law, but for then obliging those courts to follow any of the three courses those circuits' interpretation prescribes: (1) deference to a state court's normative federal legal judgments; (2) subordination of the commands of the Constitution as the federal court interprets it at all relevant times to a federal statutory directive to accept the state court's normative legal judgments; or (3) denial of any and all relief upon independently concluding that state action and, what is worse from a constitutional-structural perspective, a state *decision* upholding that action prejudicially violated the supreme law of the land at all those times.⁸⁸⁴ "Th[is] prolonged [history] would be amazing if such [statutes or doctrines] were not understood to be constitutionally proscribed."⁸⁸⁵

882. See *Withrow v. Williams*, 507 U.S. 680, 691 (1993).

883. See *id.*

884. Nor is any precedent provided by the "law of the case" doctrine, which bars the reopening of claims previously adjudicated in the *same case* by the *same federal court* after that court's decision has been reviewed and decided one way or the other on appeal. Compare *Scheidegger*, *supra* note 75, at 914–915, 953; (analogizing the three circuits' interpretation to the law of the case doctrine and the analogous rule barring federal-prisoner motions for relief from criminal judgments previously upheld against the same attack on appeal), with *id.* at 915–16 & n.171 (conceding that the law of the case doctrine has never been applied to bind federal courts to state court decisions). As *Yakus* reveals, once an *Article III* court has finally resolved a litigant's claim, the federal "judicial Power" has been exercised fully, and no *other* federal court—whether coordinate (as in *Yakus*) or, especially, the same or an inferior federal court (as in the law of the case context)—has any Article III or supremacy-based obligation to exercise that "Power" anew. See *supra* notes 641–653 and accompanying text.

885. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); see *Printz v. United States*, 117 S. Ct. 2365, 2374–76 (1997).

Another possible reason for a diminished judicial power in habeas cases is their "original" nature. Our conception of the judicial power to "spot-check" state decisions is mainly a conception of the *appellate* judicial power. Arguably, that conception does not apply to habeas cases, which (in the currently accepted view) are "original."⁸⁸⁶ This justification fails. Most importantly, Article III's references to "[t]he judicial Power" cover all, not simply appellate, judicial decisionmaking. And the Court often has protected the judicial power in cases involving statutory or state judicial interference with Article III courts' exercise of *original* jurisdiction, including *Hayburn's Case* (circuit court adjudication of widows' and orphans' petitions), *Marbury* and *Osborn* (the breadth of the Court's and lower courts' original jurisdiction), *Gordon* and *Klein* (political branch interference in Court of Claims cases), *Ableman* (state court interference with a federal district court judgment), *Crowell* and *Yakus* (lower federal court challenges to agency behavior), and *Plaut* and *Boerne* (statutory limits on the res judicata and stare decisis effect of Court decisions). Nor, surely, is the judicial power *diminished* because the subject of original Article III court review is a state court "decision,"⁸⁸⁷ thus invoking the court's overriding structural duty to supervise "the Judges in every State."

Moreover, habeas cases easily satisfy *Marbury's* classic definition of appellate actions for Article III purposes, because they "revise[] and correct[] the proceedings in a [judicial] cause already instituted."⁸⁸⁸ Any doubts on this score are removed by section 2254(d)(1), which now expressly requires federal habeas courts to make a manifestly appellate determination—whether the state court "*decision* was contrary to . . . clearly established [Supreme Court] law."⁸⁸⁹ Nor is there any constitutional objection to using lower federal courts to hear appeals from state courts, as is clear from the Convention, *The Federalist*, *Martin*, *Cohens*, the precise holding of *The Mayor*, and most especially, the plain text of Article III, which vests the whole "judicial Power" in any inferior court Congress creates, extends that "Power" to *all* "cases arising under" federal law that Congress assigns to inferior courts, and empowers Congress to declare "Exceptions" to all of the Supreme Court's appellate power including by shifting it to lower federal courts.⁸⁹⁰

Finally, the least controversial understanding of an inferior federal court's appellate review of state decisions is as a surrogate for Supreme Court direct review⁸⁹¹—a view of habeas that section 2254(d)(1) suggests

886. See *supra* notes 807–809 and accompanying text.

887. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998).

888. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803); *supra* note 806 and accompanying text.

889. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998) (emphasis added).

890. U.S. Const. art. III, § 1; *id.* § 2, cl. 1; *id.* § 2, cl. 2; see *supra* notes 128–133, 215–226, 247–252, 258–284, 298–327, 380, 662–663 and accompanying text.

891. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 514–16 (1963); Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247, 253–54 (1988); Henry M. Hart, Jr., *Foreword: The Time*

(as did *Teague*) by requiring habeas courts to apply a rough approximation of the law the Supreme Court assumedly would have applied in the case on direct appeal certiorari, namely, "clearly established Federal law, as determined by the Supreme Court" as of the end of direct appeal.⁸⁹² Indeed, if habeas qualified as an original, not appellate, action vis-à-vis state trials and appeals, then there would be no good reason why the following three inherent attributes of *original* actions, which are abandoned in our jurisprudence only in regard to *appellate* actions, do not apply to habeas cases: (1) a prior final judgment's res judicata effect in a subsequent original, but not appellate, action;⁸⁹³ (2) Eleventh Amendment sovereign immunity from suit against the state or its employees in their official capacity, which applies to all original actions in federal court but not to federal appeals of state cases in which the state is a party;⁸⁹⁴ and (3) the capacity before judgment to "remove" state civil suits—which include most state postconviction actions—to available, orig-

Chart of the Justices, 73 Harv. L. Rev. 84, 106–07 (1959); Patrick E. Higginbotham, Reflections on Reform of § 2254 Habeas Petitions, 18 Hofstra L. Rev. 1005, 1008–10 (1990); supra notes 798–799 and accompanying text.

892. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998). Lower federal courts more appropriately serve as surrogate Supreme Courts for supremacy-maintaining than for law-development purposes. See Paul J. Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 158 (1953). It thus is not unreasonable to limit habeas review to federal law that the Supreme Court already had clearly established as of the time it would have conducted the direct review for which habeas substitutes and to define that law as the rule reasonable jurists would have known was in effect at the time. Although harsh, this approach removes any risk that inferior federal judges will usurp the Supreme Court's law-development function in the process of speculating on the rule they would have applied had they been on the Court at the time.

893. See 1B James Wm. Moore et al., Moore's Federal Practice §§ 0.409[1-1], 0.410[1], 0.441[2] (2d ed. 1993) (presumptive res judicata effect of state court judgments in federal original, but not appellate, proceedings); supra notes 380, 388 (absence of res judicata effect of state court judgments in federal habeas proceedings).

894. Even under the regime of *Ex parte Young*, 209 U.S. 123 (1908), habeas actions to compel the warden to ignore state court judgments of conviction and confinement and to release a prisoner from the state's custody unless "the State" retries might be thought to qualify as suits against the state, not any individual in his or her personal capacity. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1183 (1996) (Souter, J., dissenting); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) (Eleventh Amendment sovereign immunity bars suits against state officials when "the state is the real, substantial party in interest"). Although the Eleventh Amendment exception for suits brought to enforce Fourteenth Amendment rights might cover habeas actions arising under the Constitution, cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the requirement of a clear intent to invoke Congress's powers under Section 5 of that Amendment might be problematic, because the habeas statute antedates the Amendment, cf. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (Congress's abrogation of states' sovereign immunity must be "unmistakably clear in . . . the statute" (citation omitted)). And this theory would not cover treaty and some statutory claims. Viewing habeas as an appeal avoids sovereign immunity because federal appeals of state decisions in which a state is a party have long been exempted from the Eleventh Amendment. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 409–12 (1821); Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 13–29 (1988).

inal federal forums, in contrast to the strict exhaustion and finality requirements that bar removal of appeals from state to federal courts?⁸⁹⁵

CONCLUSION: THE LESSER IN PLACE OF THE GREATER

In cases over which Congress confers jurisdiction, the Constitution vests Article III judges with—i.e., it requires them to exercise and forbids Congress to withdraw—five crucial qualities constituting “[t]he judicial Power”: (1) independent decision of (2) every—and the entire—question affecting the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court’s judgment in the case and in precedentially controlled cases.

Each of these qualities is a constitutionally protected means to Article III’s overriding structural objective of maintaining the supremacy of federal law and neutralizing the effect of contrary law. And each has particular force when the subject of federal judicial scrutiny is state statutory or decisional law. In a series of compromises negotiated with excruciating care over the course of the Convention, the Framers designed the Judiciary and Supremacy provisions as the central means of subordinating the states—and especially their law, with its tendency towards “mutability” and “injustice”⁸⁹⁶—to national law. The Convention’s novel means of achieving this end was to bifurcate the supremacy-maintaining function between the national judiciary and the nationally co-opted “Judges in every State”—while letting Congress decide whether and when federal and state courts would exercise exclusive or shared authority.

By constitutional presumption state judges would do the vast *quantity* of the work, serving as ever-ready filters for state action and especially state law in violation of the “Constitution, and the Laws . . . and all Treaties . . . of the United States.” To the federal courts would fall the task of deploying the constitutionally assured *qualities* of independent judgment, decision of the whole question, commitment to national law, finality, and effectual remedial “Power” in order to (1) spot-check the state courts’ filtering process in cases in which Congress found it necessary or proper to confer jurisdiction and, thus, (2) keep national law supreme and deprive contrary state law of effect. Checking the federal judiciary would be the constraints of “[t]he judicial Power” itself (reason not will; cases and controversies only; resolution of the whole case or question, no matter how “painful,” “difficult[],” or “doubtful”) and Congress’s power to withdraw federal jurisdiction. Constraining Congress would be the competing pushes and pulls of its own (often na-

895. Compare 28 U.S.C. § 1441 (1994) (permitting removal of most state civil actions to federal court with jurisdiction over the matter), with id. § 1257(a) (Supreme Court may only hear appeals from final “judgment[] . . . rendered by the highest court of a State in which a decision could be had”), and id. § 2254(b) (habeas court may only hear claims that have been exhausted in highest available state court).

896. See *supra* notes 53–55, 780 and accompanying text.

tionalizing) ambitions, the states' (typically federalizing) political influence, and the starkness of the all-or-nothing choice the Constitution gave Congress to confer federal jurisdiction without strings or to withhold jurisdiction and take its chances on state court adjudication.

Because an Article III court's overriding duty to maintain the supremacy of federal law over state law defines and delimits the judicial power, the qualitative ingredients of that power are especially potent when the court is not only discharging its own structural Supremacy Clause function with regard to state law but also reviewing the exercise by "the Judges in every State" of theirs. And those ingredients *lose* constitutional protection when the supremacy of national law over state law is not implicated (as when a purely factual or state law question is at issue).⁸⁹⁷ When national legal supremacy and state sovereignty concerns are both strong—as in section 1983 and habeas cases—the Court has been particularly attentive to the law-focused and supremacy-bounded nature of the judicial power. Thus, via the careful rationing of qualified immunity limitations on damages and of standing and equitable limitations on prospective relief, the Court has insisted that state *law* and its "*custom*" and "*policy*" analogues *never* withstand their inconsistency with federal law, while sometimes letting isolated official violations that make no state law and fulfill no structural, supremacy-assuring function escape federal judicial remedy.⁸⁹⁸ Via the *Teague* doctrine, the Court has ruled that, as long as a federal court is able and obliged to exercise the full supremacy-maintaining "judicial Power" in deciding that state judges fulfilled their supremacy-assuring function *when* they ruled, Article III's overriding structural objective has been achieved, and the federal court is not required in addition to apply supreme law as it developed in the months or years *since* the state court ruled.⁸⁹⁹

As we have shown, habeas section 2254(d)(1) as amended by the 1996 Antiterrorism Act plausibly may be interpreted to preserve the constitutional design in the same manner as *Teague*. In contrast, the Fifth, Seventh, and Eleventh Circuits' alternative interpretation sunders that design. For it not only limits the federal court to the supreme law as of the time the state judges ruled but also makes the Article III court (1) defer to state judges' interpretation of that law, (2) give the statute's "adopt the state court's reasonable interpretation" edict priority over the Constitution, or (3) forbear exercising a remedial power to effectuate supreme law when, in the Article III court's independent estimation, the state court failed to do so and in the process made contrary state law.

But what of the argument that the "greater" power to withdraw jurisdiction encompasses the "lesser" power to regulate any jurisdiction that is conferred?⁹⁰⁰ Assuming that Congress has every Article III right (putting

897. See *supra* notes 632–640, 671–675 and accompanying text.

898. See *supra* notes 753–760, 774–789 and accompanying text.

899. See *supra* notes 761–773, 790–799 and accompanying text.

900. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

aside any Suspension Clause constraints) to withdraw *all* habeas jurisdiction over state convictions—a proposal Congress considered but rejected in the process of adopting section 2254(d)(1)⁹⁰¹—can it not also grant federal jurisdiction but withhold the power to decide the case independently, or attentively to the Constitution, or effectually, unless the state court deviation from supreme law is “grave”? The Court’s answer to repeated questions of this sort has consistently been “No”—in *Hayburn’s Case*, *Gordon*, and *Plaut* (barring Congress from granting jurisdiction while conditioning the court’s power to effectuate its judgments on some approving, or on the absence of some disapproving, executive or legislative action); in *Ableman*, *Martin*, and *Cohens* (by implication, at least, forbidding Congress to grant federal jurisdiction but subject Article III court decisions to state court review); in *Marbury*, *Klein*, and *Yakus* (forbidding Congress to grant jurisdiction but tell the court to ignore the bearing of the Constitution or give the Constitution Congress’s interpretation or surrender jurisdiction whenever the court’s interpretation of the Constitution differs from Congress’s); in *Martin*, *Crowell*, and the Mixed Question Cases (forbidding Congress to grant jurisdiction but limit the court’s power to reverse the constitutional-normative judgments a state court or federal administrator made in applying supreme law to the facts); and in *Boerne* and *Reynoldsville* (forbidding Congress after granting the Supreme Court jurisdiction, and forbidding state courts, to deprive the Court’s judgments of stare decisis effect).

There is a good reason why the Court has given this answer: The precise goal of the Framers’ hard-fought compromises culminating in Article III and the Supremacy Clause was to cede to Congress the “greater” power while forbidding it to exercise the “lesser”—i.e., in good checks and balances fashion, to grant *and* limit Congress’s power to grant and limit the federal courts’ power. As much as Madison and the other nationalists preferred (and repeatedly proposed) a *congressional* veto on state law contrary to federal law and, that failing, a *federal judicial* veto on contrary state law by way of exclusive federal jurisdiction in federal question cases, the Convention would accept neither. But as much as the confederationists preferred (and repeatedly proposed) to limit drastically the size of the federal judiciary and, that failing, to give Congress plenary control over the quality as well as the quantity (if any) of federal jurisdiction over federal questions, the Convention would accept neither.

Instead, the Convention gave Congress nearly plenary control of the *quantity* of federal jurisdiction over federal questions, while requiring Congress—whenever it could not serve its purposes without the help of the federal courts—to let those courts independently determine the bearing of the whole supreme law on the case and effectuate their judgment. As the Framers designed Article III and the Supremacy Clause, and as the Court consistently has interpreted them, Congress was free to say how

901. See 141 Cong. Rec. S7829, S7849 (daily ed. June 7, 1995).

much or how little federal question jurisdiction the Article III courts would exercise, and free (its own ambitions permitting) to leave most of that jurisdiction to state courts partially co-opted by the Supremacy Clause. But, if Congress found it necessary or proper to establish lower federal courts and give them and the Supreme Court jurisdiction over federal questions, it was *not* free to specify the manner in which the federal courts would exercise that jurisdiction or the level of fortitude they would exhibit in maintaining the supremacy of national law and in nullifying contrary law made by Congress or the states and their courts.⁹⁰²

902. Mr. Scheidegger agrees that a lesser power offensive to core constitutional policies cannot be saved by a greater power's permissibility, but he proposes an exception: Congress, he claims, may compel Article III judges to exercise less than the full "judicial Power" in cases within their jurisdiction as long as the only effect of doing so is to limit "mere" federal court "relitigation" of matters previously addressed in the state courts. See Scheidegger, *supra* note 75, at 917, 921, 953-57. The flaw in this argument is that *the essence of the Convention's, the Constitution's, and the Court's solution to the central problem of state legal fidelity to federal law is "relitigation"*—i.e., Article III courts' deployment of "[t]he judicial Power" *in its entirety* in reviewing state decisions to assure that state law does not withstand its inconsistency with federal law. True, Congress may altogether forbid "relitigation"—if it can do so without unduly trimming its own ambitions. Federal courts have no roving commission to treat as "*void*" any prior judgment on a federal question of any . . . state court, simply because the Article III court disagrees with it." Cf. *id.* at 892. But once Congress does authorize federal "relitigation" of matters previously adjudicated in state court—as it did in, e.g., *Martin*, *Cohens*, and *The Mayor*, over vehement objections that federal adjudicative redundancy was unconstitutionally insulting to the states and their courts, see, e.g., *supra* notes 380, 478, 481 and accompanying text, and as it has done in section 2254(d)(1), see *supra* notes 888-890 and accompanying text—then *the whole constitutional point is that the federal court must exercise the entire supremacy-maintaining "judicial Power," at risk of "treason to the Constitution."*