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THE TWO-TIERED STRUCTURE OF
THE JUDICIARY ACT OF 1789

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What limits (if any) does the Constitution impose on congress-

† Professor, Yale Law School. This essay and its companion, *infra* p. 1651, grew out of my participation in the Bicentennial Conference on the Judiciary Act of 1789, jointly sponsored by Georgetown University, the Bicentennial Committee of the Judicial Conference of the United States, and the Supreme Court Historical Society. In addition to these sponsors, I would like to thank Bruce Ackerman, Barry Friedman, Gerald Gunther, John Hueston, Larry Kramer, Maeva Marcus, Judith Resnik, and Cass Sunstein for their very helpful commentary on earlier drafts. As always, I am also indebted to the Yale Law Library staff, especially Gene Coakley, Peg Durkin, and Fred Shapiro. Finally, I am especially grateful for Dan Meltzer's thoughtful criticism and his abiding sense of fair play. I cannot imagine a more agreeable person with whom to disagree.

This essay and its companion are dedicated to the Honorable William Brennan, with gratitude for his extraordinary contributions to the field of federal jurisdiction.

sional efforts to strip federal courts of jurisdiction in controversial areas—abortion, flag burning, or what have you—thereby leaving the last word to state judges who lack article III insulation from political pressure? From the First Judiciary Act on, this question has periodically occupied center stage in the high drama of national politics. To be sure, the substantive targets of would-be jurisdiction strippers in Congress have varied, from the attempts of John C. Calhoun and his followers in the early nineteenth century to eliminate all Supreme Court federal question review of state courts,¹ to the more selective efforts of politicians in the latter half of this century to oust federal court review of school segregation and school prayer.² But in spite of the substantive differences in the targets of attack, the basic separation of powers issue has remained the same: how much power to restrict federal jurisdiction does the Constitution give Congress?

For the moment, at least, the debate over this question appears to have moved from Congress and the courts into the academy. But we should not let the relative silence of the political branches these days obscure the stakes involved. While jurisdiction stripping seems for the moment to have dropped off the immediate congressional agenda, it could at any moment get put back on (perhaps in response to a particularly controversial Supreme Court opinion) as should be evident from my opening reference to abortion and flag burning. What's more, we must remember that "ordinary" adjudication, even during "quiet" periods, takes place in the shadow of whatever jurisdiction stripping powers Congress lawfully possesses, whether or not these powers are ever exercised. The President, for example, need not *exercise* his veto power to make his views felt in the House and Senate; the mere fact that such power lawfully exists enables him to credibly (and perhaps quietly) threaten to veto undesirable bills—"Go ahead, make my day!"—and thereby discourage Congress from ever passing such bills.³ So too, if the political branches do indeed enjoy virtually plenary jurisdiction-stripping power, as some have claimed, savvy federal judges will keep this power in mind whenever they decide controversial cases. Finally, the issues implicated by the

¹ See generally G. GUNTHER, *CONSTITUTIONAL LAW* 36-39 (11th ed. 1985); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913).

² See, eg., G. GUNTHER, *supra* note 1, at 48 (discussing recent bills); Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992 n.18 (1982) (same).

³ The framers well understood this political science law of anticipated response. See Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1083-84 & nn. 142-47 (1988).

jurisdiction stripping debate go to the very heart of the role of federal courts in our constitutional order. The view of federalism and separation of powers one articulates in the context of the jurisdiction stripping debate is likely to have important implications for many other key debates in the field of federal jurisdiction—over the appropriate scope of various abstention doctrines, the preclusive effect of state court determinations in federal court, the proper scope of federal habeas corpus review, and the meaning of the eleventh amendment, to name just a few.⁴

The first major Supreme Court pronouncement on the issue of jurisdiction stripping came in Justice Joseph Story's landmark opinion for the Court in *Martin v. Hunter's Lessee*.⁵ Story's analysis, though not without flaws, deserves especially close attention because it remains to this day the most comprehensive discussion of the issue in the pages of *U.S. Reports*. In one key passage that, until very recently, was all but ignored by most twentieth century commentators, Story noted that the words of article III appear to distinguish between two fundamentally different tiers, or "classes," of jurisdictional categories:

The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and [sic] that the judicial power shall extend to *all cases*; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c.⁶

Story immediately followed this textual observation with a reminder that the specific and selective language of article III should not be lightly presumed unintentional or meaningless: "From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason."⁷

⁴ See, eg., Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1145-46 (1988) (noting diversity of constitutional, statutory, and federal common law issues implicated by judicial federalism).

⁵ 14 U.S. (1 Wheat.) 304 (1816).

⁶ *Id.* at 334.

⁷ *Id.*

But what precise meaning should be attributed to the two-tiered language of article III? For Story, an easy answer presented itself:

[I]t is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.⁸

Story's easy answer relied on more than wooden textualism, glossed by the classic rule of construction that no word in the Constitution should casually be dismissed as surplusage. In the ensuing paragraphs, Story went on to suggest that his proposed two-tiered reading drew support from major structural differences between the two classes of jurisdiction:

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; . . . they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject matter; in the second, it is made materially to depend upon the value in controversy.⁹

⁸ *Id.*

⁹ *Id.* at 334-36. Story's argument in *Martin* is not wholly free from ambiguity. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 211 (1985) [hereinafter Amar, *A Neo-Federalist View*] (Story's "exposition has generated considerable confusion"); Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688, 710 (1989) (Story's two-tier language is "in some tension with other things that Story said"). Elsewhere in *Martin*, Story seems to lump together all nine categories of "cases" and "controversies," stating:

If then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. . . . [F]or the constitution

In 1985 I sought to revive and elaborate the central insights of

has not singled out any class on which congress are bound to act in preference to others.

14 U.S. (1 Wheat.) at 330; *see also id.* at 336 (“We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated.”). These passages imply that Congress must vest *all nine* categories of “cases” and “controversies” in the federal courts, at least on appeal. The tension between Story’s broad mandatory thesis (all nine categories must be vested, at least on appeal) and his narrower one (only the first three categories must be so vested) resurfaces in Story’s subsequent writings, in which he hesitates to let go completely of the broader argument, yet places much more weight on the narrower two-tier thesis: “[I]t is clear, from the language of the constitution, that, in one form or the other [i.e., original or appellate], it is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared, that it shall extend to ‘*all cases.*’” 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1696 (1833). Note how the words “at least” mediate this tension. In yet another passage of *Martin*, Story, in passing, seems to refer approvingly to yet another (and broader still) mandatory argument, requiring that all nine categories be vested in the federal courts’ *original* jurisdiction: “But there is, certainly, vast weight in the argument which has been urged, that the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority.” 14 U.S. (1 Wheat.) at 336; *cf.* G. GUNTHER, *supra* note 1, at 49 (noting that some have read *Martin* as standing for this broadest proposition). The various passages in *Martin* cited in this note are best understood as part of Story’s overall argumentative strategy of presenting a series of overlapping and concentric arguments in the alternative about the precise contours of the mandatory nature of federal jurisdiction. *Cf.* 14 U.S. (1 Wheat.) at 336 (“At all events, whether the one construction or the other prevail, . . .”); *id.* at 339-42 (suspending, *arguendo*, the claim that lower federal courts are mandatory, yet retaining the argument that federal judicial power, via Supreme Court appellate jurisdiction over state courts, must extend to all cases in certain categories). I have chosen to single out the particular passage from *Martin* quoted in the text because, for reasons that I shall summarize below, *this* is the argument in *Martin* that I find most persuasive—indeed, compelling. Consistent with the general principle of interpretive charity, *see* R. DWORKIN, LAW’S EMPIRE 44-53 (1986), *this* is the argument that should be understood as Story’s central claim; consistent with the requirement of scholarly rigor, *this* is the argument that all modern scholars of federal jurisdiction and constitutional law must engage upon pain of slaying straw.

In informal conversations, it has been suggested to me that the *Martin* passage quoted in the text may not be concerned with the limits of congressional power to strip jurisdiction from federal courts and give the last word to state courts, but instead with the somewhat different question of which categories of federal jurisdiction must be vested exclusively in federal courts, as courts of *original* jurisdiction. Not only does this reading offend the principle of interpretive charity in rendering the passage less rather than more persuasive, it simply makes hash of the passage’s words. First, the two-tier language quoted in the text speaks over and over of *original or appellate* jurisdiction. Second, Story specifically invokes congressional power to make “exceptions and regulations”—language that applies only to appellate jurisdiction. Third, the passage concludes by noting that the two-tier thesis is consistent with—and indeed, derives additional plausibility from—the Judiciary Act of 1789. Yet this Act conferred no general federal question original jurisdiction—much less *exclusive* federal question original jurisdiction—on lower federal courts but rather left

Martin, even as I rejected less plausible passages of the opinion, such as Story's claim that lower federal courts were constitutionally required.¹⁰ I summarized my position as follows:

First, Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress. Second, the federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress. Third, the judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors. Fourth, the judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme Court's appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect. Fifth, Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of the power is that *if* Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it *must* create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal; to do otherwise would be to violate the commands that the judicial power "shall be vested" in the federal judi-

the Supreme Court with general federal question jurisdiction *on appeal*, under § 25. Thus, the passage's two-tier thesis is obviously concerned with federal judicial power as a whole, and not simply with original jurisdiction, exclusive or concurrent. Furthermore, Story later explicitly argues that in some federal question cases, state courts must exercise original—indeed *exclusive*—jurisdiction. See 14 U.S. (1 Wheat.) at 342. Finally, Story's later two-tier language in his *Commentaries*, quoted above, is wholly separate from any discussion of the distinct question of exclusive jurisdiction. Thus, the two-tier language quoted in the text is about "exclusive" jurisdiction only in the sense that it asserts that state courts must be *excluded* from pronouncing the last (as opposed to the first) word on all cases in the first tier. One page later in *Martin*, however, Story does finally opine on the narrow question of exclusive original jurisdiction. See *id.* at 336-37 (federal criminal prosecution is "unavoidably . . . exclusive of all state authority," including state court original jurisdiction); see also 3 J. STORY, *supra*, §§ 1742-52; Amar, *A Neo-Federalist View*, *supra*, at 212-13.

¹⁰ Amar, *A Neo-Federalist View*, *supra* note 9, at 210-14. In the second edition of his casebook on federal courts, Professor Martin Redish implies that I argued that lower federal courts are required. See M. REDISH, *FEDERAL COURTS* 179, 184-85 (2d ed. 1988). Professor Redish is mistaken (or at least misleading). Time and again, my 1985 essay invoked the Madisonian Compromise and emphatically argued that no lower federal courts are constitutionally required. See Amar, *A Neo-Federalist View*, *supra* note 9, at 206, 212-14, 216-18, 229 & n.84, 233-34, 246, 255, 268 n.213, 272.

ciary, and “shall extend to all” federal question and admiralty cases.¹¹

In their recently released third edition of *Hart & Wechsler's The Federal Courts and the Federal System*, the editors begin their notes on congressional power to limit federal court jurisdiction with a newly captioned section entitled, “The Position of Justice Story.” In sharp contrast to earlier editions, which neither quoted nor even mentioned Story's two-tier thesis,¹² the third edition introduces the reader to key portions of the above-quoted passage in *Martin*.¹³ A few pages later, the editors describe and analyze my 1985 effort to resurrect this prong of *Martin*. They graciously describe my argument as “full[,]” “forceful[,]” and “powerful[.]” but note that

it raises difficult questions of its own. If the distinction between the two tiers was so significant, why is there so little evidence of explicit recognition of that distinction in contemporary commentary or in the available history of the 1789 [Judiciary] Act? Why did the Act leave some significant gaps in federal court jurisdiction, even in the “mandatory” categories?¹⁴

These important questions deserve serious answers, and no time seems better than the present—while we are still in the shadow of the Bicentennial of the First Judiciary Act—to re-examine the Act's text, structure, and legislative history to see what light they cast upon the two-tier thesis. In the analysis that follows, I shall take up *Hart & Wechsler's* questions in reverse order—first, in Section I, by examining the words and logic of the Act itself, and then, in Section II, by sifting the Act's rather sparse legislative history.¹⁵

¹¹ Amar, *A Neo-Federalist View*, *supra* note 9, at 229-30.

¹² Elsewhere, I have harshly criticized this omission. See Amar, *Law Story*, *supra* note 9, at 709-10.

¹³ See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 366-68 (3d ed. 1988) [hereinafter *HART & WECHSLER*].

¹⁴ *Id.* at 386 (footnotes omitted).

¹⁵ The editors of the third edition pose three additional questions:

Why did the drafters of Article III single out cases affecting ambassadors, etc., for mandatory treatment and leave Congress an option in cases in which the United States was a party? And what are the present-day implications of the thesis for the broad scope of the Supreme Court's discretion to deny certiorari? Or for the authority of Congress to delegate certain matters to the final decision of a non-Article III federal tribunal?

Id. at 386-87 (footnote omitted). For a response to the first of these questions, see *infra* notes 76-80 and accompanying text; see also 14 U.S. (1 Wheat.) at 334-36; Amar, *A Neo-Federalist View*, *supra* note 9, at 253-54. For a response to the second question, see *id.* at 267-69. For a response to the third question, see Amar, *Marbury*, *Section 13*,

I. THE LANGUAGE AND STRUCTURE OF THE FIRST JUDICIARY ACT

A. *The Two-Tier Thesis Revisited*

Before we turn directly to the Act, it may be helpful to categorize and summarize the basic lines of argument underlying my 1985 essay, so that we can more carefully measure the Act against these principles.

1. The Holistic Principle¹⁶

The holistic principle insists first, that we must look at the judicial power of the United States as a whole. Thus, we must examine how the jurisdiction of all federal courts—supreme and inferior, in both original appellate modes—fits together. Second, holism insists that we see how the words—all the words—of article III mesh into a coherent whole.¹⁷ These two holistic inquiries are obviously interrelated, for it is the text itself (as a whole) that focuses attention on the “judicial power of the United States” which “shall be vested” in federal “judges” holding office during “good behaviour” and “shall extend to all cases” in certain categories, in either “original” or “appellate” form.

The antithesis of holism is a selective literalism that sees “the issues of lower federal court jurisdiction, Supreme Court appellate jurisdiction, and the import of the salary and tenure requirements . . . as distinct inquiries.”¹⁸ Under selective literalism’s divide-and-

and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 451 n.43 (1989) [hereinafter Amar, *Section 13*]; see also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 939-40 & nn.150-52 (1988).

¹⁶ See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 211-59.

¹⁷ This holistic search for textual coherence is related to holism on yet a third level—what might be called “interpretive holism.” See generally R. DWORKIN, *supra* note 9, at 225-75 (discussing “integrity”); Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 515-47 (1989) (discussing “synthesis”); Amar, *Section 13*, *supra* note 15, (illustrating interpretive holism); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (discussing “coherence”).

¹⁸ Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143, 144 (1982). Professor Redish’s own scholarship is emblematic of this “divide and conquer” approach to constitutional interpretation. As we shall see, this narrow clause-bound textualism fails even on its own terms, for it fails to provide a satisfactory account of other words of article III (“shall,” “all”); moreover, it does violence to a number of integrated structural postulates at the heart of that article. See *infra* text accompanying notes 19-36. For two recent expositions of article III that successfully resist the allure of the divide and conquer approach, see Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV.

conquer (il)logic, the permissive (Congress-empowering) language of the inferior courts clause (“such inferior courts as the Congress *may* from time to time ordain and establish”) and the exceptions clause (“with such exceptions and . . . regulations as the Congress shall make”) are jointly deployed to outflank the clear language of the mandatory “shall be vested” and “shall extend” provisions and thereby undermine the spirit of article III’s salary and tenure protections.

2. The Bifurcation Principle¹⁹

In contrast to selective literalism, the holistic principle insists that even though Congress has sweeping power to restrict the jurisdiction of lower federal courts and broad authority to make exceptions to the Supreme Court’s appellate jurisdiction, it does not necessarily follow that Congress can exercise both powers at once so as to eliminate a given case from the federal judicial power and thereby give state courts the last word. Rather, the answer will depend not simply on the permissive language of the exceptions and inferior courts clauses but also on the language of other clauses of article III. Once those clauses are consulted, it becomes clear that in some jurisdictional categories, the Constitution requires that the judicial power (which “*shall* be vested” in federal courts) “*shall* extend to *all* cases”; thus, Congress cannot exercise its powers simultaneously. In other categories—namely, those denominated “controversies”—the judicial power need not extend to “all” lawsuits; here, Congress is free to combine its powers over supreme and inferior federal courts. Thus, holism leads us to the principle that article III is bifurcated into two fundamentally different tiers.

Holism is related to bifurcation on yet another level. Not only does holism insist that we pay attention to the mandatory language (“shall,” “all”) as well as the permissive clauses of article III; holism also helps us to interpret the “mandatory” language itself. Bifurcation is rooted not simply in the plain-meaning argument that “shall” means “shall” and “all” means “all,” but also in the holistic principle that *other* words of article III confirm the meanings of “shall” and “all.” The very contrast between, on the one hand, the “shall be vested” and “shall extend” phrasing and, on the other hand, the

741 (1984); 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 (1981).

¹⁹ See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 240-59.

obviously permissive language that Congress "may" create lower federal courts, underscores the former clauses' mandatory character—as does comparison with other uses of the word "shall" in article III and in the "shall be vested" language of articles I and II. So too, it is the very fact that "all" is used *selectively*—repeated three times, and then omitted six times in article III's jurisdictional menu, and then used with great care in article III's next paragraph—that helps corroborate its significance. Only the bifurcation principle can give a holistic account of the selective use and nonuse of "all." In contrast, unitary (nonbifurcated) readings of article III assert either that virtually all federal jurisdiction is permissive, thus trivializing the inclusion of "all" in the first tier,²⁰ or that virtually all federal jurisdiction is mandatory,²¹ thus glossing over the absence of "all" in the second tier.

Although textual evidence provides the most obvious and tangible argument for the bifurcation principle, the deepest and most satisfying reasons for embracing bifurcation are structural. Simply put, the need for mandatory federal jurisdiction in first tier categories, especially in the two categories subject to the exceptions clause—federal question and admiralty cases—is far more compelling than in second tier categories, such as diversity. Indeed, to the extent that some commentators have viewed certain second tier categories, such as U.S. party suits, as specially important,²² I submit it is precisely because lawsuits in these categories are likely to raise federal questions and thereby implicate "arising under" jurisdiction. And it is precisely because diversity jurisdiction cases implicate true federal questions with far less regularity that most serious students of federal jurisdiction—from the 1780s²³ to the 1980s²⁴—have viewed diversity as the least essential category of federal jurisdiction.

²⁰ See, e.g., M. REDISH, *supra* note 10, at 184-85; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982) [hereinafter Redish, *Congressional Power*]; Redish, *supra* note 18, at 144-54.

²¹ See, e.g., I W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 610-20 (1953); Clinton, *supra* note 18, at 749-54. Some parts of Story's opinion in *Martin v. Hunter's Lessee* seem to lean in this direction. See *supra* note 9.

²² See, e.g., HART & WECHSLER, *supra* note 13, at 386-87; cf. *infra* notes 76-80 and accompanying text.

²³ See Amar, *A Neo-Federalist View*, *supra* note 9, at 245-54; Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); *Letters from the Federal Farmer*, in *THE ANTIFEDERALISTS* 197, 230 (C. Kenyon ed. 1985); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81-82 (1923); *infra* note 62.

3. The Structural Superiority Principle²⁵

The principle of the federal judiciary's structural superiority complements bifurcation; whereas the bifurcation idea reminds us that the first tier is quite different from the second, the structural superiority principle emphasizes that federal and state judges are quite different. Unlike state judges, all article III judges, supreme and inferior, are officers of the nation. All federal judges are appointed by the President and confirmed by the Senate, paid from the national treasury, guaranteed an undiminishable salary and tenure during good behavior, and made accountable to the nation through the national impeachment process. Through these structural provisions the federal Constitution assures the competence, impartiality, and probity of federal judges in ways that no state constitution must (or even can) for state judges. As we shall see below, the structural superiority thesis has special significance when considered in connection with bifurcation, emphasizing the particular importance—indeed the indispensability—of article III salary and tenure guarantees in all cases arising under federal law, whether in law, equity, or admiralty.²⁶

The principle of structural superiority stands opposed to “the myth of parity”²⁷ propagated by some followers of Professor Henry Hart, who seek to place state judges on a par with their federal sisters and brothers. The myth is odd indeed, for it denies that dramatic differences in selection, tenure, and removal procedures between state and federal benches translate into predictable long-run differ-

²⁴ See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW*, 139-52 (1973); HART & WECHSLER, *supra* note 13, at 1695-700; Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 1-49, 268-89 (1968); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-30 (1928); Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 809 (1957); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1129 & n.86 (1977); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234-40 (1948); Wright, *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary*, U.S. Senate, 95th Cong., 2d Sess. 45-48 (1978).

²⁵ See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 235-38.

²⁶ Indeed, even Martin Redish—a strong critic of the bifurcation thesis—has acknowledged that the salary and tenure guarantees of article III seem less essential in diversity than in federal question cases. See Redish, *supra* note 18, at 152.

²⁷ See generally Neuborne, *supra* note 24, at 1105 (arguing against claim that “federal and state trial courts are equally competent forums for the enforcement of federal constitutional rights”).

ences in decisional outcomes. The framers obviously thought otherwise; they spent a good deal of time and energy carefully specifying how federal judges would obtain and hold office precisely because they understood that these factors would affect judges' decisions.

4. The (True) Principle of Parity²⁸

The "myth of parity" told by followers of Professor Hart obscures the *real* principle of parity at the heart of article III—the structural parity of all *federal* judges, supreme and inferior. Structurally, all of these officers are equal to each other (and superior to state judges) in mode of appointment, tenure of office, and mechanism of removal. Nor does the Constitution suggest any textual difference by giving Supreme Court officers and lower federal court officials different titles; on the contrary, all are simply described as article III "judges."²⁹ Thus, the modern practice of distinguishing between Supreme Court "Justices" and lower federal court "Judges" derives not from the words of the Constitution, but, as we shall see, from those of the First Judiciary Act.³⁰ Still further support for federal parity derives from the exceptions clause empowering Congress to shift the last word on any case in the Supreme Court's appellate jurisdiction to lower federal courts, either as courts of original jurisdiction or as courts of appeals, even over state courts (consistent with the principle of structural superiority). Congressional power to allocate jurisdiction *within* the federal judiciary is broad indeed; by either altering the Supreme Court's size, or by making exceptions to its appellate jurisdiction, the political branches have great power to choose *which* article III officers will have the last word on any given case. Congressional power to take the last word from all federal judges, however, is far more limited, given the constraints of the bifurcation and structural superiority principles.

Ironically, even as Professor Hart's famous *Dialogue* on jurisdiction stripping paid insufficient heed to the structural superiority of federal judges, it also obscured the true parity principle by intimating that—notwithstanding the words of the exceptions clause—certain (ill-defined) "essential" functions could be performed only by the Supreme Court.³¹

²⁸ See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 221-22, 254-58.

²⁹ Except for the "Chief Justice." See *infra* text accompanying note 139.

³⁰ See *infra* text accompanying note 139.

³¹ See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953).

5. The Coextensiveness Principle³²

When combined, the bifurcation and structural superiority principles deny Congress power to give state courts the last word on any admiralty or federal question case. Congress may allow state courts, if authorized by state constitutions, to exercise original jurisdiction in any of these cases, but, consistent with holism, only federal courts are vested with the judicial power of *the United States*—the power to speak *in the name of the nation, definitively and finally* on federal law. The correctness of this holistic reading of article III is confirmed by two additional principles which, when combined, yield an identical conclusion.

The first, the coextensiveness principle, asserts that federal executive and judicial power are coextensive with federal legislative power. Wherever Congress can legislate, the executive must have coordinate authority to execute, and the judiciary to adjudicate. Laws passed by the *national* legislature shall be approved and implemented by a *national* executive and expounded definitively by *national* judges. A congressional effort to shift final interpretive authority from federal to state courts is no more structurally supportable than a parallel effort to shift the President's power to veto laws to state governors.

The coextensiveness principle derives from more than the textual point that the judicial power is vested not in Congress, but in federal courts, and the structural observation that the opening "shall be vested" lines of articles I, II and III establish three equal and coordinate branches. Underlying this textual vesting and structural symmetry is a root principle of the rule of law. The framers designed the separation and coordinacy of powers to ensure that federal laws would be prospective and general. Interpretation by an impartial and independent federal judiciary would prevent retroactive modification and ensure even-handed application, thereby promoting the rule of law.³³ If the framers had allowed Congress to vest final interpretive authority in state judges who might lack both competence and independence, it would be easy to circumvent this careful separation of powers.³⁴ Although Congress need not legislate in a given

³² See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 231-34, 250-52.

³³ See *id.*, and sources cited therein; see also THE FEDERALIST No. 78, at 470 (C. Rossiter ed. 1961) (A. Hamilton) ("But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.").

³⁴ See, e.g., THE FEDERALIST No. 81, at 486 (A. Hamilton) ("State judges, holding

area at all, *if* it legislates it must respect the rule of law, by providing for coextensive federal jurisdiction (at least on appeal).

6. The Principle of Inadequate Political Safeguards³⁵

The rule of law's concern about generality and prospectivity should focus our attention on those parts of article I specially devoted to assuring these respective values, namely the prohibitions against bills of attainder and *ex post facto* laws. And examination of these prohibitions reveals an interesting fact. The Constitution's attainder and *ex post facto* clauses impose limits on both Congress, in article I, section 9, and state legislatures, in article I, section 10. This repetition not only confirms the absolute centrality of those prohibitions to the federalist Constitution; it also shows that the framers feared that similar majoritarian diseases would afflict all legislatures—including Congress. The framers could have hardly expected Congress alone to police state legislators—who would, after all, directly select the Senate and whose electors would automatically decide House races; Congress was itself too political and dependent to serve as the sole sentry guarding the constitutional vault from political and parochial state legislators. Conversely, the framers could not fully trust state judges to police Congress, for *both* were likely to be too closely tied to state legislatures and excessively vulnerable to short-term political pressures. Only federal judges, protected by their structurally superior tenure, would enjoy the independence, detachment, and competence to disregard the flames of faction and the passions of temporary majorities.

Thus, precisely because of the “political safeguards of federalism” noted by Professor Herbert Wechsler,³⁶ the interests of Congress, state legislators, and state judges (who in 1787 often enjoyed virtually no independence from their state legislatures) were not sufficiently “adverse.” Therefore the Constitution gave federal courts an indispensable role in policing constitutional rights against these entities.

The principle of inadequate political safeguards perfectly complements the coextensiveness principle; the former explains the need

their office during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”).

³⁵ See generally Amar, *A Neo-Federalist View*, *supra* note 9, at 224-28, 250, 253.

³⁶ See 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 (1953). Professor Wechsler's analysis, of course, was strongly anticipated by James Madison in *The Federalist Nos. 45 and 46*.

for federal court jurisdiction (at least on appeal) in all cases arising under the Constitution, whereas the latter accounts for the analogous imperative in all cases arising under federal laws and treaties. Taken together, these principles argue for plenary judicial power over not just "arising under" jurisdiction, but also admiralty jurisdiction whenever any federal norms are implicated, as is virtually always the case in admiralty. (Such cases, do not, of course, fall within the "arising under" category, which is limited to cases *in law and equity* arising under federal law.)

Thus, in tandem, the coextensiveness and political safeguards principles generate results virtually synonymous with bifurcation. The only important difference is that bifurcation goes beyond arising under and admiralty jurisdiction, and further insists that federal courts be vested with full judicial power over all cases affecting ambassadors, etc. However, since such cases fall within the Supreme Court's original, and not appellate, jurisdiction, Congress has no authority under the exceptions clause or any other clause to remove them from the Supreme Court. Insofar as the only real debate today is over the scope of congressional power under the exceptions clause, the coextensiveness and political safeguards principles, when combined, simply echo the bifurcation principle's insistence that every exception in arising under and admiralty cases be offset by vesting the last word in some lower federal court.

7. Additional Arguments

The foregoing principles all derive directly from the original Constitution, and thus should have been both relevant and accessible to the first Congress as it pondered the First Judiciary Act. In addition to these six principles, my 1985 essay offered three additional arguments on behalf of the two-tier thesis that the first Congress would not have considered. First, the two-tier thesis derives considerable support from the language of classic Marshall Court opinions on the federal judiciary,³⁷ and from important extra-judicial

³⁷ See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821-22 (1824) (Marshall, C.J.) (labelling first tier "most important class"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821) (Marshall, C.J.); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334-36, 347 (1816); see also *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 672-73 (1838) (oral argument); *id.* at 721 (Baldwin, J.) (Taney Court).

Martin's two-tier analysis also received emphatic endorsement in the House Judiciary Committee's minority report to an 1831 bill attempting to repeal the Supreme Court's authority to hear federal question appeals from state courts. The minority report, submitted by (later President) James Buchanan, W.W. Ellsworth,

writings of Justice Story³⁸ and Chief Justice Marshall.³⁹ All of these early nineteenth century expositions are entitled to considerable weight today, but they were obviously unavailable to the first Congress.

Second, the two-tier thesis lays down bright-line rules about both the affirmative scope and the limits of congressional power over federal court jurisdiction.⁴⁰ In contrast to the fuzzier "essential function" tests propounded by Professor Hart⁴¹ and some of his followers,⁴² the two-tier thesis identifies a determinate boundary between what Congress may do consistently with article III, and what it may not. Such crispness is especially valuable for judges seeking "mediating principles"⁴³ to implement constitutional values in case by case adjudication; crispness enhances predictability, reduces opportunities for abuse of judicial discretion, gives lower courts greater guidance, and enables adjudication to appear more "legal" and less "political." But the preference for bright-line rules is one

and E.D. White, was in turn emphatically embraced by the entire House, which overwhelmingly defeated the bill by a 138 to 51 vote. See Warren, *supra* note 1, at 164. The ten page report explicitly invokes "the very able and conclusive argument of the Supreme Court" in *Martin* and *Cohens* (the only opinions cited), and emphasizes over and over again the phrase "all cases"—four times in italics. See H.R. REP. NO. 43, 21st Cong., 2d Sess. 11-20 (1831). The minority report plainly argues that repeal would be not simply unwise but unconstitutional. See also F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 44 n.143 (1928) (labelling the report "one of the famous documents of American constitutional law").

³⁸ See *supra* note 9 (quoting § 1696 of Story's *Commentaries*). Story later wrote that Chief Justice Marshall, to whom the *Commentaries* were dedicated, "approved all [its] doctrines." 2 W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 274 (1851) (reprinting Letter from Joseph Story to court reporter Richard Peters (June 14, 1837)).

³⁹ See Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 204, 212-14 (G. Gunther ed. 1969); see also 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* 298 (1st ed. 1826).

Marshall's extra-judicial statements should perhaps also include the two-tiered language of *Martin* itself, in which Marshall recused himself but may well have helped behind the scenes in drafting the language of "Story's" opinion. See G.E. WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 173 n.66 (1988).

⁴⁰ See Amar, *A Neo-Federalist View*, *supra* note 9, at 230 n.86.

⁴¹ See *supra* note 31 and accompanying text.

⁴² See, e.g., Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 160-68 (1960) (noting that "denying the Court jurisdiction to review any cases involving [certain] subjects would effectively obstruct" the Court's essential functions as mandated by the Constitution); cf. Amar, *A Neo-Federalist View*, *supra* note 9, at 220-22 (describing and critiquing Ratner's thesis).

⁴³ Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107-08 (1976).

intimately bound up with special institutional needs of courts,⁴⁴ and thus would be less relevant to a legislature free to examine the Constitution directly, without the simplifying distortions introduced by judicial mediating principles.⁴⁵

Finally, I argued in 1985 that the two-tier thesis continued to make sense, two centuries after Philadelphia—that, if anything, intervening events only made the thesis more sensible.⁴⁶ These events include the adoption of the Civil War amendments, the expansion of individual rights against governments (especially state governments), the attenuation of the importance of diversity jurisdiction after *Erie*, and the legislative recognition of the heightened importance of federal question jurisdiction in federal courts.

Central to my argument about post-ratification American history was my claim that, beginning with the First Judiciary Act, congressional statutes had always reflected the basic principles underlying the two-tier thesis, with de minimis exceptions. We are now in a position to reassess that claim, at least insofar as it concerns the Judiciary Act of 1789.

B. *The First Judiciary Act Revisited*

It is somewhat ironic that one of the most “difficult questions” the two-tier thesis raises for the editors of *Hart & Wechsler* stems from the allegedly “significant” inconsistencies between the thesis and the provisions of the First Judiciary Act. In language that continues to be excluded from the casebook, even in its much-improved third incarnation, Joseph Story concluded his two-tier analysis in *Martin* by noting that it was

also worthy of remark that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction [between the two tiers of article III jurisdiction] [This distinction has] been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction.⁴⁷

⁴⁴ See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 49-50 (2d ed. 1983); J. ELY, DEMOCRACY AND DISTRUST 124-25 (1980). The value of such bright lines is perhaps at its peak when the judiciary must convince the cynic that it is not simply protecting its own political turf when it tells Congress “thus far may you strip our powers but no further.”

⁴⁵ See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586-89 (1975); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-28 (1978).

⁴⁶ See Amar, *A Neo-Federalist View*, *supra* note 9, at 247 n.134, 265-69.

⁴⁷ *Martin*, 14 U.S. (1 Wheat.) at 336. Justice Story in this passage also makes

Thus, Story seemed to view the Act as strongly supporting the two-tier thesis, rather than raising “difficult questions” for it. Indeed, Story’s entire two-tier analysis was anticipated at oral argument by Martin’s attorney, Walter Jones, who also saw the two-tier thesis as drawing support from the First Judiciary Act: “The constitution, art. 3., sec. 2., has distinguished between the causes properly *national* [i.e., “all cases”], and ‘controversies’ which it was thought expedient to vest in the courts of the United States. The judiciary act covers the first completely, the last only partially.”⁴⁸

A fresh look at the Act will answer *Hart & Wechsler* by confirming Story and Jones. In its general structure and in a great many of its specific provisions, the Act validates the main tenets of Story’s two-tier thesis, as revised and elaborated in 1985. Admittedly, the Act is perhaps not *perfectly* consistent, in every jot and tittle, with the two-tier thesis, but few things in life—and especially in law—are perfect. Contrary to *Hart & Wechsler*’s intimations, the “gaps” that the Act created in first-tier cases—if gaps they be—are not truly “significant.”

It must also be noted that the powerful microscopic lens *Hart & Wechsler* uses to reveal and magnify “significant” inconsistencies between the Act and the two-tier thesis reveals equally “significant” problems with the Act under *any* currently held article III theory. At this ultra-high level of magnification, the Act simply cannot withstand scrutiny unscathed, for it seems to have unconstitutional features under any plausible reading of article III. Indeed, some of the very holes *Hart & Wechsler* notes, far from being uniquely in tension with the two-tier thesis, are equally in tension with the explicit language of the historic centerpiece of *Hart & Wechsler* itself—the legendary *Dialogue* of the late Henry Hart—and with the overwhelming consensus opinion of today’s bench and academy. Thus, if these holes prove anything, they prove too much—or rather, they prove only that *perfect* consistency with the Act of 1789 cannot be the ultimate touchstone for our interpretations of article III. (That article is, of course, a separate text unto itself with lexically superior status.) Thus, while it would be literally true to say that “some details of the

passing reference to “subject matter” limitations created by Congress in first tier cases—no doubt a reference to the common-law “savings clause” of § 9 and perhaps also to the language limiting § 25 review to those issues that “immediately respect[]” the federal questions presented. See *infra* text accompanying notes 81-112.

⁴⁸ See 14 U.S. (1 Wheat.) at 321; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 448 (1928). Jones holds the all-time record for most Supreme Court oral arguments (317). See *infra* note 222.

Act of 1789 are embarrassing to Story's and Amar's two-tier thesis," it would be equally true—and far less misleading—simply to say that "some details of the Act of 1789 are embarrassing."

1. The Holistic Principle

The First Judiciary Act's general structure stands dramatically opposed to those contemporary scholars who seek to divide and conquer article III by treating congressional power over lower federal courts as a wholly separate issue from congressional power over the Supreme Court's appellate jurisdiction. Inferior federal court original jurisdiction, inferior federal court appellate jurisdiction (over both state courts, via removal,⁴⁹ and other federal courts, via writs of error and appeal), Supreme Court original jurisdiction, Supreme Court appellate jurisdiction (again, over both state and federal courts)—all are dealt with together in a single, comprehensive and integrated bill. The myriad internal cross-references—flagged by words such as "herein after,"⁵⁰ "before-mentioned,"⁵¹ and "said"⁵²—further confirm the interconnectedness of the Bill's various sections that, under a divide-and-conquer approach, present wholly unrelated doctrinal issues. These cross-references are intricate and at times confusing—on July 3, 1789, Joseph Jones wrote to James Madison that "the different powers and jurisdictions of the Courts would have been more clearly seen had they been taken up in several bills, each describing the province and boundary of the Court to which it particularly applied."⁵³ Yet the decision of the first Congress *not* to chop the unitary judicial branch into separate statutes—even at the expense of some added complexity—only underscores the Act's deep commitment to holism. Today we may take for granted the fact that S-1 dealt with federal courts as a whole, but we do so only at the risk of blinding ourselves to much of the significance of the Act, and of article III.

The Act's very title—"An Act to establish the Judicial Courts of the United States"—adds still further support to the holism principle's insistence on looking at the judicial power of the United States as a whole, vested in federal courts. Holism also insists that, although state courts may exercise original jurisdiction in various

⁴⁹ See *infra* text accompanying notes 118-26.

⁵⁰ Judiciary Act of 1789, ch. 20, §§ 10, 11, 13, 1 Stat. 73.

⁵¹ *Id.* § 14.

⁵² *Id.* § 15.

⁵³ 12 THE PAPERS OF JAMES MADISON 276 (C. Hobson & R. Rutland eds. 1979) (reprinting Letter from Joseph Jones to James Madison (July 3, 1789)).

article III categories, these courts may not, strictly speaking, be vested with the judicial power of the United States. The Act scrupulously adheres to this distinction. Only federal courts are “establish[ed];” only federal courts are vested with jurisdiction (typically through the use of the mandatory word “shall”⁵⁴—the very same word whose mandatory force is denied by selective literalists playing divide-and-conquer with article III). State concurrent jurisdiction is recognized, but not “vested” or “conferred”; nowhere does the Act command that state courts “shall” have jurisdiction.

2. The Bifurcation Principle

Article III requires not only that the judicial power of the United States be vested only in federal courts, but also that that very same judicial power extend to “all” cases in the first tier, but not necessarily to all “controversies” in the second tier. If we look only at original jurisdiction, it might seem as if the Act favored diversity over federal questions; but if we instead look holistically at federal judicial power in the aggregate, a very different picture emerges. As I explained in 1985:

The first Judiciary Act created major exceptions to plenary federal jurisdiction over all party-defined cases. Where the Constitution permits the federal judicial power to extend to “Controversies between citizens of different States” the Act gave federal courts original jurisdiction only in cases involving more than \$500—no small sum in the eighteenth century—and only where the suit was one between “a citizen of the State *where the suit is brought* and a citizen of another state.” Moreover, such jurisdiction was nonexclusive. Removal from state court was permitted only in a limited number of cases (again involving a \$500 minimum amount) and no diversity case proceeding to judgment in a state court was appealable [as such] to a federal court. Where the Constitution permitted jurisdiction in cases “to which the United States shall be a Party,” the Act conferred jurisdiction on federal courts only where the United States was party-plaintiff, and then only where “the matter in dispute” amounted to more than \$100, exclusive of costs. Once again this jurisdiction was concurrent with the states, from whose decisions no appeal to federal courts would lie. In cases involving land grants under different states, the federal courts were given power to hear only a limited number of cases removed from state courts; once again a \$500 minimum blocked the doors of the federal judiciary.

⁵⁴ See Judiciary Act of 1789, ch. 20, §§ 9-13, 1 Stat. 73.

The Act's treatment of cases in the mandatory tier was far different. Federal District Courts were vested with plenary and exclusive jurisdiction to hear "all civil causes of admiralty and maritime jurisdiction" regardless of the amount in controversy. The Supreme Court was endowed under the Act with exclusive jurisdiction over "all . . . suits or proceedings *against* ambassadors, or other public ministers, or their domestics, or domestic servants" and nonexclusive jurisdiction of "all suits brought *by* ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party." Lower federal courts were granted exclusive cognizance of federal crimes, while the Supreme Court was given plenary appellate review, under the famous section 25, over all state court decisions which defeated rights set up by the appellant under the Constitution, laws or treaties of the United States. Thus, in the mandatory tier, state courts were not permitted to be the last word.⁵⁵

Since 1985, various scholars have sought to offer nonbifurcated readings of the 1789 Act. Professor Robert Clinton, for example, has read article III as requiring that *all nine* categories of cases of controversies be fully vested in federal courts, at least on appeal.⁵⁶ Clinton tries to soften the rigor of his unitary principle by introducing the possibility of *de minimis* exceptions to his unitary and mandatory thesis and then argues that the Judiciary Act of 1789 basically supports his thesis.⁵⁷

The biggest problem with Clinton's argument about the Act derives from the above-mentioned limitations on diversity and land-grant cases. Clinton argues that the \$500 hurdle set up by the Act was *de minimis*, but \$500 was a hefty sum in 1789. As Senator William Paterson wrote in his notes on the Act, "The Farmers in the New England States [are] not worth more than 1,000 Ds. on an Average."⁵⁸ Examination of contemporaneous dollar limits elsewhere further undercuts Clinton's characterization of \$500 as *de minimis*. When the first Congress sought to qualify its proposed constitutional right to a civil jury with a *de minimis* amount-in-dispute require-

⁵⁵ Amar, *A Neo-Federalist View*, *supra* note 9, at 260-62 (citations and footnotes omitted).

⁵⁶ See, e.g., Clinton, *supra* note 18; Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1516-22 (1986).

⁵⁷ See generally Clinton, *supra* note 56, at 1522-52.

⁵⁸ 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-91, at 481 (K. Bowling & H. Veit eds. 1988) (reprinting notes of William Paterson on Judiciary Act of 1789) [hereinafter Notes of William Patterson].

ment, it chose \$20—a far cry from \$500.⁵⁹ That amendment, of course, was passed by Congress the very same week as the Judiciary Act.⁶⁰

Even more significant, when Congress turned to federal question appeals from state courts to the U.S. Supreme Court under section 25, it chose a truly *de minimis* amount-in-dispute requirement: zero. As Paterson's notes explained, "If a small Sum [is in dispute, nevertheless] it may involve a Question of Law of great Importance, and should be liable to be removed."⁶¹ Paterson's notes at this point make reference to the celebrated British case of John Hampden, whose refusal to pay a mere twenty shillings of ship money tax generated a momentous lawsuit raising fundamental constitutional questions about the respective authority of Charles I and Parliament.⁶² The framers of the Judiciary Act understood that federal questions *by their very nature* and subject matter, were not *de minimis*. Diversity cases, on the other hand, were by their nature far less significant, since jurisdiction derived not from the dispute's legal subject matter, but merely from the identity of its parties. Thus, large amount-in-dispute holes could be cut out of diversity jurisdiction, but none were appropriate for federal questions.⁶³

⁵⁹ See U.S. CONST. amend VII.

⁶⁰ See J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 454-55, 506-07 (1971).

⁶¹ Notes of William Paterson, *supra* note 58, at 481.

⁶² See *id.* In opposition to a proposed constitutional amendment to limit appeals to the Supreme Court to cases involving more than one thousand dollars, Representative Egbert Benson said that "the question in controversy might be an important one, though the action was not to the amount of a thousand dollars." Samuel Livermore likewise found the clause "objectionable, because it comprehended nothing more than the value." 1 ANNALS OF CONG. 784 (J. Gales ed. 1789) (1st ed. pagination) (Note that there are two editions of the *Annals of Congress* and that this Article cites to a different edition than does Professor Meltzer's article.). The amendment ultimately died in the Senate. See also 12 PAPERS OF JAMES MADISON, *supra* note 53, at 418-19 (reprinting Letter from James Madison to Edmund Pendleton (Sept. 23, 1789)) (Senate views proposed "limitation on the value of appeals to the Supreme Court . . . unnecessary, and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount"); cf. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326 (J. Elliot ed. 1888) [hereinafter ELLIOT'S DEBATES] (proposed amendments by Massachusetts and New Hampshire ratifying conventions establishing minimal dollar limits for federal jurisdiction, but only for diversity cases).

⁶³ Professor Casto argues that in many cases involving small sums, "an appeal to the distant Supreme Court would . . . not be worth the candle." Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C.L. REV. 1101, 1119 (1985). This argument should not be pushed too hard, as it is in mild tension with Casto's own invocation of Hampden's case, a case that illustrates how

Because Clinton's unitary account gives him no handle with which to distinguish federal questions from diversity, he is forced into a number of awkward positions. First, he ends up obscuring a major structural feature of the Act of 1789—the differential dollar limits between first tier cases and second tier controversies. Second, Clinton must stretch the notion of “de minimis” to its breaking point, and perhaps beyond. Third, his expanded concept of “de minimis” creates a cancer in the center of his mandatory theory that he cannot prevent from spreading to healthy and vital tissue—federal question jurisdiction. The Act of 1789 did a far better job of protecting that tissue than does Professor Clinton.

Ironically, Clinton's unitary exposition itself contains seeds of bifurcation, for Clinton treats federal question jurisdiction prior to and separately from all other categories.⁶⁴ Yet this promising move, based perhaps on eminently sound and deep-seated (but never articulated) structural intuitions about the primacy of federal question jurisdiction, never ripens into discussion (or even, seemingly, awareness) of the bifurcation alternative.

Professor Clinton's is not the only unitary alternative to the bifurcation thesis. Whereas Clinton's unitary account sees virtually all federal jurisdiction as mandatory, other unitary accounts treat virtually all federal jurisdiction as subject to plenary congressional control. Perhaps the most distinguished living exponent of this view is Professor Herbert Wechsler;⁶⁵ and the third edition of the remarka-

parties may litigate issues that involve small sums where matters of high principle are at stake. *Cf. id.* at 1110-11. Thus, the key point to be emphasized is that litigants with small claims had a *legal right* to take their federal questions to the Supreme Court, although they could of course choose to waive that right, just as they could of course choose to forego litigation in the first instance. What's more, Casto's observations about distance and expense are wholly consistent with the two-tier thesis, which is at pains to affirm broad congressional power to choose *when, where,* and in front of *which* article III officer(s) federal rightholders are to have their constitutionally guaranteed day in federal court. *See Amar, A Neo-Federalist View, supra* note 9, at 254-59; *Amar, Section 13, supra* note 15.

⁶⁴ Compare Clinton, *supra* note 56, at 1541-44 (“Federal Question Jurisdiction”) with *id.* at 1544-52 (“Other Enumerated Jurisdictional Grants”).

⁶⁵ For instance, Professor Wechsler has opined:

[T]he plan of the Constitution for the courts . . . 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, bound as they are by [the supremacy clause]. Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government.

ble casebook that bears his name continues to exhibit strong traces of his influence.⁶⁶ As with my critique of Professor Clinton, the third edition notes that the Act of 1789 left "large gaps in federal jurisdiction";⁶⁷ the book at this point cites a 1985 article by Professor William Casto,⁶⁸ which placed considerable emphasis on the \$500 requirement. The third edition goes on to argue that the Act also left other "significant"⁶⁹ gaps even in first tier cases. It is here that I part company.

Let us first consider *Hart & Wechsler's* reminder that in several respects the language of section 13 concerning ambassadors seems less comprehensive than the corresponding language of article III—language that under the bifurcation thesis is mandatory.⁷⁰ As I pointed out in 1985, the technical discrepancies between section 13 and article III are indeed somewhat embarrassing to the two-tier thesis;⁷¹ however, the two-tier thesis is hardly unique in this respect. As noted above, "all cases affecting ambassadors, other public ministers and consuls" fall within the Supreme Court's original, not appellate,

Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).

⁶⁶ The third edition, however, also exhibits other, contrary traces. See generally Amar, *Law Story*, *supra* note 9, at 711-14.

⁶⁷ HART & WECHSLER, *supra* note 13, at 386.

⁶⁸ *Id.* at 386 n.38 (citing Casto, *supra* note 63). Notwithstanding *Hart & Wechsler's* credentialing of, and apparent reliance on, Casto's "exhaustive study," HART & WECHSLER, *supra* note 13, at 366, 386 nn.38 & 40, Professor Casto's work is seriously flawed in its grasp of both general principles and many specific details. At a general level, Professor Casto reveals deep misunderstandings of the principles of holism and bifurcation underlying both article III and the Act of 1789. He claims:

It is evident . . . that Congress made no attempt whatsoever to mesh the Supreme Court's appellate jurisdiction with the limitations on the lower courts' original jurisdiction If the idea of aggregate vesting is historically accurate, one would expect Congress to have made some effort to coordinate the federal courts' jurisdictions. No such effort was made.

Casto, *supra* note 63, at 1118. He also states:

To reconcile [the limitations enacted by the first Congress] with a theory of mandatory vesting, one must assume that some of the heads of jurisdiction in the Constitution are mandatory but others—most notably diversity and alienage jurisdiction—are not. Article III does not suggest this hierarchy, nor has any historical evidence been adduced to support such a constitutional doctrine.

Id. at 1125. For examples of less sweeping misstatements, see *infra* notes 102, 169, 197-202 and accompanying text.

⁶⁹ HART & WECHSLER, *supra* note 13, at 386.

⁷⁰ See *id.* at 386 n.41. The editors also note that some of the original jurisdiction under section 13 was only concurrent. For a discussion of this issue, see Amar, *Section 13*, *supra* note 15, at 492 n.219.

⁷¹ See Amar, *A Neo-Federalist View*, *supra* note 9, at 261 n.183, 264 n.194.

jurisdiction, and thus are not subject to congressional power under the exceptions clause. Nor is there any other obvious source of congressional authority to deprive the Supreme Court of jurisdiction over those courts. Hence, Professor Martin Redish—a harsh critic of my own two-tier thesis—is himself on record as acknowledging that the Supreme Court’s original jurisdiction over all ambassador cases is off limits to Congress.⁷² Professor Henry Hart’s celebrated *Dialogue* is to similar effect: “It’s hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court).”⁷³ The discussion of original jurisdiction by these scholars is *sotto voce*, but far from idiosyncratic, for virtually no modern scholars or judges have argued that Congress can tamper with the Court’s irreducible core of original jurisdiction over ambassador cases—jurisdiction universally acknowledged to derive directly from the Constitution itself.⁷⁴

Thus, the technical discrepancies between section 13 and article III do raise “difficult questions” for the two-tier thesis, but they raise equally “difficult questions” for virtually all other widely held theories of article III, including the one most prominently associated with *Hart & Wechsler* itself. Indeed, as I shall now show, the original jurisdiction puzzle presents far more “difficult questions” for *Hart & Wechsler* than for the two-tier theory.

First, the original jurisdiction issue demonstrates that seemingly unitary accounts arrayed against Story’s two-tier thesis are often not so unitary, for they themselves bifurcate article III into mandatory and permissive tiers by distinguishing between Supreme Court original and appellate jurisdiction. Usually this bifurcation is acknowledged quickly and quietly. There are good tactical reasons for such gingerliness, for one would be hard pressed indeed to develop strong structural reasons for seeing all cases in the Supreme Court’s original jurisdiction as qualitatively more important than all cases in its appellate jurisdiction—including the all-important federal question category. If the question is not “shall we bifurcate article III?” but rather, “*which* bifurcation theory makes the most sense of the article’s text, history, and structure?” then much of the structural

⁷² M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER* 12 (1980); Redish, *Congressional Power*, *supra* note 20, at 901.

⁷³ Hart, *supra* note 31, at 1372-73.

⁷⁴ I am on record, however, as arguing that Congress *can* restrict Supreme Court original jurisdiction over state party cases. See Amar, *A Neo-Federalist View*, *supra* note 9, at 254 n.160; Amar, *Section 13*, *supra* note 15, at 478-88; see also *infra* note 222.

elegance of the (false) unitary account is lost; things are not quite so simple as the rhetoric of “plenary congressional power” and “complete parity between state and federal courts” might suggest.⁷⁵

The editors of the third edition seem subtly to obscure this point, for one of the additional “difficult questions” they raise about my 1985 essay is, “Why did the drafters of Article III single out cases affecting ambassadors, etc., for mandatory treatment and leave Congress an option in cases in which the United States was a party?”⁷⁶ There are many possible answers—and in language that is still expunged from *Hart & Wechsler*, Story in *Martin* offered a couple of them.⁷⁷ Nonetheless this is a hard question—but, once again, it is a hard question that *Hart & Wechsler* needs to ask itself, for Hart’s *Dialogue* apparently concurs in the judgment of *Martin* (but not its opinion) on this point. Under both *Hart & Wechsler*’s historic approach and my own, ambassador jurisdiction is qualitatively different from U.S. party jurisdiction—in the *Dialogue* because of the distinction between Supreme Court original and appellate jurisdiction, and in my theory because of the distinction between “all cases” and “controversies.”

Yet all this raises a second and far more troubling point about *Hart & Wechsler*’s traditional approach. Why does the *Dialogue* apparently acknowledge that article III *does* “guarantee” litigants rights to the Supreme Court’s original jurisdiction in certain cases? Why is there virtual consensus in the judiciary and academy today that one Supreme Court is constitutionally necessary, that the Court derives its original jurisdiction directly from the Constitution, and that Congress may not deprive the Court of such jurisdiction over all ambassador cases?⁷⁸ The answer presumably is that the Constitution says that “[i]n all cases affecting Ambassadors, . . . the Supreme Court shall have original jurisdiction.”⁷⁹ But if we are supposed to take

⁷⁵ Consider again, for example, Professor Wechsler’s language quoted *supra* note 65. And compare Redish, *Congressional Power*, *supra* note 20, at 901 (aside on immunity of Supreme Court original jurisdiction from congressional cuts) with Redish, *supra* note 18, at 152 (endorsing sweeping theory of congressional jurisdiction stripping power, based in considerable part on claim that state courts are “in fact independent” vis-a-vis Congress).

⁷⁶ HART & WECHSLER, *supra* note 13, at 386-87.

⁷⁷ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334-36; see also 3 J. STORY, *supra* note 9, § 1668 n.2 (noting that U.S. party suits were omitted from original draft Constitution in Philadelphia Convention).

⁷⁸ But see *supra* note 74 (discussing original jurisdiction over state party cases).

⁷⁹ See, e.g., Redish, *Congressional Power*, *supra* note 20, at 901 & n.7 (relying on wording of original jurisdiction clause); cf. *id.* at n.6 (relying on, and adding emphasis to, “shall be vested” language). The selectivity with which Professor Redish invokes

seriously the words “shall” and “all” in this clause—and also in the First Judiciary Act—how can we ignore the mandatory purport of these same words in the “shall be vested” and “shall extend to all” clauses?⁸⁰ There is very little extended discussion of original jurisdiction among Professor Hart’s disciples, and with good reason. If they focused on the issue, these scholars would either have to recant their (perhaps too hasty) concessions about the Court’s original jurisdiction and make arguments in the teeth of the text of article III’s original jurisdiction clause, or else would openly reveal themselves as *selective* literalists.

Let us now turn from ambassador cases to a second “significant” gap identified by *Hart & Wechsler*:⁸¹ the language of section 9 vesting federal district courts with plenary and exclusive jurisdiction to hear all civil causes of admiralty and maritime jurisdiction “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.” It is not clear why this language creates any gap at all, much less a “significant” one, in the mandatory tier. As I noted in 1985, the savings clause deals only with cases at common law, which by definition are not cases in admiralty, and thus by definition seem to fall outside the first tier.⁸²

Strictly speaking, the Judiciary Act denied state courts the last

the mandate of this clause is curious indeed, and never explained. Nor does Redish’s comment on the present essay clear up the confusion; the issue is simply not addressed. See Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990).

⁸⁰ Cf. Amar, *A Neo-Federalist View*, *supra* note 9, at 239-40 n.118. In his comment on the present essay, Professor Meltzer argues that the original jurisdiction “shall” has “a more imperative ring.” See Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1597 (1990). The only real reason he gives is that other words of article III confirm the mandatory nature of “shall” in the original jurisdiction clause. I agree—and for the same substantive reason, see Amar, *Section 13*, *supra* note 15, at 463-69,—but the same is true of “shall be vested” and “shall extend,” see Amar, *A Neo-Federalist View*, *supra* note 9, at 231-32 & n.88, 239-42 & nn.118-22. In particular, the “shall be vested” clauses of articles I and II have far more dramatic implications for article III than Meltzer acknowledges. Compare *id.* at 222-28, 231-33 & nn.91-96, 239 n.118 with Meltzer, *supra*, at 1573 n.14, 1597. Thus, I continue to find the Hart school analysis of this issue incomplete and unpersuasive.

I am also at a loss to see how Meltzer can think it “plausible” that any Judiciary Act gaps in the Supreme Court’s original jurisdiction are more embarrassing to my theory than to his. See Meltzer, *supra*, at 1596. Any gap in ambassador cases is *equally* embarrassing, and any holes in state party cases, see *id.* at 1608 n.138; but cf. Amar, *Section 13*, *supra* note 15, at 492 n.219, are embarrassing *only* to “traditionalists” like Meltzer, see *supra* note 74.

⁸¹ HART & WECHSLER, *supra* note 13, at 386.

⁸² See Amar, *A Neo-Federalist View*, *supra* note 9, at 261 n.182; see also 3 J. STORY, *supra* note 9, § 1666 n.3; *id.* § 1683 (“[A] suit in the admiralty is not, correctly

word—indeed, denied them *any* word—in *admiralty* cases as such. To be sure, a state court adjudication of common law issues under the savings clause might as a practical matter give a potential federal admiralty libellant virtually the same relief that he could get in federal admiralty court, but that is not enough to turn the state case into an admiralty case, or create a hole in mandatory federal admiralty jurisdiction. Analogously, if a potential federal question litigant chooses to pursue only state law claims in state court, that case does not necessarily arise under federal law, and no hole in mandatory federal question jurisdiction is necessarily opened—even if the state court gives the plaintiff virtually the same relief she might have gotten under federal law in federal court.⁸³

Perhaps *Hart & Wechsler* is implicitly suggesting that the article III language “all cases of admiralty and maritime jurisdiction” is best read as covering all maritime cases, whether or not they are brought in admiralty. This is surely a plausible reading, but so is the alternative reading that maritime cases must be in admiralty as well before they come within the scope of the language. The clause, after all, speaks of “admiralty *and* maritime jurisdiction,” not of “admiralty *or*

speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.”).

Professor Meltzer himself appears to explicitly concede this point when he properly acknowledges that to lawyers of 1789, steeped in the writ system, savings clause cases were most assuredly not the same “action” as federal admiralty libels. See Meltzer, *supra* note 80, at 1594. Each form of action had its own distinctive history, rules of pleadings, mode of assertion, and procedural incidents. For example, most “savings clause” actions provided for jury trials; admiralty libels did not.

Another possible gap, which *Hart & Wechsler* does not mention, is § 9’s limitation to *civil* admiralty cases. There is, of course, an obvious explanation: section 9 elsewhere gave district courts “exclusively of the courts of the several States, cognizance of *all* [petty] crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas;” and § 11 gave circuit courts “concurrent” jurisdiction over these offenses, and “exclusive cognizance of *all* crimes and offences cognizable under the authority of the United States, except where this act otherwise provides”—e.g., in § 9 and § 13. See Judiciary Act of 1789, ch. 20, §§ 9-13, 1 Stat. 73 (emphasis added). For a discussion of the knotty issues of federalism and separation of powers raised by criminal admiralty jurisdiction, see 1 J. KENT, *supra* note 39, at 319-21, 337-42.

⁸³ To the extent that federal pre-emption issues are lurking in the background of any state court adjudication, arising under jurisdiction may well be implicated, as I discuss *infra* text accompanying notes 99-112. But it seems odd to argue that the savings clause itself creates impermissible holes in federal jurisdiction, since savings clause cases, like all other state court cases, were subject to Supreme Court review under § 25. If, as I argue below, § 25 created virtually no gap at all in arising under cases, there is no § 9 problem. Alternatively, if § 25 was underinclusive, the problem resides there, and not in the savings clause as such.

maritime jurisdiction.”⁸⁴ The conjunctive reading also seems more compatible with the idea that the framers designed the admiralty clause as a snug complement to “arising under” jurisdiction, which was limited to federal question cases “in law and equity.”⁸⁵ In any

⁸⁴ I do not want to make too much of this textual tidbit in isolation. For example, in the arising under clause, it would obviously make little sense to require a single case to be brought simultaneously in law *and* in equity, although here too, the Constitution speaks of “and,” not “or.” By definition, an action at law is not one in equity, and vice versa. (Indeed, by symmetric logic, I have argued above that common law savings clause suits are by definition not admiralty actions, *see supra* note 82 and accompanying text.)

Where does all this leave us? If the words “admiralty” and “maritime” are indeed synonymous, which Professor Meltzer describes as the conventional view, *see* Meltzer, *supra* note 80, at 1594 n.86, there is no logical difference between the strict conjunctive (“and”) and the disjunctive (“or”) readings. Under this view, since savings clause suits are by definition not “admiralty,” by transitivity they are also not “maritime.” *Cf.* *De Lovio v. Boit*, 7 F. Cas. 418, 442-43 (C.C.D. Mass 1815) (No. 3,776) (Story, J) (“and maritime” added, out of abundance of caution, to underscore breadth of the admiralty in America); Note on the Admiralty, 18 U.S. (5 Wheat.) 106, 115 (1820) (ghost authored by Story) (similar). If, alternatively, the words have different meanings, it nevertheless would be odd to see them as mutually exclusive in the same way “law” and “equity” are, especially given the conventional view that “admiralty” and “maritime” are at the very least close cousins. Thus, our reason for rejecting the strict conjunctive reading of “law and equity”—namely, the avoidance of oxymoron—does not apply in the admiralty context. On the contrary, there are strong structural and historical reasons for reading “and” strictly in the admiralty clause—namely, to limit the possible expansion of traditionally juryless admiralty jurisdiction by imposing an additional “maritime” threshold. Given the history of British abuse and extension of Vice Admiralty jurisdiction between 1763 and 1776, and the strong historic attachment to jury trials, the framers quite possibly added “and maritime” precisely to prevent the severity of ship-law from spilling over onto dry land. *Cf.* U.S. CONST. amend. V (creating strictly limited military-law exception to general requirement of grand jury); *id.* amend. VI (guaranteeing jury trial in criminal cases); *id.* art. III, § 2, cl. 3 (similar); *id.* amend. VII (guaranteeing civil jury in common law cases).

⁸⁵ Thus, the “law and equity” clause illustrates important connections between the two mandatory categories—connections Meltzer appears to overlook here in his emphasis on admiralty jurisdiction as primarily concerned with protecting foreigners rather than assuring coextensiveness. *See* Meltzer, *supra* note 80, at 1595. *But see* Amar, *A Neo-Federalist View*, *supra* note 9, at 253; *supra* text accompanying notes 36-37. Elsewhere, Meltzer explicitly addresses the connection between the two categories, but misses the mark. Once he concedes that federal statutes in admiralty would not implicate “arising under” jurisdiction,” *see* Meltzer, *supra* note 80, at 1614 n.167, he has conceded my main point: the admiralty clause is necessary to assure coextensiveness. Meltzer tries to downplay the point by suggesting that admiralty cases involving federal statutes “presumably” comprised only “a small portion” of admiralty cases, *see id.*, but the basis of this presumption is wholly unclear. How could the framers know *ex ante* how much future Congresses would legislate, civilly and criminally, in admiralty? What’s more, even in the absence of a federal statute, admiralty cases are best understood as arising under true *federal* judge-fashioned law. Notwithstanding Meltzer’s subtle intimations to the contrary, this reading is no less anachronistic than *Erie* itself. Both are rooted in the same structural principles of

event, even if the broader reading of the clause is embraced, it is easy to see how the first Congress may have read article III more narrowly. Thus, *at most*, the clause suggests that Congress sought to obey the obligation to vest plenary "admiralty and maritime jurisdiction" in federal courts but plausibly misunderstood the exact purport of these words.⁸⁶ (As we shall see below, the same thing can be said about the "significant" gaps in federal question jurisdiction *Hart & Wechsler* reads into section 25.)⁸⁷

Indeed, even this last point may concede too much to skeptics of the two-tier thesis, for there is another reading of the savings clause that eliminates the "gap" entirely, even under a broad reading of article III. The "savings clause" was eventually construed to permit concurrent (and unreviewable)⁸⁸ state court jurisdiction in common-law cases, thus giving a plaintiff an absolute choice of forum in these cases. The clause, however, could instead be plausibly read simply to say that extant common-law remedies would continue in effect, although they would thereafter be *exclusively enforceable in federal court*. Although I do not want to push the point too hard, several factors might be invoked to support this reading. First, the Act by its explicit terms provided for exclusive federal jurisdiction in all admiralty and maritime cases; yet some experts see the eventual gloss placed on the savings clause as rendering that exclusiveness "totally illusory."⁸⁹ Second, the other clauses of section 9 suggest that when the first Congress intended "concurrent" state court jurisdiction, it used that very word.⁹⁰ Third, under the words of the savings clause itself, "[i]t is not a remedy in the common-law [state] courts which is saved, but a common-law remedy"⁹¹ enforceable in federal court (perhaps on the "law" side of the docket). Fourth, nothing in the legislative history of the Act suggests that even the anti-federalists

separation of powers (coextensiveness) and federalism. These structural principles are far from anachronistic—they pervade the federalist Constitution—even though their precise doctrinal implications for admiralty and diversity may not have been well and widely understood in 1787-1789. See generally Friendly, *In Praise of Erie—and Of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

⁸⁶ Congressional confusion is especially plausible in light of the intricacies identified *supra* note 84.

⁸⁷ See *infra* text accompanying notes 94-98.

⁸⁸ Except under § 25. See *supra* note 83.

⁸⁹ Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 265 (1950) (emphasis deleted).

⁹⁰ See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 ("And shall also have cognizance, concurrent with the courts of the several states And shall also have cognizance, concurrent as last mentioned").

⁹¹ The *Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866).

challenged exclusive federal admiralty and maritime jurisdiction.⁹² Fifth, some admiralty scholars have argued that the jurisdictional allocation eventually read into the savings clause seems to make little sense as a matter of substantive admiralty and maritime policy.⁹³

Having considered the “significant” gaps *Hart & Wechsler* notes in the ambassador and admiralty categories, let us turn, finally, to the hole the casebook sees in the most important category of all: arising under jurisdiction. *Hart & Wechsler* correctly notes that under the famous section 25, the Supreme Court had appellate jurisdiction over state courts only in cases where a federal claim had been *denied* below.⁹⁴ Yet this requirement derives from a wholly plausible reading of article III’s requirement that a mandatory tier case must “arise under” federal law.⁹⁵ Under this reading, to have one’s own case “arise under” federal law, one must claim a right rooted in federal law. Just as a “case” on appeal must continue to be a live case—it must not be “moot”—so on appeal one’s case must continue to “arise under” federal law; thus, *appellant* must claim a federal right that has been denied below—much as a plaintiff at trial today must claim a federal right before her case will be deemed to “arise under” federal law under the “well-pleaded complaint” gloss of section 1331.⁹⁶

This interpretation of “arising under” gains additional strength when we remember that the structural principles underlying article III are not principles requiring uniformity—on the contrary, the parity principle allows Congress to vest the last word in unreviewable lower federal courts, whose decisions might conflict with each other. The two-tier thesis is rooted in the need to protect substantive federal rights through structural article III safeguards of appointment, salary, tenure, and so on. Section 25’s singleminded focus on claims of federal right meshes perfectly with this structural approach. Thus, as with admiralty,⁹⁷ the *most* that could be said about section 25 is that Congress sought to obey the obligation to vest plenary “arising

⁹² See *infra* notes 207-15 and accompanying text.

⁹³ See Black, *supra* note 89, at 267.

⁹⁴ See HART & WECHSLER, *supra* note 13, at 386 n.41. Unfortunately, the casebook phrases the observation in a misleading and technically imprecise way. See *infra* text accompanying note 112.

⁹⁵ See Amar, *A Neo-Federalist View*, *supra* note 9, at 262-63.

⁹⁶ See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-53 (1908). Although Professor Meltzer finds this analogy problematic, Meltzer, *supra* note 80, at 1587 n.62, his own argument may suffer from anachronism, cf. Amar, *A Neo-Federalist View*, *supra* note 9, at 263-64 n.191.

⁹⁷ See *supra* text accompanying notes 81-87.

under" jurisdiction in federal courts, but plausibly misunderstood the exact purport of those words—words whose *precise* contours have bedeviled even the most eminent jurists and scholars of subsequent generations.⁹⁸

But as with our discussion of the savings clause, even this may concede too much; even under a broad reading of "arising under," the section 25 "gap" is largely, and perhaps wholly, an optical illusion. In virtually every case in which one party argues for a federal "right," the other side can argue that it has a federal "immunity"—which is simply another way of saying that one's opponent has no federal right. Let me be clear. I am not making the deconstructive argument that however broadly or narrowly a claim of right is defined, the argument on the other side is equally plausible. Rather, I am claiming that if the right is correctly defined,⁹⁹ at the margin, the interests for expansion and contraction will be in equipoise virtually by definition. Further, each of these interests can always be plausibly described as a *federal* interest, arising under (to use a loaded phrase) federal law. Thus, in virtually every case in which a state court errs¹⁰⁰ in adjudicating a federal law, appellant can plausibly package her claim of error as one deriving from a violation of her own federal "right, privilege, or exemption" under the precise language of section 25.¹⁰¹

⁹⁸ For an assortment of views, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 739, 822-28 (1824) (Marshall, C.J.); *id.* at 871-903 (Johnson, J., dissenting); *Martin*, 14 U.S. (1 Wheat.) at 334-35, 341-42; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); see also 3 ELLIOT'S DEBATES, *supra* note 62, at 572 (remarks of Edmund Randolph at Virginia ratifying convention) ("What do we mean by the words *arising under the Constitution?* . . . I conceive this to be very ambiguous.").

Professor Meltzer complicates matters even further by raising the issue of protective jurisdiction. See Meltzer, *supra* note 80, at 1586 n.59. Although he implies that such jurisdiction raises distinctive problems for my thesis, I am not quite sure why. Protective jurisdiction derives from the power of Congress to pass substantive legislation pre-empting state law. Just as Congress can choose not to legislate substantively in a given field, thereby leaving the field to state law and state courts, Congress can choose not to confer protective jurisdiction.

⁹⁹ "Correctly defined," as used here, refers to the perspective of the Supreme Court.

¹⁰⁰ Again, from the Supreme Court's perspective.

¹⁰¹ It might be asked, what is left of the seemingly limiting language of § 25 if my broad reading is adopted. Cf. Meltzer, *supra* note 80, at 1589. Have I not just construed away this limiting language? I think not. The limiting language can be read simply to make clear that only a litigant who *lost* below may appeal. A party who fully prevailed below on her federal claims may not invoke § 25. I am indebted to John Duffy for this point. See also *infra* note 140 and accompanying text (illustrating

To be concrete: an overexpansive state court interpretation of, say, the attainder clause of article I, section 10—that is, one that gives the individual more than her due and the state less—can be seen as a state court denial of the state's tenth amendment rights, rights arising under federal law. (This would be true even before the tenth amendment was adopted, for that amendment is simply declaratory of a structural truth about the original Constitution. Without the amendment, a losing state's claim might be structural rather than textual, but it would be no less federal.) Analogous moves can be made in all, or virtually all, other cases.¹⁰² Indeed, a comprehensive survey by Felix Frankfurter and James Landis uncovered only sixteen cases from 1789 to 1914 (when section 25 was amended) in which the section 25 "gap" was successfully invoked to defeat Supreme Court jurisdiction.¹⁰³ Thus, section 25 as written was essentially a trap for unwary lawyers, for it required them to package their claims of error with great care.

Section 25 also proved a trap for the Supreme Court, which in several cases failed to acknowledge that the gap was an optical illusion. *Hart & Wechsler* cites one particularly egregious opinion authored by Chief Justice Taney, *Commonwealth Bank of Kentucky v. Griffith*,¹⁰⁴ in which the Court held it had no jurisdiction under section 25's "second clause"¹⁰⁵ where the state court below voided state

that the limiting language of the first two clauses of § 25 is redundant under any reading).

¹⁰² To take another example, Professor Casto has argued that § 25, properly construed, would not reach a case in which "a Connecticut court were to void a Rhode Island statute as contrary to the federal Constitution." Casto, *supra* note 63, at 1118. Yet if this application of the federal Constitution was incorrect—which, by hypothesis, would be plaintiff-in-error's contention—then the Connecticut court had wrongly denied effect to a valid Rhode Island law in contravention of the full faith and credit clause of article IV § 1. (The tenth amendment could also be invoked here.) Such a case would clearly fall within the reach of § 25, properly construed. *But see infra* notes 104-10 and accompanying text (discussing subsequent incorrect interpretations of § 25).

Elsewhere Casto raises the spectre of state court manipulation of state law to defeat federal treaty-based rights, and suggests that these cases, too, would fall outside of § 25. *See* Casto, *supra* note 63, at 1119. This is surely a provocative conclusion in light of the Supreme Court's treatment of the Fairfax Devisee litigation, including *Martin* itself—litigation Casto nowhere mentions. Perhaps Casto would argue that the Court overreached in the Fairfax litigation, but even this claim would not help him much. On the contrary, it would only show that the Court strained the language of § 25—quite possibly in order to avoid holding the Act unconstitutional in its technical details. *Cf.* Clinton, *supra* note 56, at 1581 n.243.

¹⁰³ F. FRANKFURTER & J. LANDIS, *supra* note 37, at 190 n.20 (citing cases).

¹⁰⁴ 39 U.S. (14 Pet.) 56 (1840).

¹⁰⁵ *Id.* at 57-58.

bank notes as violations of article I, section 10's language that "No state . . . shall emit bills of credit." Curiously, the Court never mentioned section 25's third clause whose general "right, privilege, or exemption" language could easily have been read to uphold the Supreme Court's appellate jurisdiction. *Hart & Wechsler* cites *Griffith* for the proposition that "the Supreme Court itself appears to have understood that the [section 25] gap was wholly within Congress's prerogative."¹⁰⁶ Of course, the obvious counter is that "the Supreme Court itself also appears to have understood that *if* a gap really existed, and *if* it invaded the inner boundaries of 'arising under' jurisdiction, then the gap was *not* within Congress's prerogative. *Martin v. Hunter's Lessee*."¹⁰⁷ The casebook's reliance on *Griffith* is especially unfortunate because Taney's sloppy opinion never even engaged counsel's explicit argument that the state court's overgenerous disposition violated plaintiff-in-error's rights under the tenth amendment.¹⁰⁸ To make matters worse, the facts of *Griffith* also implicated a full faith and credit clause issue, for a *Missouri* state court had invalidated notes of a *Kentucky* state bank, although counsel apparently failed to emphasize this issue at oral argument. Thus, the case seems wrongly decided under *any* reading of section 25.¹⁰⁹

¹⁰⁶ HART & WECHSLER, *supra* note 13, at 386 n.41.

¹⁰⁷ Given the emphasis placed on the mandatory tier in *Martin* and in several other Marshall Court opinions, *see supra* note 37, any gap under § 25 must have seemed far less obvious and important to the Marshall Court than to Professor Meltzer. *See* Meltzer, *supra* note 80, at 1585-93. Meltzer's microscopic focus quite simply blows this issue out of all proportion.

¹⁰⁸ *See* 39 U.S. (14 Pet.) at 57 (oral argument of John J. Crittenden). Unfortunately, even as he invoked the tenth amendment, Senator Crittenden appears to have directed the Court's attention to the first, rather than the third, clause of § 25. *See id.*

I have been unable to locate a copy of Crittenden's brief.

¹⁰⁹ After the Missouri state court's ruling in *Commonwealth Bank of Ky. v. Griffith*, 4 Mo. 255 (1836), but before the Taney Court heard the case, the Taney Court itself (over Story's vigorous dissent) held that Kentucky bank laws and notes were constitutionally valid. *See* *Briscoe v. Bank of the Commonwealth of Ky.*, 36 U.S. (11 Pet.) 257 (1837). Although Meltzer correctly notes that Story failed to dissent from *Griffith's* § 25 holding (whether he *concurred* is far less clear), there is an obvious explanation: Story agreed with the Missouri state court below on the constitutional merits, but knew that his brethren, if they were to take the case, would wrongly (to Story's mind) reverse.

Elsewhere, Professor Meltzer properly notes that *Griffith* was not the first case to read § 25 in (to my mind) a crabbed way. *See* Meltzer, *supra* note 80, at 1589-90. But precisely because of this, and the many problems with *Griffith* itself, the editors of *Hart & Wechsler* would do well to cite these other cases, and not *Griffith*. But in virtually every one of these cases, as in *Griffith*, it could easily be shown how a careful lawyer could have packaged an appeal to fall within the precise language of § 25's third clause.

In the end, blame for whatever "gaps" emerged under section 25 should be laid at the feet not of the first Congress, but of subsequent Supreme Courts and the lawyers who brought cases to them: virtually every one of the sixteen "gaps" cited by Frankfurter and Landis was due to poor craftsmanship on the part of either counsel or the Court.¹¹⁰

Hart & Wechsler's emphasis on the "significan[ce]" of the wrinkle of section 25 is especially hard to square with independent scholarship of one of its leading editors, the late Professor Paul Bator. For he persuasively illustrated how federal interests typically exist on *both* sides of a claimed right.¹¹¹ But if we accept this insight—as I do—then where's the gap? Isn't *Hart & Wechsler's* language that "the Supreme Court's appellate jurisdiction over the state courts did not extend to cases in which the federal claim had been *upheld*" misleading?¹¹² Whence this premise of only one ("the") federal claim? Wouldn't it be clearer to speak of how the Supreme Court's appellate jurisdiction "*did* extend to cases in which *a* federal claim had been upheld whenever an opposing federal claim had been denied (as is virtually always the case)"?

We have now considered all the "significant gaps" in the mandatory tier identified by *Hart & Wechsler*. What is striking, at least to me, is how much one has to strain one's eyes to see the "gaps" identified. Many of the apparent gaps emerge simply because Oliver Ellsworth stubbornly insisted on substituting his own language for that of article III, even where substitutions were obviously inappropriate (as with ambassador jurisdiction) or awkwardly written (as with section 25). Many contemporaries criticized the clumsiness of Ellsworth's language,¹¹³ but in the end went along, probably

¹¹⁰ See Ratner, *supra* note 42, at 185-86; Sager, *supra* note 18, at 58-60. It does seem fair, however, to blame the first Congress for clumsy and confusing draftsmanship. See *infra* note 140 and accompanying text (illustrating that under any reading of § 25, the language is awkward).

¹¹¹ See Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 631-35 (1981).

¹¹² HART & WECHSLER, *supra* note 13, at 386 n.41.

¹¹³ See, e.g., 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-91, *supra* note 58, at 91 (reprinting Diary of William Maclay) [hereinafter Diary of William Maclay] ("I made a remark where Elsworth [sic] in his diction had varied from the Constitution. [T]his vile Bill is a child of his, and he defends it with the Care of a parent, even with wrath and anger."); 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 333 (G. McRae ed. 1857-58) (reprinting Letter from William Davie to James Iredell (Aug. 2, 1791)) (Act "defective in point of arrangement" and "obscurely drawn or expressed"); THE LIFE AND CORRESPONDENCE OF GEORGE READ 481-88 (W. Read ed. 1870) (reprinting Letter from John Dickinson to George Read (June 24, 1789)) (Bill "most difficult to understand of any legislative bill I have ever

because, however inelegant, the Act generally approximated article III where it counted—in the mandatory tier. In the permissive tier, by contrast, the Act created a \$500 hole that, quite literally, was large enough to ride a team of horses through, given the price of horses in 1789.¹¹⁴

Thus, as it does the words and structure of article III, the two-tier approach seems to fit the Judiciary Act more snugly than its major “unitary” alternatives, mandatory and permissive.

Contrary to *Hart & Wechsler's* intimations, basic consistency with the Judiciary Act is one of the greatest strengths of the two-tier thesis, for the most plausible alternative to it is not Professor Hart's *Dialogue*, but Professor Clinton's unitary and mandatory thesis. Followers of the *Dialogue* simply miss too many of the textual, structural and historical principles at the heart of article III. Professor Clinton's theory embraces many of these, but is obviously structurally as well as textually overinclusive in requiring federal jurisdiction in a good many places where it would be unnecessary and counterproductive—i.e., all diversity cases. The Act of 1789 helps to illustrate this point by the very size of the major gaps in diversity it sensibly created.

No one understood all this better than Joseph Story. In portions of *Martin*, he toyed with a unitary and mandatory argument remarkably similar to Professor Clinton's.¹¹⁵ Yet later in the opinion—and later in life¹¹⁶—Story put forth a more limited, two-tier, mandatory theory among whose greatest appeals to Story was its basic consistency with the “legislative opinion”¹¹⁷ embodied in the First Judici-

read”); 12 THE PAPERS OF JAMES MADISON, *supra* note 53, at 274 (reprinting Letter from Edmund Randolph to James Madison (June 30, 1789)) (“The jurisdiction is inartificially, untechnically and confusedly worded. Would it not have been sufficient to have left this point upon the constitution itself? Will the courts be bound by any definition of authority, which the constitution does not in their opinion warrant?”); *id.* at 317 (reprinting Letter from Madison to Samuel Johnston (July 31, 1789)) (Bill “peculiarly complicated & embarrassing”).

¹¹⁴ The average price of horses exported from 1790-1792, in current dollars, was less than \$40. R. ROBERTSON & G. WALTON, HISTORY OF THE AMERICAN ECONOMY 128 (4th ed. 1979) (Table 9-2, line 18, cols. 4-5).

The short-lived Judiciary Act of 1801 had a similarly two-tiered structure of dollar limits. No limits at all were placed on the (plenary) arising under and admiralty jurisdiction given to lower federal courts, but elsewhere a \$400 dollar limit applied—again with no Supreme Court review of state court decisions except under § 25 (which was of course limited to federal questions). *See* Act of Feb. 3, 1801, §§ 11, 13, 2 Stat. 89, 92-93.

¹¹⁵ *See supra* note 9.

¹¹⁶ *See id.*

¹¹⁷ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336 (1816).

ary Act. Thus the real Dialogue that should dominate our thinking about jurisdiction stripping is not Henry Hart's in *Hart & Wechsler* but Joseph Story's in *Martin v. Hunter's Lessee*. And in that Dialogue, between two different mandatory theories, the Act leads us to the narrower two-tier approach.

3. The Structural Superiority Principle

By giving federal judges the last word in all, or virtually all, mandatory tier cases, the Judiciary Act powerfully underscored the structural superiority of article III officers. Indeed, this principle was at work even in permissive tier cases. Section 12 authorized litigants to remove various diversity and land-grant cases from state court to federal circuit court, but the Act created no symmetrical removal in the other direction. As Joseph Story later reminded his readers in *Martin v. Hunter's Lessee*, removal is, strictly speaking, a mode of appellate jurisdiction.¹¹⁸ Thus the basic teaching of the Act's removal clauses is that lower federal courts may sit in appellate review of state courts (even in the permissive tier) but not vice-versa.

Today's Supreme Court could learn a thing or two from the Act in this respect, for in recent years the Court has taken a series of steps that reveal a profound misunderstanding of the structural superiority principle. First, the Court has often indulged in rhetoric propagating the myth of parity, even as the Court has at other times spoken more accurately on the subject.¹¹⁹ Second, the Court has proliferated a confusing assortment of various abstention doctrines, and dramatically expanded the scope of many of the individual categories of abstention.¹²⁰ Not only do many of these decisions smack of *ad hocery*, and disregard the spirit and letter of congressional statutes allocating various cases to federal courts, these decisions also turn the principles of article III and the First Judiciary Act on their heads by creating what my colleague Owen Fiss has aptly described as "reverse removal" from federal to state courts.¹²¹

To make matters even worse, the Court has shown great hostility to the idea of lower federal court review of state courts, and has even given this hostility a new name: *Rooker-Feldman*.¹²² The tran-

¹¹⁸ See *id.* at 349-50.

¹¹⁹ See generally Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 242-55 (1988); Fallon, *supra* note 4, at 1164-225.

¹²⁰ See generally HART & WECHSLER, *supra* note 13, at 1354-464.

¹²¹ Fiss, Dombrowski, 86 YALE L.J. 1103, 1134-36 (1977).

¹²² See HART & WECHSLER, *supra* note 13, at 1630-38.

substantiation of *Rooker v. Fidelity Trust Company*¹²³—a justly forgotten opinion by Justice Van Devanter, nowhere even cited in the encyclopedic first and second editions of *Hart & Wechsler*—into a “classic”¹²⁴ of federal jurisdiction is curious indeed. It is not entirely clear what *Rooker* stands for—or more to the point, what the current Court will say *Rooker* stands for—but whatever it is, “*Rooker-Feldman*” seems either unnecessary or misguided. If it simply means that lower federal courts cannot act without statutory jurisdiction, well and good, but we didn’t need a fancy new doctrine to tell us that. So too with the principle that state court adjudications are entitled to full faith and credit in lower federal court—a principle already embodied in section 1738. If the doctrine means anything more than this, it is likely to do far more harm than good in the hands of the Rehnquist Court. What’s more—and more central to our purpose here—*Rooker* is technically wrong on its own terms for it claims that under the statutory jurisdictional scheme Congress has created, federal district courts have only original jurisdiction, never appellate jurisdiction over state courts.¹²⁵ But as Story’s opinion in *Martin* makes clear, lower federal courts have *from the very beginning* exercised appellate jurisdiction, strictly speaking, over state courts. Today, the categories of appellate jurisdiction are far more extensive than in 1789, both *de jure* (civil rights and federal officer removal)¹²⁶ and *de facto* (habeas corpus, certification, and the *England* reservation to *Pullman* abstention).¹²⁷

4. The (True) Principle of Parity

By affirming that lower federal judges, as well as Supreme Court justices, could hear technical “appeals” from state courts, the Judiciary Act dramatized the true parity principle—the parity of all article III officers. Once again, we should note the Act’s title—“An Act to establish the Judicial Courts of the United States”—which made no sharp distinction between supreme and inferior federal tribunals.

¹²³ 263 U.S. 413 (1923).

¹²⁴ HART & WECHSLER, *supra* note 13, at xxi.

¹²⁵ Justice Van Devanter declared “The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24.” 263 U.S. at 416. Had the Justice looked a little more carefully, he would have seen an entire chapter of the code devoted to removal—that is, *appellate*—jurisdiction of District Courts. See Act of March 3, 1911, ch. 3, §§ 28-39, 36 Stat. 1036, 1094-99.

¹²⁶ See 28 U.S.C. §§ 1442-43 (1973). See generally HART & WECHSLER, *supra* note 13, at 1052-71, 1767-88.

¹²⁷ See generally HART & WECHSLER, *supra* note 13, at 1376-83, 1465-1578.

Indeed, the true parity principle pervaded the Act. As I explained in 1985:

In addition to its differential treatment of the two tiers of cases, the Act also established important distinctions between Supreme Court review of state court decisions on one hand, and of lower federal courts on the other. No dollar minimum limited automatic appeals from state courts arising under federal law, but appellate review over federal circuit courts was limited to civil cases involving more than \$2,000, and was nonexistent in criminal cases. The lesson of the Act seems clear: lower federal courts could be trusted with the power of ultimate disposition of cases in the mandatory tier, but state courts could not.

Indeed, the very structure of the circuit courts created by the Act dramatized the structural equality of all federal judges. These courts were staffed not by appointing separate article III judges, but rather by forming circuit panels in which Supreme Court justices and federal district judges sat together, with each judge—regardless of status—given an equal vote. The Act created no analogous court pairing Supreme Court justices with state judges.¹²⁸

Supreme Court justices not only *sat with* lower federal court judges; the justices were *themselves* simultaneously lower federal court judges. For if they sat circuit *qua* Supreme Court justices, a strong argument could be made that Congress had extended the Court's original jurisdiction—something that *Marbury v. Madison*¹²⁹ later (and correctly)¹³⁰ held that Congress could not do. Yet seeing Supreme Court justices as simultaneously lower court federal judges as well was possible only because all federal judges were basically equal in such critical respects as appointment, tenure and removal.

To see this point most clearly, remember that the first Congress did *not* attempt to make state judges simultaneously lower federal judges. During the ratification era several leading federalists seem in passing to have suggested such a possibility, including President Edmund Pendleton of the Virginia ratifying convention,¹³¹ James Madison in *The Federalist No. 45*, and Alexander Hamilton in *No. 81*. It seems that similar suggestions were made in early committee deliberations on the First Judiciary Act.¹³² Yet as Ellsworth later

¹²⁸ Amar, *A Neo-Federalist View*, *supra* note 9, at 262 (footnote omitted).

¹²⁹ 5 U.S. (1 Cranch) 137 (1803).

¹³⁰ See Amar, *Section 13*, *supra* note 15, at 463-78.

¹³¹ See ELLIOTS'S DEBATES, *supra* note 62, at 517.

¹³² See Warren, *supra* note 23, at 66.

explained, such state-federal hybrids were unworkable precisely because of structural disparities in office-holding. If state judges were "constitut[ed] . . . *pro tanto*, Federal Judges, . . . they would continue [as] such during good behavior, and on fixed salaries, which, in many cases, would illy comport with their present tenure of office."¹³³ The flip side of this point is that *federal-federal* hybrids were thinkable only because such schemes *did* "comport with [the] tenure of office" of all federal judges.

This is not to say that circuit riding was constitutionally unproblematic. As Professor Currie has noted, the hybrid scheme raised important questions about multiple-officeholding and the appointments clause.¹³⁴ Thus, if anything, the First Judiciary Act may have pushed parity a bit too far.

This point is most evident in the Act's treatment of Supreme Court jurisdiction. For although the two-tier thesis focuses on the general parity of all federal courts, it also notes the specific ways in which the Supreme Court is special.¹³⁵ It is, for example, the only Court that, strictly speaking, derives its jurisdiction directly from the Constitution itself. This jurisdiction is to a very large extent defeasible, for Congress may make exceptions to the Court's appellate jurisdiction, and may even, under a two-tier approach, restrict the Court's original jurisdiction over state-party cases.¹³⁶ Nevertheless, strictly speaking, Congress does not *confer* jurisdiction in the Supreme Court in the same way it confers jurisdiction on lower federal courts. Yet the Judiciary Act does not seem to respect this distinction. It speaks of conferring the Court's appellate jurisdiction, not making exceptions to it.

The Supreme Court later cured this awkward phrasing in the celebrated *Durousseau*¹³⁷ case by reading the Act as if it contained an opening phrase, "Congress hereby excepts all the Supreme Court's constitutionally-derived appellate jurisdiction but for the following" Harder still to understand is where the first Congress thought

¹³³ *Id.* William Smith of South Carolina and William Paterson made much the same point in floor debates on the Judiciary Act. See 1 ANNALS OF CONG., *supra* note 62, at 850; Notes of William Paterson, *supra* note 58, at 478-79; see also J. GOEBEL, *supra* note 60, at 471 n.34; 3 J. STORY, *supra* note 9, § 1749 & n.3; Letter from Senator Robert Morris to Richard Peters (Aug. 24, 1789), in 9 PETERS PAPERS COLLECTION, pt. 2, at 99 (Historical Society of Pennsylvania).

¹³⁴ See Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 663-64 (1982).

¹³⁵ See Amar, *A Neo-Federalist View*, *supra* note 9, at 221 n.60, 257 n.168.

¹³⁶ See *id.* at 254 n.160; Amar, *Section 13*, *supra* note 15, at 478-88.

¹³⁷ *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810).

it had authority to decline to “give” the Supreme Court original jurisdiction in “all cases affecting ambassadors,”¹³⁸ or at least to substitute its own paraphrase of the language of article III.

These wrinkles remind us again that *perfect* consistency with the Judiciary Act cannot be the ultimate touchstone of our theories of article III, for the Act contains some features that almost everyone would now recognize as unconstitutional. But if we overlook the technical wrinkles, and the often awkward phrasing, and focus instead on the Act’s *basic structure*, we see repeated confirmation of basic article III principles, such as the true principle of parity.

Given the Act’s unequivocal—indeed, overly enthusiastic—embrace of parity, it is ironic indeed that so many commentators today seem to miss this structural truth. It is even more ironic that some may have been led astray by ordinary language conventions set in motion by the Act itself—namely, our habit of referring to Supreme Court officials as “Justices,” and lower article III officers as “Judges.” As noted earlier, the Constitution contains no such distinction—it singles out only a “Chief Justice” who is to preside at presidential impeachment trials.¹³⁹ But the Act of 1789 introduced an invidious linguistic discrimination when it called other Supreme Court officials “associate justices” in section 1 while insisting in section 3 that any other article III officer “shall be called a District Judge.” Once again, we must pierce through Ellsworth’s clumsy phrasing to see the structural truth obscured by his word choices.

5. The Coextensiveness Principle

To the extent the Act satisfies the bifurcation mandate, it also meets the lesser-included requirements of coextensiveness. The Act also illustrates that the principle is not a sterile one based only on

¹³⁸ During the ratification period, Ellsworth himself seemed to acknowledge that Congress had no authority over these cases. See *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 164 (P. Ford ed. 1892) (reprinting Letter to Landholders and Farmers from a Landholder (VI), Conn. Courant, Dec. 10, 1787).

¹³⁹ U.S. CONST. art. I, § 3, cl. 6. In sharp contrast, on two separate occasions the Constitution explicitly speaks of Supreme Court “Judges.” *Id.* art. II, § 2, cl. 2; *id.* art. III, § 1. Before the Judiciary Act, it appears that the dominant oral and written usage referred to Supreme Court “judges.” See, e.g., *THE FEDERALIST CONCORDANCE* 282-87 (T. Engeman, E. Erler & T. Hofeller eds. 1988) (“judge” and “judges” used over 20 times in *Federalist Papers* to describe Supreme Court officers as well as lower federal adjudicators; “justices” never used in this fashion, except for one reference in *No. 65* to “Chief Justice” presiding at Presidential impeachment); Amar, *Section 13, supra* note 15, at 471 (quoting George Mason at Philadelphia Convention discussing “judges [sic] of the Supreme Court”).

flow-chart symmetry, but rather a principle intimately bound up with the rule of law—hence the Act's explicit focus on claims of federal right.

6. The Principle of Inadequate Political Safeguards

As with its coextensiveness counterpart, the political safeguards principle is satisfied a fortiori by the Act's conformity with the bifurcation principle. Consistent with the political safeguards principle, the language of section 25 is obviously concerned with assuring federal jurisdiction to protect constitutional rights against both states and Congress—concern evidenced by plainly redundant language. (Given the rather plenary scope of the third clause, it is unclear what the first two clauses add, except confusion.)¹⁴⁰

The political safeguards principle should also remind us of a point so basic, it should go without saying. The principle has bite precisely because Congress cannot be fully trusted as a guardian of constitutional values. But this point holds true for the first Congress as well. Indeed, it *especially* holds true for the first Congress; fully two-thirds of the first senators were given less than the usual six year terms to build up national reputations before having to account for themselves back home, before the state legislatures that had selected them.¹⁴¹ Many state legislators were both personally and professionally jealous of the new federal government—especially its judiciary, which would enjoy the most insulation from state legislative influence.¹⁴²

We must also remember that the Constitution derived its authority not from these legislators, but from special conventions of the People themselves, who ratified the document.¹⁴³ Many of the federalists' strongest and clearest voices at Philadelphia and in the fights for ratification—those of James Wilson, Gouverneur Morris, and Alexander Hamilton, to name just a few—were conspicuously absent from the first Congress.¹⁴⁴ Although several "federalists" played leading roles in drafting the Act—most obviously Oliver Ellsworth—the leading historian of the Act, Charles Warren, has con-

¹⁴⁰ See, e.g., Ratner, *supra* note 42, at 185-86; Sager, *supra* note 18, at 58-59; *supra* text accompanying notes 99-112.

¹⁴¹ See U.S. CONST. art. I, § 3, cl. 2.

¹⁴² See Amar, *A Neo-Federalist View*, *supra* note 9, at 222-28, 250.

¹⁴³ See generally Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1429-66 (1987); Amar, *supra* note 3; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402-05 (1819).

¹⁴⁴ See Clinton, *supra* note 56, at 1524-27.

cluded that the Act “pleased the Anti-Federalists more than the Federalists.”¹⁴⁵ And with all due respect, “federalists” like Ellsworth and his mentor, Roger Sherman, were simply not in the same league as James Wilson¹⁴⁶ in the depth and breadth of their structural understanding of the new Constitution.

Thus, even if it were the case that the First Judiciary Act is “significan[tly]” at odds with the two-tier thesis—and I hope I have shown that the reverse is true—this would hardly end the matter. The political safeguards principle is a constant reminder that even the first Congress may have misunderstood the Constitution. If there are myriad and strong independent reasons for embracing the two-tier thesis—and I believe there are—then *it* provides a sturdy basis for critique of the Act, rather than vice-versa. As it turns out, however, the Act is instead a friend of the two-tier thesis, furnishing yet another reason for accepting Story’s analysis, as revised in 1985.

II. THE LEGISLATIVE HISTORY OF THE FIRST JUDICIARY ACT

A. *The Sounds of Silence*

If there is some irony in the fact that “significant gaps” in the Judiciary Act raise “difficult questions” for *Hart & Wechsler*, the casebook’s invocation of the Act’s legislative history is equally ironic. “If the distinction between the two tiers was so significant,” ask the editors, “why is there so little evidence of explicit recognition of that distinction . . . in the available history of the 1789 Act?”¹⁴⁷ They buttress this question with a footnote citing a 1985 essay by Professor Casto as “[o]ne recent study of the history of the 1789 Act [that] reveals no references to the distinction.”¹⁴⁸ Yet Professor Casto’s essay was an attempt to measure the historical evidence against Professor Clinton’s *unitary* argument that all nine categories of article III jurisdiction must be vested, at least on appeal, in federal courts.¹⁴⁹ Nowhere did Casto carefully sift the historical record with an eye towards explicitly confirming or disconfirming the two-tier thesis. Given that he was asking the wrong question, we should be wary of any attempt to read his essay as furnishing reliable evidence regard-

¹⁴⁵ Warren, *supra* note 23, at 53.

¹⁴⁶ Cf. Amar, *A Neo-Federalist View*, *supra* note 9, at 230 n.86; Amar, *supra* note 143, at 1437, 1439 n.57.

¹⁴⁷ HART & WECHSLER, *supra* note 13, at 386.

¹⁴⁸ *Id.* at 386 n.40.

¹⁴⁹ See Casto, *supra* note 63, at 1102-03.

ing the two-tier thesis. As Alexander Bickel elegantly reminded us, “[n]o answer is what the wrong question begets.”¹⁵⁰

Casto’s essay is nonetheless quite relevant in helping to furnish the first of several answers to *Hart & Wechsler’s* question, but this answer is, as noted above, an ironic one indeed. At one point in his essay, Casto writes:

To reconcile [the limitations enacted by the first Congress] with a theory of mandatory vesting, one must assume that some of the heads of jurisdiction in the Constitution are mandatory but others—most notably diversity and alienage jurisdiction—are not. Article III does not suggest this hierarchy, nor has any historical evidence been adduced to support such a constitutional doctrine.¹⁵¹

The biggest problem with this passage is not that Professor Casto disagrees with the two-tier thesis, but that he seems *unaware of it*. He cites nothing here, not Story’s *Commentaries*, not *Martin*, not my 1985 essay—*nothing*. Thus, when Professor Casto wrote his essay, he was apparently oblivious to the arguments that the text and structure of article III *do* suggest a hierarchy, and that there is considerable historical evidence for such a constitutional doctrine—in the Philadelphia convention records,¹⁵² in a string of classic nineteenth century expositions by Chief Justice Marshall and Justice Story,¹⁵³ and even, as we shall see in more detail below, in the First Judiciary Act. (Indeed, Casto’s own language in this passage seems to concede that the Act exemplifies bifurcation, although Casto appears unaware of the significance of this concession.)

Given the timing of his publication, Professor Casto’s apparent lack of awareness of my own 1985 essay is wholly understandable. Far more puzzling, however, is Casto’s seeming unfamiliarity with central passages of *Martin v. Hunter’s Lessee*.¹⁵⁴ *Martin*, of course, is the classic Marshall Court exposition on jurisdiction stripping, authored by one of the most important figures in American constitutional history. What’s more, in the Clinton essay Casto sought to critique, *Martin* was explicitly invoked as the Supreme Court exposition closest to Clinton’s own thesis.¹⁵⁵ To invert the language of

¹⁵⁰ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (1962).

¹⁵¹ Casto, *supra* note 63, at 1125.

¹⁵² See Amar, *A Neo-Federalist View*, *supra* note 9, at 242-45.

¹⁵³ See *supra* notes 37-39.

¹⁵⁴ This is not the only occasion on which Casto’s unfamiliarity with *Martin* seriously weakens his analysis. See, e.g., *supra* note 102.

¹⁵⁵ See Clinton, *supra* note 18, at 750-51 & nn.20-21. Professor Clinton did not

Hart & Wechsler, "If the distinction between the two tiers is so forceful and powerful (as the casebook itself acknowledges) why is there so little explicit recognition of that distinction by Professor Casto?"

The closest thing to an answer to this puzzle is the fact that the two-tiered language of *Martin* was excluded from pre-1988 editions of *Hart & Wechsler*, editions which virtually defined the canon of federal jurisdiction for scholars of Professor Casto's generation.¹⁵⁶ Yet of course this fact only pushes the puzzle back one level: "If the distinction is even merely plausible (as the third edition concedes) why was it ignored by the first two editions?"

In asking these blunt questions it is not my aim to embarrass excellent scholars or stoop to *ad hominem*. My argument is analytic not personal, and in fact becomes even stronger when its targets are acknowledged as scholars of the first rank. The argument is simply this: if even careful scholars can overlook significant language in article III and in landmark expositions of that article, then the same is of course true for members of the first Congress.¹⁵⁷ In both cases the brute fact remains that article III's language is two-tiered: "all" is used selectively. Justice Story and I have provided an account to explain why this language is two tiered; others—whether scholars or Congressmen—who have apparently eschewed bifurcation—have provided none.

Often, they have not *rejected* bifurcation so much as *ignored* it. To put the point somewhat tendentiously, the strong affirmative argument against the two-tier thesis boils down to, quite literally, *nothing*. It is an (often implicit) argument that the selective language of article III has *no* real significance,¹⁵⁸ based on the asserted *absence* of explicit recognition of the distinction, among people who apparently did *not* read carefully the words of the framers or the Marshall Court.

explicitly mention or quote the two-tier language of *Martin*, but that language is prominent on the face of the pages from *Martin* he cites, 14 U.S. (1 Wheat.) at 327-39, had Professor Casto taken the time to consult them. Moreover, Clinton's citation of *Martin* is accompanied by an extended quotation from William Crosskey which explicitly mentions "the omission of 'all' in the categories of the judicial enumeration that are described as 'Controversies.'" Clinton, *supra* note 18, at 750 n.20 (quoting 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 615 (1953)).

¹⁵⁶ See Amar, *Law Story*, *supra* note 9, at 689-91.

¹⁵⁷ At one point during the debate, anti-federalist Aedanus Burke of South Carolina moved that the Act's reference to a "Chief Justice" should be struck out as "a concomitant of royalty." When New York Representative Egbert Benson properly pointed out that this title derived from the Constitution itself, Burke sheepishly withdrew his motion. 1 ANNALS OF CONG. *supra* note 62, at 812.

¹⁵⁸ See, e.g., M. REDISH, *supra* note 10, at 185.

Nowhere has anyone—Casto, *Hart & Wechsler*, Redish, Clinton, or anyone else—pointed to a single eighteenth century figure who *explicitly* says that the selective use of the word “all” has no significance and should in effect be disregarded.¹⁵⁹

This last point is important, for it should remind us that there are not two but three possible categories into which the historical evidence might conceivably fit. The issue is not simply, as *Hart & Wechsler*'s question might imply, whether the framers of the 1789 Act explicitly embraced bifurcation or were merely silent, for there is a third possibility: the framers of the Act could have made statements *explicitly* rejecting the idea that the selective use of the word “all” has meaning, or offering some *other* interpretation of its significance. If only two categories existed, then silence might strongly undermine the two-tier thesis; but in fact silence does not necessarily cut one way or the other. Even if it were the case that the legislative history of the Act “reveals no references to the distinction”—and we shall see that it is not—*Hart & Wechsler* never points to any *affirmative* evidence challenging my reading of the selective use of the word “all.”

What's more, first principles of constitutional law establish that the burden of historical proof is not upon those who seek to follow the most plausible meaning of the text, but on those who seek to avoid that meaning.¹⁶⁰ As John Marshall reminded his readers in *Marbury v. Madison*, “It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it.”¹⁶¹ To similar effect is language from Story's two-tier passage in *Martin*—language which has been edited out of even the third edition of *Hart & Wechsler*: “It is hardly to be presumed that the variation in the language could have been accidental.”¹⁶² The language of these cases quite self-consciously allocate legal burdens of proof—both passages speak of legal “presum[ptions].” For lawyers who take technical doctrine seriously—as the editors of *Hart & Wechsler* generally do—the true “difficult question” should be, “what affirmative historical evidence exists to overcome the seemingly straightforward meaning of the words?”

¹⁵⁹ Nor does any such source appear in either of the two comments on the present essay. Apparently, neither Professor Redish nor Professor Meltzer seems inclined—or able—to accept my challenge to “put up or give up.”

¹⁶⁰ See 1 J. STORY, *supra* note 9, §§ 397-407; 3 *id.* § 1263; cf. Amar, *A Neo-Federalist View*, *supra* note 9, at 214 n.39, 219 n.57, 230 n.86.

¹⁶¹ 5 U.S. (1 Cranch) 137, 174 (1803).

¹⁶² 14 U.S. (1 Wheat.) at 334.

Indeed, the presumption in favor of the two-tier thesis is even stronger than this, for the thesis draws strong support from a series of interconnected structural arguments, outlined above, which underscore the primacy of federal question and admiralty cases, and the superiority of federal courts in adjudicating these cases.¹⁶³ The presumption in favor of the most plausible reading is strengthened even more by the fact that, notwithstanding the intimations of *Hart & Wechsler*,¹⁶⁴ this reading is supported by considerable historical evidence from the records of the Philadelphia Convention.¹⁶⁵

The issue of burden of proof is especially important because the amount of legislative history from the Act of 1789 is by all accounts rather scanty. As Professor Casto concedes: "Because all debates in the first Senate were secret, there is some difficulty in piecing together a complete history of the act."¹⁶⁶ Records of the debates in the House are somewhat more complete, but most of the structure of the Act had been fixed by the time the Bill reached the Representatives.¹⁶⁷ In the words of Representative Egbert Benson,

The Senate had employed a great deal of time in perfecting this bill, and he believed had done it tolerably well; besides, the session was now drawing to a close; he therefore wished as few alterations as possible to be made in it, lest they should not get it through before the adjournment.¹⁶⁸

To be sure, the "formal" legislative history can be supplemented by other sources, such as letters, but even here there are important gaps. For example, a letter from that central figure James Wilson—the man who in the Philadelphia Committee of Detail penned the two-tier language of article III—to Pennsylvania Senator Robert Morris on the subject of the pending Judiciary Bill has yet to be found (if it still exists).¹⁶⁹ The incompleteness of the record coun-

¹⁶³ See *supra* text accompanying notes 16-36.

¹⁶⁴ The casebook editors question why there is "so little evidence of explicit recognition" of the bifurcation principle in late eighteenth century commentary other than the debates over the Act. See HART & WECHSLER, *supra* note 13, at 386.

¹⁶⁵ See Amar, *A Neo-Federalist View*, *supra* note 9, at 242-45; see also *id.* at 245-46 & n.130 (explicit recognition by many key federalists during ratification era that diversity cases were less significant). In their comments on the present essay, both Professors Redish and Meltzer significantly understate the Philadelphia Convention evidence. For my response, see Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter Amar, *Reply*].

¹⁶⁶ Casto, *supra* note 63, at 1107.

¹⁶⁷ See Clinton, *supra* note 56, at 1533.

¹⁶⁸ 1 ANNALS OF CONG., *supra* note 62, at 812.

¹⁶⁹ Conversation with Charlene Bickford, Project Director, First Federal Congress Project, George Washington University. For references to this letter, see

sels special caution in drawing strong inferences from silence, as *Hart & Wechsler* seems to invite. To the extent there is not overwhelming and indisputable affirmative evidence on behalf of the two-tier thesis, it may simply be because the record is small and spotty.

In the end, the persuasiveness of the two-tier thesis is like the old joke about whether old age is a good thing or not: the critical question is, compared to *what*? Just as the key historical comparison is not between explicit endorsement of the two-tier thesis and silence, so too the relevant bottom-line comparison is not between the two-tier thesis and perfection. Rather, the comparison is between the two-tier thesis and *other* theories of article III—and here, there is really no comparison. Other theories offer *no* satisfactory account of the entire text, *no* persuasive rebuttals to the myriad structural arguments underlying the two-tier thesis, and *no* affirmative historical support. The two-tier thesis may not be perfect, but it sure is better than nothing.¹⁷⁰

Diary of William Maclay, *supra* note 113, at 100, 103-04. At the Pennsylvania ratifying convention, Wilson took pains to use the precise two-tiered language of article III—"all cases" in some categories, versus "controversies" in others—even as he simultaneously paraphrased other language from the article III jurisdictional menu. See 2 ELLIOT'S DEBATES, *supra* note 62, at 489-93; see also 4 *id.* at 156-58 (similar care taken by federalist William Davie in North Carolina ratification convention).

Professor Casto has argued that Wilson's later decision in *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 324-27 (1796), is "quite inconsistent with the theory of mandatory aggregate vesting." Casto, *supra* note 63, at 1123. Given that Casto himself properly concedes that the mandatory vesting theory "would not have been pertinent because a federal—rather than a state—court had made the findings of fact sought to be reviewed," *id.*, it is a mystery how Casto can only a few sentences later proclaim Wilson's decision "quite inconsistent" with this theory. Casto apparently reads Wilson as denying Congress power to make exceptions over Supreme Court admiralty jurisdiction in favor of lower federal courts. Even if this were Wilson's argument, it would not be *inconsistent* with the notion that some federal court must have the last word on all admiralty cases—it would simply be *supplementary* to such a theory, adding a "Supreme Court essential functions" gloss to the aggregate mandatory vesting theory. In fact, however, Wilson was not making any such argument. He was simply saying that although Congress might withhold all Supreme Court appellate jurisdiction over lower federal courts in admiralty, see *Wiscart*, 3 U.S. (3 Dall.) at 326, if Congress sought to confer such jurisdiction on the high court, Congress could not simultaneously limit the Court's authority to revisit factual questions; the *nature* of admiralty jurisdiction called for appellate review of both law and fact if appellate review was to be provided at all. Wilson's opinion in *Wiscart* thus focused on issues far closer to those raised by *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), than by *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). For further support for this reading of *Wiscart*, the interested reader should consult J. GOEBEL, *supra* note 60, at 486; 3 J. STORY, *supra* note 9, § 1757; Clinton, *supra* note 18, at 774 n.113, 805 n.206; Warren, *supra* note 23, at 108, 127 n.173.

¹⁷⁰ Neither of the two comments on the present essay fill the breach. Indeed,

B. *Still Small Voices*

The preceding remarks have generally assumed, arguendo, the factual validity of *Hart & Wechsler's* premise that there is "little explicit recognition" of the two-tier thesis in the "available history" of the First Judiciary Act. In fact, if we know what to look for and search the record with care, we shall find considerable historical support for the thesis.

Just as the strongest indication of the framers' "intent" "*is the constitutional language itself*"¹⁷¹ so too with the Act of 1789—and as we have already seen, the words and general structure of the Act itself strongly support the two-tier thesis. *Hart & Wechsler* notwithstanding, the Act *itself* is "explicit recognition" of the two-tier thesis—a fact which the editors miss because they make craters out of moleholes, seeing "significant gaps" that are largely irrelevant or nonexistent. In fact, the basic consistency between the Act and the two-tier thesis runs even deeper, for the arguments various legislators made for or against this Act harmonize very well with the principles underlying the thesis. Let us, once again, consider each principle in turn.

1. Holism

As William Paterson declared in his speech to the Senate: "A Beauty frequently results from a View of the whole, which is lost when garbled, or taken by Piecemeal."¹⁷² Other legislators took up Paterson's invitation to focus on "the whole"—in particular, on the federal judicial power as a whole, and on the words of article III as a whole. Indeed, Paterson himself noted that states' rightists explicitly focused on federal judicial power in a holistic way: *original* federal court jurisdiction could be reduced precisely because "[t]here may be an *appeal* from the State Courts to the federal."¹⁷³ Or to quote from Representative James Jackson, "one appeal . . . would answer every purpose; he meant from the State courts immediately to the Supreme Court of the continent."¹⁷⁴ A little later in the debate, Jackson once again exemplified holism by pointing out how the con-

their *affirmative* and *comparative* textual, historical, and structural arguments on behalf of more "traditional" accounts of article III are consistently thin and conclusory as I show in my rejoinder. See Amar, *Reply*, *supra* note 165.

¹⁷¹ J. ELY, *DEMOCRACY AND DISTRUST* 16 (1980); see also *supra* note 160.

¹⁷² Notes of William Paterson, *supra* note 58, at 478.

¹⁷³ *Id.* at 475 (emphasis added).

¹⁷⁴ 1 ANNALS OF CONG., *supra* note 62, at 833.

trast between different clauses of article III enhanced the plain meaning of each clause:

In the constitution it is declared that the Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time ordain and establish. From hence he presumed that there was a constitutional necessity for the establishment of a Supreme Court, but there was a discretionary power in Congress to establish, from time to time, inferior courts.¹⁷⁵

Jackson was not alone in his effort to make holistic sense of the framers' selective use of words like "shall" and "may." Consider, for example, the following statement by federalist William Smith:

The words, "shall be vested," have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to state judicatures, where a discretionary power is left to Congress by the constitution; the word "may" is employed where a discretion is left; the word "shall" is the appropriate term; this distinction is cautiously observed.¹⁷⁶

Unfortunately, Smith at times betrayed his own insight by misquoting the language of the inferior courts clause, and arguing that such courts were constitutionally required.¹⁷⁷ Smith sometimes appeared to argue that article III ousted state courts from exercising concurrent jurisdiction; nevertheless, at other times he seemed to acknowledge that state courts might take original jurisdiction of cases falling within the mandatory judicial power, subject to a constitutional requirement of appellate review by some federal court: "If the state courts are to take cognizance of those causes which, by the constitution, are declared to belong to the judicial courts of the United States, an appeal must lie in every case to the latter, otherwise the judicial authority of the Union might be altogether eluded."¹⁷⁸ Smith's emphasis on appellate review as a substitute for original jurisdiction, and his emphasis on the *judicial* authority of the Union, mesh perfectly with holism's insistence that the judicial power of the United States is vested "in the federal judiciary, and not in state courts, or in Congress."¹⁷⁹

¹⁷⁵ *Id.* at 862.

¹⁷⁶ *Id.* at 850.

¹⁷⁷ *See id.* at 828, 850.

¹⁷⁸ *Id.* at 828-29; *see also infra* text accompanying note 219.

¹⁷⁹ *See supra* text accompanying note 11.

2. Bifurcation

When Smith referred to “those causes which, by the constitution, are declared to belong to the judicial courts of the United States” in which appeal to some federal court “must lie” whenever state courts took original jurisdiction, which “causes” did he have in mind? Let us carefully consider Smith’s own words on the matter:

It is declared by [the Constitution] that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall [sic] from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States. It is further declared that the judicial power of the United States shall extend to *all cases of a particular description*. How is that power to be administered? Undoubtedly by the tribunals of the United States; if the judicial power extends to those *specified cases*, it follows indisputably that the tribunals of the United States must likewise extend to them. . . . [Congress cannot] assign the jurisdiction of these *very cases* to the State courts, to judges who, in many instances, hold their places for a limited period; whereas the constitution, for the greater security of the citizen, and to insure the independence of the federal judges, has expressly declared that they shall hold their commissions during good behavior. To judges who are exposed every year to a diminution of salary by the State Legislatures; whereas, the constitution, to remove from the federal judges all dependence on the Legislative or Executive, has protected them from any diminution of their compensation.¹⁸⁰

This passage is remarkable in many respects. We should, for example, note Smith’s holistic integration of the “shall be vested” and tenure and salary clauses of article III into the jurisdiction-stripping analysis—a marked contrast indeed to the divide-and-conquer methodology all too common among today’s scholars.¹⁸¹ Nor should we ignore Smith’s strong affirmation of the structural superiority of federal over state judges, and of the structural parity of all “federal judges,” supreme and inferior. For our purposes now however, the most important feature of this passage is its strong endorsement of bifurcation. Smith speaks of the judicial power extending to “all

¹⁸⁰ 1 ANNALS OF CONG., *supra* note 62, at 831-32 (emphasis added).

¹⁸¹ *See, eg.*, Redish, *supra* note 18. Smith’s comments are thus flatly inconsistent with Professor Redish’s claim that, as a constitutional matter, article III salary and tenure provisions are not relevant to the question *whether* a given case should be heard by a federal rather than state court. *See id.* at 150.

cases” in certain categories, and then makes two additional references to these “cases.” This is, of course, the language of the mandatory tier only, for article III denominates permissive tier lawsuits as “controversies” not “cases,” and the word “all” is nowhere to be found.

Professor Clinton has read Smith’s statement as referring to all nine categories of cases and controversies, and thus supportive of Clinton’s own unitary mandatory thesis.¹⁸² This is surely a plausible reading, but the bifurcation reading is preferable for two reasons. First, as we have already seen, Smith sought to parse the language of article III with some care, and stressed the significance of the selective and contrasting use of words like “shall” and “may.”¹⁸³ In the absence of strong evidence to the contrary, we should not lightly assume that Smith intended to abandon these interpretive principles when confronting the selective and contrasting formulations “all cases” and “controversies”; here too, the “distinction” in article III language “is cautiously observed.”¹⁸⁴ Indeed, this distinction is “cautiously observed” in Smith’s own wording, for he quotes only the “all cases” language, and places much stress on this language. Second, we must remember that Smith in the end voted for the First Judiciary Act notwithstanding the fact that the Act came nowhere close to vesting federal courts with final jurisdiction over all diversity suits. If read as referring to all nine categories, Smith’s language would be hard to square with this vote; if read more cautiously and narrowly, the puzzle disappears.

Additional light on Smith’s remarks comes from Abraham Nott who, like Smith, was a federalist from South Carolina, and who entered the House of Representatives within eighteen months of Smith’s departure in 1797.¹⁸⁵ During the debate on the so-called Midnight Judges Act of 1801, Nott used language and arguments remarkably similar to Smith’s. After citing the opening “shall be vested” clause of article III, Nott declared:

The obvious meaning of the Constitution, was that the judicial power of the United States should be confined to courts established and organized by their own government. Besides . . . it was required that the Judges should hold their offices during good behavior, but this was not the case in the several states. . . .

¹⁸² See Clinton, *supra* note 56, at 1534-36.

¹⁸³ See *supra* text accompanying note 176.

¹⁸⁴ *Id.*

¹⁸⁵ See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, at 60-64 (G.P.O. 1989).

The doctrine to be contended for would be further obvious by a reference to the second section of [article III] expressing the cases to which the Judicial Power of the United States should extend.¹⁸⁶

Thus far, this is vintage Smith. But Nott was even more explicit than his predecessor about which article III cases he had centrally in mind:

There was a marked difference between the words of the Constitution relating to the catalogue of cases enumerated in the first part of [the article III menu] and those in the latter part of the same. The word “all” was prefixed to each of the cases first mentioned, down to the words “admiralty and maritime jurisdiction” inclusive, but was omitted in all the subsequent cases. He [i.e., Nott] could see no reason why that word was added in the former part of the section, and omitted in the latter part, except it meant there was no case of the former description to which the Judicial power of the United States should not extend; in fact that the courts of the United States should have exclusive jurisdiction of all those cases, and in the latter their jurisdiction should be concurrent with the state courts.¹⁸⁷

To be sure, these are Nott’s words, not Smith’s, but they are obviously important in their own right, especially given when and where they were uttered—one of the most important and most comprehensive discussions of the relationship between Congress and the federal courts ever to occur in the halls of Congress. What’s more, Nott’s 1801 words can also help us interpret Smith’s 1789 speeches. The deep parallels between their arguments—the invocation of the “shall be vested” and “shall extend” language, the interjection of salary and tenure provisions in the analysis, the careful attention to specific article III words, and even the too-quick collapsing the notion of exclusive (original) federal jurisdiction and the analytically distinct idea of leaving federal courts with the last word via appeal—suggest that Nott may well have learned his lessons in federal jurisdiction from Smith.¹⁸⁸

¹⁸⁶ 6 ANNALS OF CONG. 893 (1801).

¹⁸⁷ *Id.* at 894.

¹⁸⁸ Smith’s biographer chronicles one episode in 1793 where Smith appears quite self-consciously to have shaped young Nott’s political views: “I found a smart young country lawyer . . . desirous of understanding [the treasury debates] . . . I left him with a duplicate of the speeches, which I had carried with me & a pamphlet; before I left him, he was quite one of us.” G. ROGERS, *EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON (1758-1812)* 245 (1962) (quoting Smith and identifying young man as “without doubt Abraham Nott”).

Smith's 1789 remarks in the House were paralleled by those of William Maclay in the Senate. In response to a motion by anti-federalist Richard Henry Lee "that The Jurisdiction of the [lower] Federal Courts should be confined, to cases of admiralty and Maritime Jurisdiction,"¹⁸⁹ Maclay rose up:

The Effect of the Motion was to exclude the Federal Jurisdiction, from each of the States, except in admiralty and maritime Cases. But the Constitution expressly extended it to *all cases* in law and equity under the Constitution the Laws of the united States, Treaties made or to be made. &ca. [W]e already had existing Treaties and were about making many laws. These must be executed by the federal Judiciary. [T]he Arguments which had been used would apply well, if amendments to the Constitution were under Consideration. but certainly were inapplicable here.¹⁹⁰

Professor Clinton has invoked this language on behalf of his unitary mandatory thesis,¹⁹¹ and once again, this is not a wholly implausible reading. But once again, the narrower bifurcation reading provides a better account of the exact words of the passage. Here too, the phrase used is "all cases," not "controversies." Maclay went on to make it clear that he was talking about all *federal question* cases, not about all nine categories of cases and controversies. The exclusive focus on federal questions meshes perfectly with the two-tier thesis, for the Lee motion which Maclay rose to oppose conceded the need for plenary federal admiralty jurisdiction—and as we have already seen, admiralty is the only other mandatory tier category arguably subject to curtailment by Congress through joint deployment of its "exceptions" and "ordain and establish" powers in divide-and-conquer fashion. Maclay's failure to mention diversity jurisdiction is hard to explain under Professor Clinton's reading, but easily understandable when examined through the bifurcation lens.

Maclay's insistence on the primacy of federal question jurisdiction is, if anything, even more evident in his remarks the next day:

I rose and read over from the Constitution a number of the powers of Congress—Viz. collecting Taxes duties imposts, naturalization of Foreigners. Laws respecting the Coinage, punishing. the counterfeiting of the Coin. Treason against the united States &ca. declared that no force of Construction. could bring these Cases within Admiralty or maritime Jurisdiction—and Yet *all* these Cases,

¹⁸⁹ Diary of William Maclay, *supra* note 113, at 85 (paraphrasing Lee's motion). For the apparent actual wording of the motion, see Warren, *supra* note 23, at 67.

¹⁹⁰ Diary of William Maclay, *supra* note 113, at 85 (emphasis added).

¹⁹¹ See Clinton, *supra* note 56, at 1530-31.

were most *expressly* the Province of the Federal Judiciary. so that the question expressly turned upon this point. shall we follow the Constitution or not the Constitution placed the Judicial power of the Union in One Supreme Court and such inferior Courts as should [sic] be appointed. & of Course the State Judges in Virtue of their Oaths, would abstain from every Judicial Act under the federal laws. and would refer all such Business to the federal Courts

[H]ere it was totally different [from England]. the Mass of Causes would remain with the State Judges, those only arising from federal laws, would come before the federal Judges.¹⁹²

If Professor Clinton tends to read the words of Maclay and Smith too expansively,¹⁹³ Professor Casto returns the compliment by virtually ignoring them. He devotes only a single footnote to these passages, which he cites but does not quote. His major argument for ignoring them is that both men “espoused the notion that concurrent state court jurisdiction of causes within Article III is unconstitutional. . . . This is the argument that Hamilton destroyed in Federalist No. 82 and that was rejected in numerous ratification conventions.”¹⁹⁴ As we have seen, however, Smith at times seemed to acknowledge that state courts would exercise concurrent jurisdiction, and insisted only that “appeal must lie in every case” of a “particular description” to “the judicial courts of the United States.”¹⁹⁵

In any event, even if Smith and Maclay did hold erroneous views about concurrent state court jurisdiction, their arguments about the mandatory character of the “shall be vested” and “shall extend to all cases” language, and Smith’s emphasis on federal judges’ salary and tenure guarantees, are analytically severable from the concurrent

¹⁹² Diary of William Maclay, *supra* note 113, at 86-87 (emphasis added).

¹⁹³ These are not the only examples of Professor Clinton’s tendency to move a bit too quickly from historical evidence about the need for federal question jurisdiction in federal courts to more sweeping conclusions about all nine categories. See, e.g., Clinton, *supra* note 18, at 816 (invoking statement by Archibald Maclaine in North Carolina ratifying convention about federal question jurisdiction as encompassing “cases of federal magnitude” and then making sweeping claims about “each and every case within” the article III menu); *id.* at 844 (moving from evidence about the need for federal courts “to assure conformity with the Constitution and federal law” to conclusion about “all cases involving federal law questions or matters of transstate concern” (emphasis added)); *cf. id.* at 817 (paraphrasing Madison in Virginia ratifying convention as saying that diversity cases “might safely *have been* left to state courts” by the Philadelphia convention, when Madison in fact said that diversity cases “might *be* left to state courts” by future Congresses—in direct contradiction to Clinton’s theory (emphasis added)).

¹⁹⁴ Casto, *supra* note 63, at 1110 n.70.

¹⁹⁵ See *supra* text accompanying notes 177-78; *infra* text accompanying note 219.

jurisdiction issue. If there are strong historical, structural, and textual reasons for rejecting Smith and Maclay's arguments about the unconstitutionality of state court concurrent jurisdiction—and both Casto and I agree that there are such reasons¹⁹⁶—there are not equally valid reasons for ignoring the residue of Smith's and Maclay's remarks. (Similarly, we need not agree with *everything* Story said in *Martin*—such as his claim that some lower federal courts were constitutionally required—in order to treat with due respect other things that Story said, namely, his basic two-tier argument quoted at the outset of this essay.)

Casto also claims that the Judiciary Act, as finally approved, “gave the back of its hand to the Smith-Maclay analysis.”¹⁹⁷ But once their arguments about concurrent jurisdiction are severed, the Act harmonizes perfectly because their analysis strongly supports the bifurcation principle underlying both article III and the Act itself.

In another footnote, Casto again betrays his tendency to slight important evidence undercutting his own theories. The Notes of Senator William Paterson include the following sentence: “The Constn. points out a Number of Articles, which the federal Courts must take up.”¹⁹⁸ Casto argues that “the cases that ‘the federal courts must take up’ may be the few cases within the Supreme Court’s mandatory original jurisdiction”¹⁹⁹ but this wishful interpretation does violence to the plain words of the passage, which speak of federal *courts* holistically, and not the Supreme Court. What’s more, this interpretation runs aground on the same shoals that we have seen earlier,²⁰⁰ for Casto offers no reason why the “shall” language is “mandatory” in the Supreme Court’s original jurisdiction clause, but not elsewhere in article III. Casto also argues that “the verb, ‘must take up,’ may be hortatory.”²⁰¹ This reading is surely possible; but then again, it is virtually always possible to ignore inconvenient evidence by refusing to read words in their most natural way. Yet again, the bifurcation reading is more satisfactory, as it accounts for more evidence (“shall,” “all,” and now “must”) than competing theories. Finally, Casto argues that the phrase “a Number of Articles,” may “refer[] to substantive provisions of the Constitution rather than the list of cases and controversies in Article

¹⁹⁶ See Amar, *A Neo-Federalist View*, *supra* note 9, at 212-14, 233-34, 255 n.165.

¹⁹⁷ Casto, *supra* note 63, at 1110 n.70.

¹⁹⁸ Notes of William Paterson, *supra* note 58, at 477.

¹⁹⁹ Casto, *supra* note 63, at 1108 n.56.

²⁰⁰ See *supra* text accompanying notes 78-80.

²⁰¹ Casto, *supra* note 63, at 1108 n.56.

III, section 2.”²⁰² Although Casto seems to present this as an independent argument, it cannot stand on its own and ultimately collapses into his “hortatory” reading of “must.” If “must” means “must,” then even under Casto’s “substantive provisions” reading, Paterson is arguing that federal courts must hear federal question cases, a proposition Casto is at pains to deny.

When closely examined, Paterson’s notes provide modest additional support for the bifurcation principle. Paterson does not say that Congress is free to give state courts the last word in *any* case it fancies (the unitary permissive thesis); nor does he say that federal courts must hear *all nine* categories of cases and controversies (the unitary mandatory thesis). Rather, consistent with the bifurcation thesis, Paterson notes that *some* (“a number of”) articles must be heard by federal courts.

But which ones? Paterson’s notes are much more cryptic here, but Professor Casto’s “substantive provisions” reading suggests that Paterson may have been thinking about cases arising under the Constitution, and perhaps federal laws. If so, Paterson’s notes fit beautifully with the requirements of bifurcation, even as they ironically undermine Casto’s own (later) claim that no historical evidence has been adduced to support the idea that “some of the heads of jurisdiction in the Constitution are mandatory but others—most notably diversity and alienage jurisdiction—are not.”²⁰³ Elsewhere, Paterson strongly affirmed the coextensiveness principle, once again suggesting his commitment to mandatory federal question jurisdiction.²⁰⁴ Additional, albeit subtle, evidence comes from another portion of Paterson’s notes: “Hence we shall approximate to each other gradually—Hence we shall be assimilated in Manner, in Laws, in Customs—Local Prejudice will be removed”²⁰⁵ This prediction implies that the need for diversity jurisdiction was only temporary, and provides additional confirmation of the structural bifurcation argument I made in 1985:

To guard against particular—and foreseeable—instances of special bias in state tribunals, the framers wanted to allow impartial national courts to hear [diversity] . . . cases, if necessary. But the necessity would not be uniform and unwavering—it would vary from state to state and year to year. Instead of laying down an absolute rule of mandatory national jurisdiction in all such cases,

²⁰² *Id.*

²⁰³ *Id.* at 1125.

²⁰⁴ See *infra* text accompanying notes 236-37.

²⁰⁵ Notes of William Paterson, *supra* note 58, at 477.

the Framers were content to commit the issue to a congressional discretion that could accommodate fluctuating circumstances

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Taken together, the statements of Smith, Maclay, and Paterson furnish more support for the two-tier theory than for any competing interpretation of article III.²⁰⁷ Yet perhaps the strongest evidence on behalf of the theory comes not from these federalists, but from the anti-federalist side of the aisle. Let us now consider carefully both what these men said, and what they did not say.

Despite their hostility to other categories of lower federal court original jurisdiction, especially diversity, leading anti-federalists affirmatively endorsed the concept of lower federal court original jurisdiction over all admiralty cases. Senator Lee's motion, it will be recalled, sought to eliminate all other categories of original jurisdiction in the inferior federal courts, but expressly approved the (constitutionally nonobligatory) creation of these courts for admiralty cases. Indeed, it appears that support for at least this much original jurisdiction was virtually unanimous in the Senate. Much the same thing can be said of the House. Representatives Thomas Tudor Tucker, and Samuel Livermore echoed their ally Lee both in their opposition to other categories of original jurisdiction and in their explicit endorsement of federal district courts of admiralty.²⁰⁸ In a letter written in early September, 1789, Massachusetts Representative Fisher Ames wrote that federal admiralty courts "were not denied to be necessary" by states' rightists.²⁰⁹

²⁰⁶ Amar, *A Neo-Federalist View*, *supra* note 9, at 245-46; *see also* Amar, *Section 13*, *supra* note 15, at 478 (framers anticipated that increased interstate commerce would reduce state parochialism and corresponding need for diversity jurisdiction). In the end, the framers expected the *parochial* nature of state courts to vary over time, but not their *political* nature. Future state courts might become less hostile towards out-of-staters, and thus, might prove trustworthy in deciding purely state law controversies; but those courts would *never* have article III insulation from temporary majorities, *see* Amar, *A Neo-Federalist View*, *supra* note 9, at 226 n.81. Thus, they would never be sufficiently trustworthy guardians of certain countermajoritarian constitutional rights, or sufficiently independent of politics to satisfy the rule of law concerns (implicit in the coextensiveness principle) when *federal* law was at issue. Put another way, state courts might become fair arbitrators or umpires of local disputes, but never independent expounders and guardians of national norms. *Cf. id.* at 246 n.133.

²⁰⁷ *See supra* text accompanying notes 169-70.

²⁰⁸ *See* 1 ANNALS OF CONG., *supra* note 62, at 813; *id.* at 791-92 (Tucker's proposed constitutional amendment eliminating diversity jurisdiction but explicitly calling for lower federal courts of admiralty).

²⁰⁹ 1 WORKS OF FISHER AMES 69 (S. Ames ed. 1854) (reprinting Letter from Fisher Ames to George Minot (Sept. 3, 1789)).

When we turn from admiralty to the other major mandatory tier category, arising under jurisdiction, a similar pattern emerges. Here, the states' rightists wanted only appellate rather than original federal court jurisdiction, but once again, they generally agreed on the need to give the last word in all these cases to a federal court. As with lower federal court admiralty jurisdiction, what is most striking about section 25 is the relative *lack* of controversy it engendered, despite its sweeping scope.²¹⁰ Although the section allowed any losing party with a federal claim to drag the winning party hundreds of miles away to the distant Supreme Court, even in cases where the financial stakes were trivial, the section as written was supported by many legislators who fought tooth and nail against other jurisdictional categories such as diversity. Perhaps the most eloquent and emphatic of these was Representative James Jackson:

But we are told, he said, it is necessary that every Government should have the power of executing its own laws. This argument would likewise fail. . . . [Not only are state courts bound by the supremacy clause but] does there not remain the appellate jurisdiction of the Supreme Court to control them, and bring them to their reason? Can they not reverse or confirm the State decrees, as they may find them right or wrong?²¹¹

Professor Clinton has read Jackson's remarks as supporting a unitary mandatory thesis,²¹² but this reading ignores critical features of Jackson's position. Jackson was talking only of federal question jurisdiction, not diversity. He begins this passage by invoking the coextensiveness principle—a notion which, as we have already seen, is intimately bound up with “arising under” jurisdiction—and ends by paraphrasing the “reverse[] or affirm[]” language of section 25, a section which, again, only deals with arising under jurisdiction. Jackson was arguing only for federal question appellate jurisdiction over state courts, and not, as Clinton seems to imply, for comparable appellate review over state courts in pure state-law diversity cases.

²¹⁰ Some support did exist in the first Congress to amend the Constitution to allow appeals to the Supreme Court only in cases involving a thousand dollars or more. See *supra* note 62. For our purposes, two features of this effort are noteworthy. First, the amendment failed, and was opposed by both federalists and anti-federalists on grounds strongly supportive of the two-tier thesis. See *id.* Second, the fact that the proposal took the form of a *constitutional* amendment may suggest that even its supporters may have understood that a mere statute would have been vulnerable on article III grounds, at least in the absence of lower federal court review of state court decisions.

²¹¹ 1 ANNALS OF CONG., *supra* note 62, at 834.

²¹² See Clinton, *supra* note 56, at 1536-37.

Despite gaping holes in lower federal court original jurisdiction in diversity, holes that Jackson sought to widen much further, neither he nor anyone else made a serious or sustained argument for federal appellate jurisdiction over state courts in diversity suits barred from inferior federal courts. And of course, the Act as finally approved embodies this overwhelming consensus.

If Jackson's remarks are somewhat embarrassing to Professor Clinton's thesis, they are even more so to those who seek to make hay out of the alleged "significant gaps" in section 25. For Jackson at least, section 25 was plenary, and covered all arising under cases—there "will not, neither can there be"²¹³ federal question suits outside section 25. And nowhere else does the legislative history disclose that section 25 was seen, by either federalists or antis, as containing significant gaps.²¹⁴

In the end, the dominant anti-federalist position was well summed up by Samuel Livermore:

Now, if we have a Supreme Court, to which appeals can be carried [under Section 25], and an Admiralty [federal district] Court for deciding cases of a maritime nature, our system will be useful and complete If justice cannot be had [in state courts] there will be an appeal [under section 25] to the federal Supreme Court, which is all that can be required.²¹⁵

Taken as a whole, the weight of the evidence supports bifurcation. Legislators in both Houses expressly placed weight on the "shall be vested" and "shall extend to all cases" phrases of article III, phrases which lie at the base of the two-tier thesis. But as noted earlier, while the selective text of article III provides the most obvious and tangible evidence for bifurcation, the deepest and most sat-

²¹³ 1 ANNALS OF CONG., *supra* note 62, at 846.

²¹⁴ *But see* Letter from William Smith to John Rutledge (Aug. 9, 1789), in files of First Federal Congress Project, George Washington University (file # 07409) (suggesting that Rutledge saw gap in language of § 25).

²¹⁵ 1 ANNALS OF CONG., *supra* note 62, at 827-28; *see also* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, *supra* note 58, at 456 (reprinting Notes of Pierce Butler). Butler argued:

Perhaps some Gentlemen will tell me that my objections extend to destroy all Centralizing power in the General Judiciary—I answer No—I would give them Appellate Jurisdiction in *all Cases*, And Original in Admiralty or Maritime Cases And in whatever related to the Collection of the Revenue of the General Government.

Id. (emphasis added). For views similar to those of Livermore, Jackson, and Butler expressed during the ratification era, see, for example, the remarks of anti-federalist Samuel Spencer in the North Carolina ratifying convention, in 4 ELLIOT'S DEBATES, *supra* note 62, at 155.

isfying reasons for embracing the bifurcation reading are structural: federal question and admiralty jurisdiction is structurally and qualitatively more important than, say, diversity jurisdiction. It is this structural point that the Act's legislative history overwhelmingly confirms. Time and again, legislators of all political stripes affirmed the primacy of these two categories of jurisdiction. Whether these legislators explicitly invoked—or were even aware of—the selective language of article III is somewhat besides the point. Once again, the brute fact remains that the language *is* two-tiered; and the basic sentiments and intuitions evidenced in the first Congress give us additional reasons for *choosing* to treat this two-tiered language as significant, and for respecting the language's most plausible and coherent reading.

3 & 4. Structural Superiority and True Parity

We have already noted one speech in which William Smith stressed the unique structural independence enjoyed by all federal judges but lacking in state courts.²¹⁶ This was a theme Smith (ex)pounded on over and over:

[A federal judge] will be more independent than the State judges, holding his commission during good behavior and not influenced by the fear of a diminution of his salary.²¹⁷

....

... There is another argument that appears conclusive; the constitution provides that the Judges of the Supreme and inferior courts, shall hold their commissions during good behavior, and shall receive salaries not capable of diminution²¹⁸

For Smith, the flipside of the structural superiority of federal judges was the notion of parity within the federal bench. Lower federal courts, unlike state courts, could be trusted with the last word in vital areas such as admiralty:

By restricting the State courts to few causes of federal jurisdiction, the number of appeals will be diminished, because every cause tried in those courts will, for the reasons before mentioned, be subject to appeal; whereas the jurisdiction of the district court will be final in many cases. Inasmuch, therefore, as those appeals are grievous to the citizens, which lie from a court within their own State to the Supreme Court at the seat of Government, and at a

²¹⁶ See *supra* text accompanying note 180.

²¹⁷ 1 ANNALS OF CONG., *supra* note 62, at 829.

²¹⁸ *Id.* at 850.

great distance, they will consequently be benefited by an exemption from them.²¹⁹

William Paterson's notes are much to the same effect, describing in detail the structural disparities of selection, tenure, and salary between state and federal judges,²²⁰ and arguing for vesting the last word in various cases in lower federal courts for reasons of geographic convenience: "How as to Appeals—Bring Law Home—meet every Citizen in his own State—not drag him 800 miles upon an appeal . . . Sup. Court cannot go into each State."²²¹

The idea that one of the biggest differences between Supreme Court and lower federal court judges is geographic, not structural, is a notion at the very center of the two-tier thesis.²²² And it is an idea

²¹⁹ *Id.* at 829-30.

²²⁰ See Notes of William Paterson, *supra* note 58, at 476, 478-79.

²²¹ *Id.* at 475.

²²² See, Amar, *Section 13*, *supra* note 15, at 471-78.

Professor Meltzer takes issue with my geographic argument in a variety of ways, only a few of which can be briefly addressed here. Because Meltzer's rendition of my argument is at times a bit too quick and at others a bit too grudging, the interested reader would do well to consult my original formulation. To summarize my biggest objections:

(1) Although Meltzer suggests that much of my geographic evidence concerns matters "quite different" from Supreme Court original jurisdiction, *see* Meltzer, *supra* note 80, at 1605, some of my sources explicitly connected geography and Supreme Court original jurisdiction, *see, e.g.*, Amar at 471-72 (Madison in Philadelphia); *id.* at 475 (Samuel Chase's subtle invocation of geography). There is less *geographic* evidence about original jurisdiction simply because, as Meltzer himself notes, there is less *overall* discussion of original jurisdiction. Given that geographic concerns ramified throughout the Constitution, *see id.* at 469-71, and indeed pervaded virtually every other aspect of article III (as Meltzer himself seems to concede, Meltzer, *supra* note 80, at 1605) his manipulation of the burden of proof by labelling all these other issues "quite different" (a classic divide and conquer approach) shows more lawyerly skill than historical sensitivity. To serious historians of the period, it is rather obvious that geography was an overwhelming fact of daily life and an overarching concern of both federalists and antis in the late 1780s. I never meant to claim that geography was the *only* factor influencing Supreme Court original jurisdiction, but simply that it was an important one that many *legal* scholars had overlooked. *Cf.* Amar, *A Neo-Federalist View*, *supra* note 9, at 254 (discussing special dignity of Supreme Court in ambassador cases).

(2) I do not believe that in each and every suit that article III allows to be tried in the Supreme Court, eighteenth century geography always made that venue most convenient; but *in general*, geographic considerations in ambassador and state party cases tended to favor—or at least not greatly *disfavor*, as was true for other article III categories—trials in the national capital. It's easy to conjure up certain fact patterns where the generalizations fail; and Meltzer does usefully identify some of these scenarios. *See* Meltzer, *supra* note 80, at 1605-08. Yet even here, the issue is far more mixed than Meltzer acknowledges. For example, cases affecting *consuls* were far less momentous than cases affecting *ambassadors* who generally did reside in the nation's capital—a sign of their *geographic*, as well as *political* centrality. *Cf.* U.S. CONST. art. II,

that appears over and over again in the Judiciary Act's legislative his-

§ 3 (President "shall receive Ambassadors and other public ministers," but not consuls). The Judiciary Act reflects this intertwined centrality by providing for exclusive Supreme Court original jurisdiction over suits against ambassadors, but only concurrent jurisdiction in suits against consuls. See Judiciary Act of 1789, ch. 20, §§ 9, 13, 1 Stat. 73. A "geographic" reading of article III can provide a rather nice explanation for this fact. What's more, regardless of foreign consuls' residence, the President and State Department would be headquartered in the national capital. Given the desirability of quick communication between Executive and Judiciary in many of these delicate cases, concurrent venue in the nation's capital makes far more geographic sense than Meltzer admits. Cf. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 111 (M. Farrand ed. 1937) (remarks of George Mason that only Supreme Court judges "fixed near seat of government" could communicate with the President as part of proposed Council of Revision).

(3) Meltzer seems to doubt whether the framers expected that federal legislators in the nation's capital would litigate in the Supreme Court. See Meltzer, *supra* note 80, at 1604 n.126. There is abundant evidence. Daniel Webster, for example, litigated more cases before the Court (170) than any other counsel in history except Walter Jones. See *Commemoration of the 200th Anniversary of the Supreme Court's First Sitting*, 110 S. Ct. cx, cxiv (1990) (remarks of Rex Lee); see also Finley, *Daniel Webster Packed 'Em In*, YEARBOOK 1979, SUPREME COURT HISTORICAL SOCIETY 70, 71. (Jones of course litigated *Martin* and anticipated Story's two-tier analysis. See *supra* text accompanying note 48.) Yet another casual datum: in literally every one of the early nineteenth century cases that both Meltzer and I cite, at least one federal legislator argued before the Court. See *Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 56 (1840) (John J. Crittenden); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) (Webster); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (Webster); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) (Henry Clay and Webster); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (William Pinkney and Philip Barbour); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Webster and Joseph Hopkinson); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Henry St. George Tucker); see also 1 C. WARREN, *supra* note 48, at 50 (discussing large number of Congressmen sworn in during 1790 to practice before Supreme Court). Finally, even federal legislators who did not themselves litigate were in an excellent position to hire and monitor Washington lawyers who would—hence my language about federal legislators *attending to states'* litigation interests, see Amar, *Section 13*, *supra* note 15, at 476. Despite Meltzer's doubts, it strains credulity to believe that none of these developments were anticipated by the framers who, after all, expected federal legislators to represent their state's interests in the nation's capital—especially given that under the Articles of Confederation the only suit between states ever to reach judgment before the nascent national tribunal established to hear such cases was in fact litigated by a member of Congress. See, e.g., J. GOEBEL, *supra* note 60, at 189 (role of Connecticut Congressman Jesse Root in 1782 hearings of *Pennsylvania v. Connecticut* dispute over Wyoming Valley). Members of Congress also appeared before the national tribunal in both of the only two other state suits that came before the tribunal, but never reached judgment. See 1 J. CARSON, *THE SUPREME COURT OF THE UNITED STATES* 75 (1902) (role of New York Congressmen Egbert Benson, Robert R. Livingston, and Walter Livingston in New York-Massachusetts dispute); *id.* at 76 (role of South Carolina Congressmen John Kean, Charles Pinckney, and John Bull and Georgia Congressmen William Few and William Houston, in South Carolina-Georgia dispute).

(4) I argue that although state party cases need not be heard in any federal court, if they are to be so heard, geographic fairness requires that they be triable in a

tory.²²³ Indeed, Paterson's notes elsewhere acknowledge that even anti-federalists seemed to concede parity within article III, by acknowledging the trade-off between original jurisdiction in lower federal courts and appellate jurisdiction over state courts by the U.S. Supreme Court.²²⁴ As Ellsworth later explained, "Circuit courts . . . would . . . settle many cases *in the States* that would otherwise go to the Supreme Court. . . . Without this arrangement, there must be many appeals or writs of error from the Supreme Courts of the States"²²⁵

The structural superiority of federal justice was especially important in cases arising under federal law. As James Madison explained, state courts, in many states

will satisfy us that they cannot be trusted *with the execution of the Federal laws* [In some states] they are so dependent on State Legislatures, that to make the *Federal laws* dependent on them, would throw us back into all the embarrassments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature, and the Legislature is itself the last resort in civil cases.

In Rhode-Island . . . the case is at least as bad.²²⁶

Even anti-federalists at times expressly acknowledged the structural superiority of federal judges. Elbridge Gerry, for example,

geographically neutral forum—the Supreme Court. Amar, *Section 13, supra* note 15, at 487 & n.204. My logic here is the logic Meltzer himself admits is plausible: geographic neutrality is required *only* "if and when" the federal judiciary intervenes. See Meltzer, *supra* note 80, at 1607 n.136. To be sure, I reject the "if and when" logic as an explanation of the *salary and tenure* provisions generally, and of the mandatory language of "shall be vested" and "shall extend to all cases." That is because the "if and when" logic fails to satisfy all the concerns underlying the rule of law and coextensiveness principles implicated by *federal question* jurisdiction. (Put another way, these principles are implicated "if and when" the *Constitution* or *federal law* intervenes. See *supra* text accompanying notes 32-34.) But where (by hypothesis) only state law is at stake, geographic impartiality is required only if and when the federal *judiciary* gets involved to umpire the dispute. See also *supra* note 206 (distinguishing between *political* and *parochial* nature of state court adjudication; concern over geographic parochialism "waivable" by Congress; concern over lack of political independence, not). Meltzer's apparent willingness here to read various statements about the importance of state party cases as *requiring*, rather than simply *allowing*, Congress to provide for federal jurisdiction stands in sharp contrast to his treatment of analogous or stronger statements in the "arising under" context. See, e.g., *infra* text accompanying notes 231-40.

²²³ For examples of the profound importance of geographic considerations in the First Judiciary Act, see J. GOEBEL, *supra* note 60, at 460, 471, 500-01.

²²⁴ See Notes of William Paterson, *supra* note 58, at 479-80.

²²⁵ Warren, *supra* note 23, at 76-77 (geographic emphasis added).

²²⁶ 1 ANNALS OF CONG., *supra* note 62, at 844 (emphasis added).

pointed out that only federal judges were accountable to the nation through congressional impeachment²²⁷—a point also noted by Theodore Sedgewick²²⁸—and Jackson in one speech noted that “[i]t has been said in this debate, that the state judges would be partial.”²²⁹ Rather than deny the claim, Jackson once again invoked section 25, (which as we have seen, was limited to federal questions): “the Supreme Federal Court will have the right to annul these partial adjudications.”²³⁰

5. Coextensiveness

The affirmations of coextensiveness in the first Congress are so clear and so emphatic that no parsing or commentary seems necessary. I shall therefore simply let the legislators speak for themselves.

William Smith:

The Legislative and Executive are now in existence, but the Judicial is uncreated. While we remain in this state, not a single part of the several systems can operate; no breach of your laws can be punished . . . The Judiciary is an essential part of the Government²³¹

The Judicial power is a component part of this Government, and must be commensurate to it.²³²

Fisher Ames:

[H]e should think it a wonderful felicity of invention to propose the expedient of hiring out our judicial power, and employing courts not amenable to our laws, instead of instituting them ourselves as the constitution requires. We might with as great propriety negotiate and assign over our legislative as our judicial power; and it would not be more strange to get the laws made for this body than after their passage to get them interpreted and executed by those whom we do not appoint, and cannot control.²³³

A Government that may make but cannot enforce laws, cannot last long, nor do much good.²³⁴

John Vining:

²²⁷ See *id.* at 860.

²²⁸ See *id.* at 836.

²²⁹ *Id.* at 861.

²³⁰ *Id.*

²³¹ Warren, *supra* note 23, at 117.

²³² 1 ANNALS OF CONG., *supra* note 62, at 847.

²³³ *Id.* at 837-38.

²³⁴ *Id.* at 837.

[T]he institution of general and independent tribunals were essential to the fair and impartial administration of the laws of the United States. That the power of making laws, of executing them, and a judicial administration of such laws, is in its nature inseparable and indivisible.²³⁵

William Paterson:

[Coextensiveness is in] the very Nature of the Thing.²³⁶

Contemplate the [United States]. . . . [T]hey have a Legislature consisting of two Houses to frame laws for the Weal and Salvation of the Union—And who are to adjudicate upon these Laws—Judges chosen by the Union—No [say some]—A new Era indeed. Judges chosen by the respective States; in whose Election the Union has no Voice and over whom they have little or no Control. This is a Solecism in Politicks—a Novelty in Govt.²³⁷

James Madison:

[The] Judiciary System . . . ought to be commensurate with the other branches of the Government [T]he Legislative power is made effective for its objects; the Executive is co-extensive with the Legislative; and it is equally proper that this should be the case with the Judiciary.²³⁸

Theodore Sedgwick:

Is it not essential that a Government possess within itself the power necessary to carry its laws into execution? But the honorable gentleman proposes to leave this business to a foreign authority, totally independent of this Legislature, whether our ordinances shall have efficacy or not. Would this be prudent, even if it were in our power?²³⁹

Although Professor Clinton has cited several of these passages

²³⁵ *Id.* at 853.

²³⁶ Notes of William Paterson, *supra* note 58, at 476.

²³⁷ *Id.* at 478.

²³⁸ 1 ANNALS OF CONG., *supra* note 62, at 843.

²³⁹ *Id.* at 836. Leading anti-federalists had embraced the coextensiveness principle during the ratification debates. See, e.g., *Letters From the Federal Farmer*, *supra* note 23, at 230. This embrace of federal question jurisdiction was combined with a harsh attack on diversity only a few lines later. See *id.*; see also 2 THE COMPLETE ANTI-FEDERALIST 428 (J. Storing ed. 1981) (reprinting the Essays of Brutus XII) (“[T]he judicial power should be commensurate with the legislative.”).

James Wilson thought the coextensiveness principle so vital and axiomatic that his copy of the Philadelphia Committee of Detail’s charge contains only two things—a list of the 19 convention resolutions thus far, in his hand, and a note opposite resolution 13 on the scope of the national judiciary’s jurisdiction: “N.B. the Judicial should be commensurate to the legislative and Executive Authority.” 2 Wilson Manuscript Collection, item 68, at 6 (Historical Society of Pennsylvania).

in support of the unitary mandatory theory,²⁴⁰ all of these comments are clearly limited to federal question and admiralty jurisdiction, and thus provide more support for the two-tier thesis.

6. Political Safeguards

It is hardly to be expected that members of the first Congress would proudly proclaim Congress's general unreliability as a constitutional sentry. Nevertheless, several legislators did ring out variations on the political safeguards principle. Sedgwick, for example, declared that it was "dangerous . . . to make the State Legislatures the sole guardians of the national faith and honor."²⁴¹ Left unspoken was the obvious structural corollary: it was also dangerous to rely solely on entities dependent on state legislators, entities that included not just state courts, but Congress itself. In a vein similar to Sedgwick's, Madison wrote to Samuel Johnston:

The Senate have proceeded on the idea that the federal Gov't ought not to depend on the State Courts any more than on the State Legislatures, for the attainment of its ends and it must be confessed, that altho' the reasons do not equally hold in the two cases, yet not only theoretic propriety, but the vicious constitution and proceedings of the Courts in the same states, countenance the precaution in both.²⁴²

When combined with Madison's earlier structural observations in *The Federalist Nos. 45 and 46*, about state legislative influence on Congress, and his speech, quoted above, about the dependence of state courts on state legislatures,²⁴³ this passage once again affirms the centrality of federal courts—freed from all dependence on state governments—as the primary guardians of federal constitutional rights against both state governments and Congress.

CONCLUSION: OF SMOKING GUNS AND BARKING DOGS

When all the historical evidence is collected, sifted, and weighed, it tends in the aggregate to support the two-tier thesis far more than to refute it. Virtually every major principle and premise underlying the two-tier thesis was given voice—sometimes resound-

²⁴⁰ See Clinton, *supra* note 56, at 1537-40.

²⁴¹ 1 ANNALS OF CONG., *supra* note 62, at 836.

²⁴² 12 PAPERS OF JAMES MADISON, *supra* note 53, at 317 (reprinting Letter from James Madison to Samuel Johnston (July 31, 1789)).

²⁴³ See *supra* text accompanying note 226.

ingly, other times more faintly, yet nonetheless distinctly—in the legislative history of the First Judiciary Act.

To be sure, there is no historical “smoking gun”—no single piece of historical evidence that clinches the case beyond all doubt. Indeed, it may even be that only a few legislators integrated the six principles in exactly the same way that I did in 1985—their task, after all, was to persuade other politicians, not to expound to scholars. Thus, the two-tier thesis is best understood as a synthesis, seeking to combine the strongest and most sensible arguments of each framer and interpreter of article III into a coherent whole that makes analytic and doctrinal sense.²⁴⁴

If we insist on finding a “smoking gun” before accepting the two-tier thesis, I suggest we simply look to the text itself, and its selective language. Careful analysis of various drafts of the Philadelphia Committee of Detail, which originated the two-tiered language, confirms my reading of the import of the word “all.”²⁴⁵ But as I have sought to underscore repeatedly in this essay, the textual argument standing alone is dramatic, but not fully satisfying. Without the accompanying structural vision explaining why federal courts are superior to state courts, and why admiralty and arising under cases are more important than, say, diversity suits, the textual argument is cute and clever, but arguably not much more. Thus, it is the underlying structural vision that makes the textual argument truly a “smoking gun” rather than just so much smoke—just as it is always the presence of other factors—motive, opportunity, other circumstantial evidence, and so on—that makes some final dramatic piece of evidence the “smoking gun” in a good detective story.

But perhaps the whole search for a “smoking gun” is somewhat misguided. First, the metaphor may mask the fact that, unlike a criminal case, we should not insist on proof beyond all reasonable doubt. Rather, we must ask which reading of article III is *more* plausible, under a preponderance-of-the-evidence standard—the two-tier interpretation or some competing theory?

Second, the “smoking gun” metaphor may obscure one of the most dramatic aspects of the legislative history we have just examined. From the very beginning, there was a striking consensus that lower federal courts should have plenary admiralty jurisdiction,

²⁴⁴ See *supra* note 17.

²⁴⁵ See Amar, *A Neo-Federalist View*, *supra* note 9, at 242-44. To repeat: in their comments on the present essay, Professor Redish ignores and Professor Meltzer significantly understates this evidence. For a corrective, see my rejoinder, Amar, *Reply*, *supra* note 165.

and the Supreme Court plenary appellate federal question jurisdiction over state courts. This “minimalist” anti-federalist alternative to the Act fully comports with the requirements of article III under the two-tier thesis. Given that the two-tier thesis was never seriously threatened, there was little practical need to carefully articulate and defend it. Perhaps a more apt metaphor from detective stories derives from the celebrated dog that didn’t bark²⁴⁶—for the minimalist requirements of the two-tier thesis appear to have aroused far more sounds of contentment than growls of disapprobation from fierce anti-federalists and other vigilant watchdogs of the rights of states.

²⁴⁶ A.C. Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335, 347-49 (1960).

