

FEDERAL SUPREMACY, STATE COURT INFERIORITY, AND THE CONSTITUTIONALITY OF JURISDICTION-STRIPPING LEGISLATION

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Neither Congress nor the British Parliament nor the Vermont legislature has power to confer jurisdiction upon the New York courts.[†]

To confer the power of determining [federal] causes upon the existing courts of the several states, would perhaps be as much “to constitute tribunals,” as to create new courts with the like power.[‡]

INTRODUCTION

The House of Representatives has considered and adopted a wide range of jurisdiction-stripping legislation in the last few years.¹ Touching such subjects as gay and lesbian marriage, the Pledge of Allegiance, and official acknowledgment of God by public officials, the bills follow a consistent pattern: They deny the lower federal courts jurisdiction over certain controversial issues of constitutional law, and forbid the Supreme Court from exercising appellate jurisdiction over those same issues. By proposing to strip the federal courts of all power to hear disputed issues, the legislation would make the state courts the final arbiter of the meaning of the Constitution.² The bills draw on provisions in Article III that confer powers of un-

[†] *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

[‡] THE FEDERALIST NO. 81, at 547 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

¹ On March 3, 2005, Senator Richard Shelby (R-AL) introduced the Constitution Restoration Act of 2005, S. 520, 109th Cong., and Representative Robert Aderholt (R-AL) introduced a companion measure, H.R. 1070, 109th Cong., in the House. The Senate bill would add a new section 1260 to Title 28, providing that the Supreme Court shall not have appellate jurisdiction over a matter “to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent of Federal, State, or local government . . . concerning that entity’s, officer’s, or agent’s acknowledgment of God as the sovereign source of law, liberty, or government.” In addition, a new section 1370 would impose a parallel jurisdictional restriction on the federal district courts.

Three other bills follow the same pattern. The Marriage Protection Act of 2005, introduced on March 3, 2005, by Representative John Hostettler (R-IN) as H.R. 1100, 109th Cong., would deprive the federal courts, both Supreme and inferior, of jurisdiction to hear any question pertaining to provisions of the Defense of Marriage Act, codified at 28 U.S.C. § 1738C, that free states from any obligation to give effect to same-sex marriages lawfully celebrated in other states. According to Representative Hostettler, the bill would “stop the federal courts from imposing [the] Massachusetts definition of marriage on all the other states in this union.” Press Release, Office of Rep. Hostettler (July 22, 2004) (on file with Office of U.S. Rep. John N. Hostettler). The Sanctity of Life Act of 2005, introduced as H.R. 776, 109th Cong., on February 10, 2005, by Representative Ron Paul (R-TX), would similarly bar jurisdiction over claims challenging state and local laws that protect the rights of human beings between conception and birth or that regulate the practice of abortion. Finally, the Pledge Protection Act of 2003, introduced as H.R. 2028, 108th Cong., would curtail federal jurisdiction over claims involving the validity of the pledge of allegiance under the Constitution. The Pledge Protection Act again passed the House on May 17, 2005. See H.R. 2389, 109th Cong. So far, however, the Senate has not taken up any of these bills.

² The bills in question differ from the Detainee Treatment Act of 2005 (“DTA”), H.R. 2863 tit. 5, 109th Cong., which presents jurisdiction-stripping issues of its own. Under the terms of the DTA, Congress has authorized the United States Court of Appeals for the District of Columbia Circuit to exercise exclusive original jurisdiction over two kinds of determinations: decisions by Status Review Tribunals that aliens held at Guantanamo Bay were properly detained as enemy combatants, and decisions by military commissions convicting such enemy combatants of acts in violation of the laws of war. See DTA §

certain and untested scope on Congress to limit the jurisdiction of the federal courts.³

Apart from investing the state courts with initial and final decision-making authority, certain of the bills would introduce new wrinkles. One of the bills would free the state courts from any obligation to respect the legal precedents of the federal courts on the issues over which federal jurisdiction has been curtailed.⁴ The bills thus attempt to answer the nettlesome (and up to now, largely academic) question whether old Supreme Court precedents would continue to bind the state courts in the wake of legislation restricting the Court's appellate jurisdiction.⁵ In addition, some of the bills would threaten federal judges with impeachment if they exercise jurisdiction denied them by the legislation.⁶ These features of the bills seek to counter the familiar principle that the federal courts have jurisdiction to determine their own jurisdiction and can decide whether the Constitution imposes any limits on Congress's power to adopt jurisdiction-stripping legislation.⁷ By threatening non-compliant judges with impeachment, the legislation raises the stakes for any federal judges called upon to consider challenges to the constitutionality of the bills.

Although the bills have not moved forward in the Senate, the adoption of jurisdiction-stripping legislation by the House marks something of a watershed in the history of Congress's relationship with the federal courts. Jurisdiction-stripping bills are no strangers to Capitol Hill; past bills would have foreclosed federal jurisdiction over questions of abortion, school bus-

1005(e)(2). The DTA joined these provisions for exclusive jurisdiction in the D.C. Circuit with a new provision that forecloses all other courts, judges, and justices from hearing applications for a writ of habeas corpus or other actions relating to the detention of aliens at Guantanamo Bay. See DTA § 1005(e)(1) (adding new subsection (e) to 28 U.S.C. § 2241). The DTA thus forecloses judicial review in the district courts, and curtails the scope of review in the D.C. Circuit, but it does not seek to foreclose all judicial review and does not bar the Supreme Court from reviewing detainee cases from the D.C. Circuit. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (rejecting government's argument that the DTA forecloses the Court from exercising appellate jurisdiction over a case pending when the statute became law); cf. 28 U.S.C. § 1254 (authorizing the Court to review cases in the courts of appeals).

³ See U.S. CONST. art. III, § 2 (conferring appellate jurisdiction on the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make"). For scholars who view the Exceptions and Regulations Clause as empowering Congress to strip the Court of appellate jurisdiction, see *infra* note 19.

⁴ See Constitutional Restoration Act of 2005, S. 520, 109th Cong., § 301 (providing that any decision of the federal courts within the jurisdiction removed in earlier sections of the bill "is not binding precedent on any state court").

⁵ For a discussion of that question, see *infra* text accompanying notes 158–167.

⁶ See S. 520, § 302 (declaring that judges or justices who hear cases in excess of the jurisdiction defined will be deemed to have committed an offense justifying impeachment and removal from office and to have breached the standard of good behavior set forth in the constitutional grant of life tenure).

⁷ For the classic statement of the principle, see Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953).

ing, and school prayer.⁸ But such legislation has rarely gained a hearing in the House Judiciary Committee and has even more rarely passed the House or Senate.⁹ Recent legislation, however, has come nearer to passing,¹⁰ and the current political climate may produce further initiatives.¹¹ Indeed, House members have questioned the need for an independent federal judiciary.¹²

If the bills were to pass, the Supreme Court would eventually face questions about the scope of Congress's jurisdiction-stripping authority. Apart from a few well-known landmarks, we know little about how the Court might analyze the legislation. On the one hand, the Court has suggested a willingness to tolerate restrictions on the jurisdiction of the lower federal courts, in keeping with the notion that Congress has broad power over their continued existence and the scope of their jurisdiction.¹³ On the

⁸ For a description of the bills involving abortion, busing, and school prayer, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321–22 (5th ed. 2003) [hereinafter H&W V].

⁹ See H&W V, *supra* note 8, at 322 (reporting that none of the jurisdiction-stripping bills have become law since the 1930s).

¹⁰ For example, Representative James Sensenbrenner succeeded in attaching the REAL ID Act of 2005 to the Emergency Supplemental Appropriations Act. See Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Section 102 of the House version of the bill, H.R. 418, 109th Cong., would have precluded all judicial review of decisions by the Secretary of Homeland Security to waive the applicability of laws perceived as delaying the completion of a border fence in Southern California. That provision was amended during conference deliberations and now provides for exclusive judicial review in the district courts, and direct review on appeal to the Supreme Court (thereby bypassing the Ninth Circuit). See Pub. L. No. 109-13, part D, § 102, 119 Stat. 231 (2005). The Detainee Treatment Act of 2005 also evolved during the legislative process to become a less sweeping restriction on judicial review. See *supra* note 2. Further jurisdictional restrictions took effect on October 17, 2006, when President Bush signed into law the Military Commissions Act of 2006. See Pub. L. No. 109-366, 120 Stat. 2600 (2006). The Act curtails habeas review in the district courts, substituting limited review on appeal to the United States Court of Appeals for the District of Columbia Circuit for those convicted before military commissions of unlawful combat. *Id.* § 950d, 120 Stat. at 2621. Although the Act will doubtless face legal challenges under the Constitution's Habeas Suspension Clause, it does not curtail all federal judicial review and thus presents a different question from that posed by jurisdiction-stripping measures that eliminate all federal judicial review.

¹¹ Provisions to curtail the exercise of jurisdiction frequently crop up in bills that do not necessarily seek simple jurisdictional restriction. The Streamlined Procedures Act of 2005, S. 1088, 109th Cong., for example, would restrict the availability of habeas corpus to review state court criminal convictions. Early versions of sections 4 and 6 of the bill included provisions that would deny courts, judges and justices "jurisdiction" to consider certain kinds of claims, instead of simply foreclosing the assertion of such claims as a matter of law. Later versions of the bill dropped the jurisdictional restrictions.

¹² See Editorial, *Congress Assaults the Courts, Again*, N.Y. TIMES, June 18, 2005, at A12 (calling attention to an amendment, introduced by Rep. John Hostettler (R-IN) and adopted by the House of Representatives, that would proscribe the expenditure of federal money to enforce a federal court decision barring the display of the Ten Commandments); see also Arts, *Briefly*, N.Y. TIMES, May 28, 2005, at B-10 (reporting that Tom Delay (R-TX) threatened to punish the federal judiciary for its failure to intervene in the Terry Schiavo case).

¹³ See *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850) (upholding the power of Congress to restrict the scope of diversity jurisdiction). See generally H&W V, *supra* note 8, at 330–37 (citing other examples

other hand, the Court has suggested that it might view restrictions on its own appellate jurisdiction with a measure of suspicion.¹⁴ Not only has the Court adopted somewhat strained readings of restrictions on its appellate jurisdiction, it has done so to avoid the constitutional question that would arise from legislation proposing to curtail such appellate authority.¹⁵ Yet the Court's reliance on avoidance canons tells us little about the ways it might respond to a determined attempt at jurisdiction stripping.

Scholars have suggested a rich array of possible responses. Perhaps most continue to adhere to what has come to be known as the orthodox position, which interprets Article III as giving Congress relatively broad power over the jurisdiction of the inferior federal courts and over the Court's own appellate jurisdiction.¹⁶ Proponents of orthodoxy advise the federal courts to acquiesce in court-stripping legislation. To be sure, theories of obligatory federal jurisdiction, like those of Professors Akhil Amar and Robert Clinton, have gained some prominence.¹⁷ But recent scholarship questions such theories on textual and historical grounds and points to an emerging orthodox consensus.¹⁸ One important challenge to orthodoxy, the

of restrictions on the jurisdiction of the lower federal courts, including limits on diversity jurisdiction and threshold amount requirements for federal question jurisdiction).

¹⁴ Compare *Ex parte McCardle*, 74 U.S. 506, 515 (1868) (upholding legislation that restricted the exercise of the Court's appellate jurisdiction but noting the availability of an alternative mode of review), with *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103–06 (1868) (exercising the alternative source of habeas jurisdiction identified in *Ex parte McCardle* to conduct review of a military commission), and *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996) (declining to read a legislative restriction as an absolute bar to the exercise of the Court's appellate jurisdiction and thereby avoiding any question as to the scope of Congress's power).

¹⁵ See *Felker*, 518 U.S. at 661 (noting that its interpretation of the statute preserved appellate review and “obviate[d]” any question as to the scope of Congress's power). See generally Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (exploring the use of “resistance norms” to preserve jurisdiction in the face of legislative restrictions).

¹⁶ See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982); William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 260 (1973); Herbert Wechsler, *The Court and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965).

¹⁷ See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 843–44 (1984) [hereinafter Clinton, *A Guided Quest*] (interpreting Article III as requiring Congress to vest the federal courts with jurisdiction over all federal cases and controversies); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1616 (1986) [hereinafter Clinton, *A Mandatory View*] (same); cf. Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229–30 (1985) (interpreting Article III as requiring Congress to provide for the exercise of federal judicial power over all federal question cases); Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1511 (1990) (same).

¹⁸ See John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 205–06 (1997); James S. Liebman & William F. Ryan,

so-called “essential function” thesis, holds that Congress may not deprive the Court of its essential role as the head of the judicial department.¹⁹ But this suggested limit on congressional power must overcome arguments based both on the plain text of Article III’s Exceptions and Regulations Clause and on worries about its indeterminacy.²⁰

As they do about the scope of Congress’s jurisdiction-stripping authority, scholars disagree about the extent to which state courts would remain bound by Supreme Court precedents in the wake of such legislation. Some scholars have taken the view that the Court’s precedents would continue to bind state courts. For these scholars, the obligation of state courts to follow Supreme Court decisions does not depend on the availability or effectiveness of a direct revisory or appellate jurisdiction.²¹ Many others take the view, however, that the obligation to follow Supreme Court decisional law essentially derives from the existence of a statutory avenue of appellate review. For these scholars, whenever Congress acts within constitutional bounds in creating an exception to the Court’s appellate jurisdiction, prior decisions of the Court need not be regarded as binding precedent.²² Dean Caminker disagrees in part; he sees the inferiority requirement of Article III as requiring the lower federal courts, but not the state courts, to follow the Court’s precedents.²³

This Essay proposes a new framework for analyzing the legality of jurisdiction-stripping legislation.²⁴ Rather than looking exclusively to the

“Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 721–58 (1998); Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 763 (1997). *But see* Robert J. Pushaw, Jr., *Congressional Power Over Federal Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847 (defending Amar’s mandatory theory from its critics).

¹⁹ See Hart, *supra* note 7, at 1364–65 (arguing that restrictions on the Court’s appellate jurisdiction must not eliminate its “essential role” in the constitutional plan); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 165–67 (1960) (linking the Court’s supremacy to its obligation to enforce a single body of federal law, binding on state courts under the Supremacy Clause).

²⁰ See *infra* text accompanying notes 193–195.

²¹ See Paul Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL’Y 31, 33 (1984); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 925 (1982); Wechsler, *supra* note 16, at 1006.

²² See Amar, *A Neo-Federalist View of Article III*, *supra* note 17, at 258 n.170; Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 84 (1990); Charles E. Rice, *Congress and the Supreme Court’s Jurisdiction*, 27 VILL. L. REV. 959, 985 (1981–82).

²³ See Evan Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817, 837–38 (1993). Caminker derives the obligation of lower federal courts to obey the Supreme Court’s precedents in part from their constitutional status as “inferior” courts; he notes that Article III does not extend this status of inferiority to the state courts. *Id.* at 837–38.

²⁴ The state tribunal account builds on my prior work on the constitutional relationship between the Supreme Court and inferior courts and tribunals. See generally James E. Pfander, *Jurisdiction-Stripping*

language of Article III, and the scope of congressional power over federal jurisdiction, this Essay focuses on the relationship between state courts and the federal judiciary—a relationship long framed by conventional accounts of the Madisonian compromise.²⁵ In general, convention holds that the framers of Article III reached a compromise between those (like James Madison and James Wilson) who wished to mandate the creation of inferior federal courts, and those (like Roger Sherman) who believed in the appointment of state courts to serve as courts of first instance, subject to appellate review in the Supreme Court.²⁶ The Madisonian compromise resulted in the adoption of language in Article III that empowers, but does not require, Congress to create lower federal courts.²⁷ Convention holds that Congress has broad freedom either to establish lower federal courts, or to leave matters to the state courts instead. It also assumes that state courts act as state courts in hearing federal claims, as opposed to operating in func-

and the Supreme Court's Power to Supervise Inferior Tribunals, 78 TEX. L. REV. 1433 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*] (examining the requirements of supremacy and inferiority as they apply to the relationship between the Supreme Court and the inferior federal courts); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) [hereinafter Pfander, *Tribunals*] (exploring the implications of supremacy and inferiority for the power of Congress to create non-Article III courts and tribunals). It also draws on valuable historical explorations of the way in which Congress appointed state courts to serve as federal tribunals under the Articles of Confederation. See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1967–71, 2013–18 (1993) (tracing the use of appointed federal courts under the Articles of Confederation and suggesting that Article I, section 8 provides Congress with power to constitute the state courts as tribunals in implementing the Madisonian compromise). The conclusions closely resemble those that Professors Calabresi and Lawson have reached on textual grounds. See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. (forthcoming 2007).

²⁵ The literature on the Madisonian compromise has a richness and complexity that belies the apparent simplicity of the framers' decision to give Congress an option either to rely on state courts or to ordain and establish lower federal courts. Convention holds that Congress can leave all federal matters to the state courts and thus enjoys broad control over the jurisdiction of the lower federal courts. See, e.g., Liebman & Ryan, *supra* note 18, at 760–62; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975). Convention also holds that state courts may owe a duty to hear claims left to them by Congress, at least so long as they can do so in the exercise of their standing jurisdiction. See, e.g., *Howlett v. Rose*, 496 U.S. 356, 369 (1990); *Testa v. Katt*, 330 U.S. 386, 394 (1947); cf. Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1156, 1168–69 (1984) (arguing that state courts owe a duty to hear federal claims that goes beyond one of non-discrimination). But see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 [hereinafter Collins, *Article III Cases*] (questioning the conventional view that the Madisonian compromise affords Congress broad discretion to rely upon the state courts to hear federal claims); Michael G. Collins, *The Federal Courts, The First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1520–22 (2005) [hereinafter Collins, *Non-Settlement*] (restating his criticism of the conventional view in the context of a review of the First Congress's debate over the implementation of Article III).

²⁶ For a description of the Madisonian compromise, see *infra* text accompanying notes 56–82.

²⁷ See U.S. CONST. art. III, § 2, cl. 2.

tional terms as federal tribunals. Indeed, many observers doubt that Congress could appoint state courts to exercise federal jurisdiction; state courts often employ judges who lack the life tenure required of Article III judges.²⁸

In contrast to conventional accounts of the Madisonian compromise, this Essay proposes that Congress may have power to “constitute” state courts as federal tribunals by conferring jurisdiction on them to hear federal claims. The Essay begins with the text of Article I, which empowers Congress to “constitute tribunals inferior to the supreme Court.”²⁹ The reference to “tribunals” in Article I is broad enough to encompass both the inferior federal “courts” to which Article III refers and certain non-Article III adjudicatory bodies, such as Article I tribunals and state courts.³⁰ Moreover, the power to “constitute” such tribunals can encompass both the “establish[ment]” of new federal courts under Article III and the appointment of existing tribunals, such as state courts, to serve as adjudicative bodies. So read, Article I appears to implement the Madisonian compromise by giving Congress a choice either to create Article III courts or to rely on appointed state courts instead (as the old Congress had done under the Articles of Confederation).

Other features of the text seem to confirm that Congress may choose between new federal courts and appointed state tribunals. For one thing, Article III vests the judicial power in “courts” established by Congress; it does not formally vest all Article I tribunals with the judicial power.³¹ Similarly, Article III requires life-tenured judges for all federal “courts,” both supreme and inferior.³² No similar requirement applies to the judges of federal tribunals in Article I. As a textual matter, then, one can interpret Congress’s power under Article I and the Madisonian compromise as including a power to “constitute” or appoint the state courts as federal tribunals.³³ The state tribunal account thus offers an alternative basis for the acknowledged power of Congress to rely on state courts. Rather than simply assuming

²⁸ Concerns about the ability of Congress to appoint state judges to hear federal claims arose during the debates over the ratification and early implementation of Article III. See *infra* Part III.

²⁹ See U.S. CONST. art. III, § 8, cl. 9.

³⁰ The Constitution refers to courts on a number of occasions, but makes its only reference to “tribunals” in Article I. See Pfander, *Tribunals*, *supra* note 24, at 671–73.

³¹ The vesting clause declares that the “judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

³² Article III declares that the “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

³³ In suggesting that the Article I power of Congress to “constitute” inferior tribunals may include the power to appoint existing state courts to hear federal claims, this Essay draws upon the dual meaning of the word “constitute,” understood now and at the time of the framing to mean both to “depute or appoint” as well as to “erect or establish.” See Pfander, *Tribunals*, *supra* note 24, at 674 n.148 (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755)). Structural and historical evidence more fully developed in Part III confirms this dual meaning of the word.

that state courts may hear federal claims in the exercise of what Alexander Hamilton called their primitive or pre-existing jurisdiction, Congress might constitute the state courts as Article I tribunals.

Although the Constitution seemingly authorizes Congress to entrust federal adjudication to state courts under the Madisonian compromise, it did not contemplate that the state courts were to be free to act without federal judicial oversight and control. One form of control flowed from the appellate jurisdiction clause and its provision that the Supreme Court shall have appellate jurisdiction in a broad array of matters.³⁴ A further limit on state court authority may appear in the Inferior Tribunal Clause itself, which provides that any “tribunals” that Congress constitutes as such must remain “inferior to the supreme Court.”³⁵ The inferiority requirement of Article I operates as a limit on the power of Congress and of the tribunals to which Congress assigns federal jurisdiction: such tribunals must remain subordinate to the Supreme Court as the head of the judicial department of the federal government.³⁶ This requirement of subordination to the Supreme Court may oblige inferior tribunals to give effect to the Court’s precedents and submit to some form of supervisory oversight and control. While Congress may regulate the Court’s appellate jurisdiction, it may not place inferior tribunals beyond the Court’s supervisory authority as the Supreme Court of the United States.³⁷

³⁴ Article III provides for the Court to exercise original jurisdiction in ambassador and state-party cases and then declares that “in all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. Congress conferred appellate jurisdiction on the Supreme Court to hear appeals from the state courts in section 25 of the Judiciary Act of 1789, and the Court has exercised this power ever since. See An Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–87 (1789) (now codified at 28 U.S.C. § 1257). On the constitutionality of Supreme Court appellate review, see *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See generally *H&W V*, *supra* note 8, at 466–600.

³⁵ U.S. CONST. art. I, § 8, cl. 9.

³⁶ Although supremacy and inferiority might call to mind courts of greater and lesser importance, see William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role,”* 100 YALE L.J. 1013, 1020 (1991), and courts of broader and narrower geographic jurisdiction, see David E. Engdahl, *What’s In a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 466–70 (1991), Article I uses the term quite concretely to require inferiority “to” the Supreme Court. This specific inferiority requirement suggests the existence of a constitutionally required relationship of subordination. See Caminker, *supra* note 23, at 828–34 (surveying the options and concluding that subordination best defines inferiority); cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 n.115 (1992) (suggesting that the requirements of supremacy and inferiority may grant power to the Supreme Court to reverse lower court decisions and to require lower courts to obey its precedents). On the power of superior courts to supervise inferior tribunals through the exercise of the common law writs, see Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1446–51.

³⁷ The conclusions here bear some resemblance to those in Professor Amar’s path-breaking work. See Amar, *A Neo-Federalist View of Article III*, *supra* note 17, at 229. Amar contends that Article III imposes a duty on Congress to vest some federal court, either inferior or superior, with jurisdiction over all federal question, admiralty, and public ambassador cases. While Congress may rely upon state courts

Article I's inferiority requirement provides a reason to question the constitutionality of the House's recent court-stripping bills. The bills would provide the state courts with exclusive jurisdiction over all the matters within the scope of the jurisdictional restriction, and they would deny the lower federal courts any authority over such matters. Such grants of exclusive jurisdiction to the state courts should be seen as "constitut[ing]" the state courts as tribunals within the meaning of Article I.³⁸ But Article I requires that such tribunals remain "inferior" to the Supreme Court. Inferiority may not require as-of-right appellate review in every case, but does forbid Congress from placing the state courts entirely beyond the reach of federal judicial oversight. By combining restrictions on the power of the lower federal courts with restrictions on the Court's power to review state court decisions, the legislation before Congress could be seen as threatening to constitute state courts as federal tribunals in violation of the inferiority requirement of Article I. The inferiority requirement also calls into question legislation that purports to free the state courts from their obligation to respect Supreme Court precedent; Article I requires inferior tribunals to respect decisions of their judicial superiors.³⁹

The Essay has four parts. Part I develops the elements of a revisionist account of the relationship between the state courts and the federal judiciary, one that offers a new understanding of the Madisonian compromise. Part II also briefly reviews the textual and structural support for the state tribunal account and considers the comments of Alexander Hamilton in *The Federalist No. 81*. Part III tests the state tribunal account from a functional perspective, examining its fit with the views of other participants in the ratification debates and with the nation's institutional history.⁴⁰ Part IV exam-

under the Madisonian compromise, it cannot do so without providing for review of their decisions in the Article III judiciary. *Id.* at 229–30. Unreviewed state court decisions would violate the Article III requirement that the "judicial power" shall extend to all federal-question and admiralty cases.

The state tribunal account differs from Amar's two-tier thesis in two important respects. Instead of relying on restraints internal to Article III, the state tribunal account emphasizes the Article I requirement of inferiority as a check on legislation that would deny continuing oversight by the Supreme Court. It thus ascribes greater significance to the Court's supremacy than to the claim that Article III itself mandates federal judicial exercise of original or appellate jurisdiction over all federal-question claims. The Amar account would require as-of-right federal judicial review in every federal case that the state courts handle in the first instance; the inferiority account, by contrast, would require only that federal courts have the power, in the exercise of judicial discretion, to review state decisions.

³⁸ For a discussion of what might qualify as the constitution of state courts, see *infra* text accompanying notes 135–157.

³⁹ See Caminker, *supra* note 23, at 832–34.

⁴⁰ The Essay weaves together two strands of argument often used in debates over the separation of powers. See generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency*, 72 CORNELL L. REV. 488 (1988) (sketching formal and functional approaches to the separation of powers). Part II sets out the formal case for the state tribunal account, drawing upon familiar modes of textual, structural, and historical analysis. Cf. Akhil Reed Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703, 1704 (1994) (acknowledging a debt to the modes of constitutional argument described in PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION*

ines the implications of the Article I requirement of state court inferiority for Congress’s power to restrict the jurisdiction and the precedential value of the decisions of the Supreme Court. The Essay concludes that certain forms of jurisdiction stripping violate the constitutional requirements of supremacy and inferiority.⁴¹

I. STATE COURTS AS ARTICLE I TRIBUNALS, AND THE MADISONIAN COMPROMISE

This part of the Essay sets out the formal elements of the state tribunal account as a working hypothesis of the way in which the Constitution provides for the incorporation of the state courts into the federal judicial establishment. The key to this account lies in a new understanding of the relationship between inferior “tribunals” under Article I and inferior “courts” under Article III.⁴² Reading the term “tribunals” as encompassing both state courts and lower federal courts opens up the interpretive possibility that Congress may either ordain and establish lower federal courts under Article III, or rely upon the state courts instead. If it chooses to rely on state courts, it can do so by constituting such courts as inferior federal tribunals under Article I. The decisions of state courts are subject to appellate review in the Supreme Court, in keeping with the Court’s appellate jurisdiction. But as the framers understood and Hamilton explained, the Supreme Court’s appellate jurisdiction was not a complete solution. It could potentially require parties of modest means to re-litigate their cases at great expense and inconvenience before a distant federal court. So it was important to preserve Congress’s authority to qualify the Court’s as-of-right appellate jurisdiction, through the Exceptions and Regulations Clause. But this power to fashion exceptions did not include a power to place the state courts, acting as federal tribunals, beyond the reach of the Court’s supervisory authority. Inferiority requires state courts, when acting as federal tri-

(1982)). Part III derives functional support for the formal claim from the institutional history of the relationship between state courts and the federal judiciary.

⁴¹ With its focus on legislation that forecloses all federal courts, but no state courts, from hearing certain claims, this Essay tackles only one aspect of the jurisdiction-stripping debate. The issues that arise from legislation that would foreclose all judicial review, state and federal, lie beyond the Essay’s scope. For a review of those issues, see *H&W V*, *supra* note 8, at 345–57.

⁴² In suggesting that the “tribunals” in Article I encompass both the “courts” in Article III and other federal adjudicative bodies, this Essay challenges the prevailing assumption that the two terms refer to the same set of federal judicial institutions. One can see that assumption reflected both in the decisions of the Supreme Court, see, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (concluding without analysis that the Inferior Tribunal Clause relates only to the inferior courts identified in Article III), and in the work of scholars. See, e.g., Engdahl, *supra* note 36, at 487–90 (treating the Constitution’s reference to Article I tribunals as synonymous with that to Article III courts). One can also find some evidence of synonymous usage among participants in the ratification debates who referred to federal tribunals and courts somewhat indiscriminately. See, e.g., *THE FEDERALIST NO. 81*, at 546 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (using both terms to describe Article III courts); Pfander, *Tribunals*, *supra* note 24, at 679–90 (collecting additional examples).

bunals, to give effect to federal law as pronounced by the Supreme Court and to remain within the (constitutional and statutory) boundaries of their authority.

A. Textual Support for a State Tribunals Account

Read together, the texts of Articles I and III, coupled with the Necessary and Proper Clause, provide strong support for the proposition that Congress may either constitute state courts as inferior federal tribunals or create new federal courts. To begin with, Article I not only distinguishes tribunals from courts, but also uses the distinctive term “constitute” to describe the process by which Congress brings a particular tribunal into existence.⁴³ Article III, by contrast, uses the terms “ordain and establish” to describe the process by which Congress creates courts. The term “constitute” seemingly gives Congress a broader set of options; it can either erect new tribunals, or it can appoint existing bodies to serve as tribunals.⁴⁴ Arti-

⁴³ According to Johnson’s dictionary, “constitute” meant both to “give formal existence . . . to erect; to establish,” and to “depute; to appoint another to an office.” 1 JOHNSON, *supra* note 33. Webster’s American dictionary said much the same thing. See 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining constitute as “to fix, to enact, to establish” and as “to appoint, depute or elect to an office”); cf. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 304 (2d ed. 1980) (defining constitute as to “set up” and “to give a certain office or function to; to appoint”). The first definition suggests the establishment of a new institution or set of courts and could conceivably apply both to the lower federal courts contemplated in Article III and to a range of non-Article III tribunals that Congress has relied upon from time to time to hear certain kinds of federal claims. See Pfander, *Tribunals*, *supra* note 24, at 656–59, 699–721 (describing the origins of such non-Article III courts as courts martial, territorial courts, the Court of Claims, administrative agencies, magistrates, and bankruptcy courts, all of which hear federal claims, many with judges that lack life tenure). The second definition could refer to the appointment or deputation of existing courts to serve as federal tribunals. This aspect of the definition supports reliance on the Inferior Tribunal Clause as the predicate for congressional appointment of the state courts to hear federal claims. See Prakash, *supra* note 24, at 2007–13 (exploring the possibility that state courts may be “constituted” as inferior tribunals under Article I).

Most scholars have analyzed the possibility that Congress may rely upon the state courts under the terms of Article III, with its provision for Congress to “ordain and establish” lower federal courts. These scholars rightly observe that the language of Article III seems to rule out reliance on the state courts. See Collins, *Article III Cases*, *supra* note 25, at 124–25 (ordination and establishment of federal courts seemingly precludes reliance on appointed state courts); Liebman & Ryan, *supra* note 18, at 739 (arguing that the switch in Article III from appointment of courts to their ordination and establishment forecloses the state court option). With the proposed distinction between tribunals and courts in mind, it may be easier to see the Inferior Tribunal Clause as empowering Congress to appoint the state courts to hear federal claims. For structural and historical support, see Part II.A. Perhaps most tellingly, Alexander Hamilton’s account of the interplay between state and federal courts in *The Federalist No. 81* declared that Congress could constitute inferior tribunals either by assigning jurisdiction to state courts or by creating new federal courts or by doing both. See *infra* text accompanying notes 98–114. Of course, Congress has not formally constituted the state courts as federal tribunals under Article I. But this Essay contends that Congress may be taken as having done so when it relies on the state courts to hear federal claims. *Id.*

⁴⁴ For definitions of “constitute,” see *supra* note 43. In some cases, the existence of a dual meaning creates an ambiguity that must be resolved through careful interpretation. In the case of Article I, by

cle III, however, operates more narrowly; Congress may ordain and establish new bodies as federal courts, but an existing body would not easily qualify for ordination and establishment as a federal court within the meaning of the Constitution.⁴⁵ To “ordain” means to invest with official power and to “establish” means to erect or settle permanently.⁴⁶ The combined requirements of investiture, creation, and permanent settlement seemingly refer to the creation of a distinctive set of new federal courts, rather than to the re-designation or appointment of an existing state court.⁴⁷

The judicial-power and life-tenure provisions of Article III further distinguish inferior tribunals from inferior courts. Article III vests the judicial power of the United States only in federal courts; it does not vest this special power in tribunals. Moreover, Article III calls for the appointment of federal judges who serve during good behavior and who receive a stated salary that cannot be diminished and must be paid by the Treasury of the United States. Article III’s salary and tenure requirements do not apply to Article I tribunals. So while state courts could not easily qualify as federal courts within the meaning of Article III, they might well be constituted as federal tribunals under Article I.⁴⁸ State court judges could serve without being compelled to accept life-tenured appointments within the federal ju-

contrast, the dual meaning of “constitute” serves to broaden the scope of congressional power to include appointment of existing tribunals and creation of new courts. Embrace of the dual meaning as an expression of broad congressional power seems consistent both with what we know about the Madisonian compromise and with the familiar idea that Article I confers power in “great outlines” and does not speak “expressly and minutely.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁴⁵ Johnson’s dictionary defines “to ordain” to mean “to appoint, . . . to establish; . . . to institute; . . . to set in an office; . . . [and] to invest with ministerial function, or sacerdotal power.” 2 JOHNSON, *supra* note 33. Meanwhile, Johnson defined “establish” as to “settle firmly; to fix unalterably; . . . to form or to model; . . . to found; to build firmly.” 1 *id.* The meaning of “ordain and establish” thus conveys a sense of newly erected institutions, established on a permanent basis (and seemingly rules out reliance on the existing state courts). See Collins, *Article III Cases*, *supra* note 25, at 124–25; Liebman & Ryan, *supra* note 25, at 735.

⁴⁶ For a definition of “ordain,” see *supra* note 45.

⁴⁷ But see Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 267 n.3 (1993) (suggesting that establishment might encompass a power to appoint existing institutions).

⁴⁸ Decisions of the Supreme Court adopt a formalistic view of the “judicial power of the United States,” treating it like a religious essence that the Constitution instills in Article III courts and forbids other tribunals from exercising. Both state courts and Article I tribunals hear matters that come within the scope of the “cases and controversies” to which Article III, section 2 extends the judicial power, but the Court has refused to accept that, in doing so, these non-Article III courts thereby exercise the judicial power of the United States. See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (legislative courts validly constituted to hear admiralty disputes in the territories but incapable of “receiving” the judicial power of the United States); cf. Collins, *Article III Cases*, *supra* note 25, at 70 n.70, 155–57 & nn.335, 337 (collecting authorities that support notion that state courts may entertain federal claims without thereby exercising the judicial power of the United States). See generally Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 240–43 (1990) (criticizing the air of theological formalism that characterizes the Court’s decisions denying that non-Article III tribunals exercise the judicial power of the United States).

diciary, without being paid the requisite salaries, and without raising eyebrows under the Appointments Clause of Article II.⁴⁹ Judges serving in a state court could continue to serve as judges following the court's constitution as a federal tribunal for certain purposes under Article I. Congress might pay the states directly to defray the cost of its relying on such tribunals rather than being constrained to pay the judges directly, as it must under Article III.⁵⁰

The Necessary and Proper Clause tends to confirm the distinction between tribunals and courts by suggesting that Congress's power to constitute tribunals extends more broadly than its power to ordain and establish federal courts. To see the point, consider the two-fold function of the Necessary and Proper Clause: It empowers Congress to pass all laws necessary and proper for carrying into execution the "foregoing" powers (the powers that Article I vests in Congress) and "all other powers" vested in any department of the United States.⁵¹ This second power enables Congress to structure the executive and judicial departments within the framework es-

⁴⁹ The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. The clause also provides for Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* The clause forecloses Congress from vesting the appointment power in itself, see *Buckley v. Valeo*, 424 U.S. 1 (1976), and thus apparently rules out the adoption of legislation through which Congress would specifically appoint particular state court judges to serve as judges of Article III courts. See generally Collins, *Non-Settlement*, *supra* note 25, at 1559–60 (discussing the Appointments Clause issue).

⁵⁰ The Spending Clause empowers Congress to spend federal money in an effort to procure state compliance with a federal program that Congress could not adopt directly in the exercise of its other enumerated powers. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (barring the commandeering of state executive officials); *New York v. United States*, 505 U.S. 144, 167 (1992) (prohibiting Congress from requiring states to legislate in accordance with federal standards, but permitting Congress to induce states to adopt such legislation through the Spending Power). See generally *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) (adopting broad view of the scope of Congress's power to procure through federal spending that which it could not obtain from the states directly). To the extent that Congress cannot simply compel the state courts to hear federal claims, it could presumably procure state court adjudication of federal claims through a program of conditional spending. Even were it free to rely upon state courts without doing so, Congress might sensibly help defray the cost of federal adjudication in the state courts by making grants to state governments.

⁵¹ U.S. CONST. art. I, § 8, cl. 18 (empowering Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). On the importance of the Necessary and Proper Clause in empowering and constraining Congress in its establishment of a judicial system under Article III, see David Engdahl, *Intrinsic Limits of Congress's Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 104–19 (reading the Inferior Tribunal Clause as requiring Congress to respect and carry into effect the powers that the Constitution vests in the judicial department); Lawson & Granger, *supra* note 47, at 272–73, 333–34 (exploring the clause's provision for Congress to structure the other departments through "proper" legislation); see also Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (exploring the scope and limits of congressional power to structure the manner in which the federal courts exercise the judicial power).

tablished in Articles II and III. More specifically, it permits Congress to carry into execution the “judicial power” that Article III vests in the Supreme Court, and in such inferior courts as Congress may ordain and establish. In other words, the Necessary and Proper Clause and Article III fully authorize Congress to fashion lower federal courts in its discretion, and require that any such courts be inferior to the Supreme Court.

The breadth of the congressional power to create lower federal courts conferred in Article III and the Necessary and Proper Clause raises the question of what the Inferior Tribunal Clause adds to congressional power. Most observers read the clause as if its reference to tribunals encompassed only the federal “courts” to which Article III refers.⁵² While such a reading no doubt reflects the widespread usage of the words tribunals and courts as synonyms, it fails to explain why the Constitution confers a separate power in Article I to constitute inferior tribunals. Such a power, if read synonymously to refer only to federal courts, would simply duplicate the power Congress already enjoys under the second half of the Necessary and Proper Clause.⁵³ But no duplication would occur if the Inferior Tribunal Clause confers power on Congress to constitute a class of inferior tribunals that may encompass, but extend more broadly than, the narrow and specialized category of Article III courts. This broader class of tribunals might include both state courts (appointed as federal tribunals under Article I) and non-Article III federal tribunals such as courts martial and territorial courts (created as Article I tribunals).

The broader conception of the Inferior Tribunal Clause imposes two important structural limitations on the powers of the political branches of government. First, by assigning the court-making power to Congress, Article I clearly, if implicitly, denies the president any power to fashion courts and tribunals through the exercise of executive or prerogative powers. One purpose of enumerating powers in Article I was to assign to Congress certain of the powers that might otherwise have been viewed as implicitly in-

⁵² See Engdahl, *supra* note 36, at 464–65, 472–76. *But see* Pfander, *Tribunals*, *supra* note 24, at 550–54 (suggesting the need to distinguish tribunals from courts); Prakash, *supra* note 24, at 2007–08, 2013 (contending that Congress may rely on state courts as inferior tribunals under Article I).

⁵³ In general, the enumerated powers of Article I, section 8 do not restate or duplicate grants of authority elsewhere conferred. As Chief Justice Marshall explained in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), the Constitution confers power in great outline, and does not “partake of the prolixity of a legal code . . .” Congress has exercised broad power over the federal judiciary, including power to specify the jurisdiction and judgeships of the Supreme Court, set the salary of the judges, and fashion exceptions to and regulations of the Court’s appellate jurisdiction. All of these powers derive from the combined operation of Article III and the Necessary and Proper Clause; Article I, section 8 contains no language that one might read as confirming or clarifying the existence of such powers. Congress’s power to create exceptions to the Court’s appellate jurisdiction, for example, does not appear among the enumerated powers in Article I. It would make little sense if the Inferior Tribunal Clause, alone among the enumerated powers, were to restate a power to establish federal courts already conferred through the Necessary and Proper Clause.

cluded among the prerogative or executive powers of the President.⁵⁴ Second, Article I extends the inferiority requirement to any courts or tribunals that Congress constitutes under Article I. By recognizing and qualifying Congress's authority to appoint or establish tribunals outside of Article III as an alternative to the inferior federal courts already authorized there, Article I ensures the place of the nation's only Supreme Court at the top of the judicial hierarchy and prevents the political branches from setting up an alternative or competing set of freestanding courts.⁵⁵ Article I thus helps to ensure the independence of Article III courts by expressly foreclosing the political branches from attempting end-runs around the judicial department.

B. *Support in the Drafting History*

If text and structure suggest that the power to constitute tribunals in Article I extends more broadly than that to ordain and establish inferior courts in Article III, then the drafting history provides important confirma-

⁵⁴ See 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 428–33 (1953). Writing in 1803, St. George Tucker attributed precisely this purpose to the Inferior Tribunal Clause of Article I. See 1 BLACKSTONE'S COMMENTARIES, editor's app. at 267–68 (St. George Tucker ed., 1803) (describing the Inferior Tribunal Clause as having assigned the court-making power to the legislative branch, and thereby having foreclosed the executive magistrate from creating the prerogative courts that were described as “engines of oppression and tyranny”). While critics have questioned Crosskey's thesis (as omitting issues of federalism) and Tucker's commentary (as expressing the views of an Anti-Federalist), the Crosskey-Tucker thesis seems persuasive. See generally Pfander, *Tribunals*, *supra* note 24, at 676–77. Note that the President's power to fashion Article II tribunals in territory occupied by military force operates within a narrow compass and presents a different question. See David Bederman, *Article II Courts*, 44 *MERCER L. REV.* 825, 825 (1993). See also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (rejecting broad claims of presidential power to institute military commissions to try enemy combatants at Guantanamo Bay).

⁵⁵ During the ratification debate, the Anti-Federalists argued that Article III would create a single supreme court of unprecedented power and independence. See *Essays of Brutus XV* (March 20, 1788), reprinted in 16 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE* 431 (J. Kaminski & G. Saladino eds., 1986) [hereinafter *DHRC*] (questioning whether the “world ever saw . . . a court of justice invested with such immense powers, and yet placed in a position so little responsible”). According to the Anti-Federalist Brutus, for example, the Supreme Court was to enjoy greater authority than courts in England, which divided responsibility over proceedings at law, in equity, and in admiralty, and were subject to parliamentary oversight on all questions of law. While Congress could change federal law by statute, Brutus argued that Congress would lack power to override or explain the Court's constitutional interpretations. See *id.* at 431–34.

The Federalist response was telling. Hamilton did not tout the exceptions and regulations clause as a tool of congressional control over the Court's constitutional interpretations or deny Brutus's claim as to the finality of the Court's decisions. Rather, he replied that judicial independence was essential if the courts were to enforce constitutional limits on the political branches and that the judiciary would prove to be the least dangerous branch, possessing neither the sword nor the purse. See *THE FEDERALIST NO. 78*, *supra* note 42, at 522–23 (Alexander Hamilton). Elsewhere, Hamilton described the Exceptions and Regulations Clause as empowering Congress to make the appellate jurisdiction less absolute and inconvenient and to qualify the constitutional provision for appellate jurisdiction over issues of fact. See *THE FEDERALIST NO. 81*, *supra* note 42, at 549–52. No one argued that the clause provided Congress with a means of political control.

tion. To be sure, the early drafts of the Virginia plan used the term tribunals to refer to the national courts,⁵⁶ and a certain amount of synonymous usage peppered the debates over the nature and extent of the judicial power.⁵⁷ But during and after the specification of the judicial power by the Committee of Detail, the draft Constitution consistently distinguished the tribunals of Article I from the courts of Article III. As we shall see, the apparent purpose of the distinction was to enable Congress either to constitute state courts (and other adjudicative bodies⁵⁸) to serve as federal tribunals under Article I or to establish a freestanding group of lower federal courts under Article III.

Before turning to the developments in Philadelphia, recall that the Articles of Confederation distinguished between Congress's power to "establish," or newly create, a federal court of appeals in prize cases, and its power to "appoint" the existing state courts to serve as courts of first instance for the trial of crimes on the high seas.⁵⁹ Established courts were to be created by act of Congress and were to be staffed by federal officials, while appointed courts were to make use of existing state judges. On January 15, 1780, Congress exercised the first of these powers, "establish[ing]" the court of appeals in prize cases with three judges appointed and paid by Congress.⁶⁰ Well over a year after the court of appeals was established,⁶¹ on

⁵⁶ The Virginia Plan, which structured debate at the Philadelphia convention, provided in its ninth resolution that a "National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior, and to receive punctually at stated times fixed compensation for their services." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21–22 (Max Farrand ed., 1966) [hereinafter RECORDS]. Similarly, the New Jersey Plan called for the "establish[ment]" of "a supreme Tribunal." *See id.* at 244.

⁵⁷ On the usage of terms in Philadelphia, see Pfander, *Tribunals*, *supra* note 24, at 670 n.170 (reporting synonymous usage of "courts" and "tribunals" during the early debates, but noting that delegates dropped the word tribunals after the Committee of Detail draft provided for the creation of "courts" in the precursor to Article III).

⁵⁸ Apart from the constitution of state courts as federal tribunals, the Inferior Tribunal Clause may empower Congress to create such Article I tribunals as courts martial and territorial courts outside of Article III. *See* Pfander, *Tribunals*, *supra* note 24, at 697–721 (describing the textual, structural and historical support for so reading the Inferior Tribunal Clause). The operative language of the provision encompasses both the constitution or appointment of state courts and the constitution or creation of new tribunals, such as courts-martial.

⁵⁹ *See* ARTICLES OF CONFEDERATION art. IX, para. 1 (providing Congress with the power of "appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures"). For other accounts linking the approach of the Constitution to the pattern set under the Articles of Confederation, see Collins, *Article III Cases*, *supra* note 25, at 119–24; Liebman & Ryan, *supra* note 18, at 717 n.100; Prakash, *supra* note 18, at 1967–71.

⁶⁰ *See* HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787, at 114–16 (1977) (noting that the creation of the court of appeals in prize cases was accomplished by ordinance adopted on January 15, 1780). The ordinance in question resolved that "a court be established for the trial of all appeals from the courts of admiralty in these United States, in cases of capture." *See* 16 JOURNAL OF THE CONTINENTAL CONGRESS 61 (Worthington C. Ford ed., 1934) [hereinafter JOURNAL]. The ordinance thus tracked the Articles in

April 5, 1781, Congress “constituted and appointed” state judges to hear cases involving certain crimes on the high seas.⁶² This appointment took the state judges as it found them; the ordinance did not provide for the issuance of federal commissions or the payment of federal salary to the state judges. Under the Articles of Confederation, Congress thus developed a distinction between federal courts that were to be established as courts of the United States, and state judges that Congress might “constitute and appoint” to serve in a federal capacity.⁶³ This distinction provided the backdrop against which the framers debated and drafted the Madisonian compromise.

The debate took place initially on June 5, 1787. Before the delegates were the terms of the Virginia Plan, the Ninth Resolution of which would have required that a “National Judiciary be established.” That judiciary was to consist of one or more supreme tribunals and of inferior tribunals, all of which were to employ judges appointed to serve during good behavior.⁶⁴ The provision deserves close attention as the trigger for the debate that led to the Madisonian compromise; it actually required the creation of both supreme and inferior federal courts, and it used the verb “establish” to describe the act of creation. Moreover, the provision prescribed tenure during good behavior for the judges of all the federal courts, both supreme and inferior. It thus seemingly foreclosed federal reliance on state courts and committed Congress to the creation of an independent federal judiciary.⁶⁵

providing for the “establish[ment]” of the federal court. It also provided for the payment of a salary to each of three judges, who were to be “appointed and commissioned by Congress.” *Id.*

⁶¹ Over a year passed between the establishment of the federal court and the appointment of the state courts, during which the Articles of Confederation entered into force following the accession of Maryland. *See* MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781*, at 150–60 (1940) (describing the dispute over western lands that had held up Maryland’s ratification until 1781). Professor Collins has argued that the intervening effectiveness of the Articles may have influenced Congress’s approach to these two different federal courts. *See* Collins, *Non-Settlement*, *supra* note 25, at 1561–62.

⁶² *See* BOURGUIGNON, *supra* note 60, at 128 (noting that Congress appointed the state courts to act as trial courts in admiralty proceedings by ordinance adopted on April 5, 1781). The ordinance that effected the appointment first declared that crimes on the high seas were subject to punishment according to the course of the common law; it then declared that the judges of the superior courts and courts of admiralty of the several states “are hereby constituted and appointed judges for hearing and trying” such offenses. *See* 19 JOURNAL, *supra* note 60, at 355. There was no provision for Congress to commission such judges or to pay them a salary.

⁶³ The federal court of appeals was established to exercise appellate jurisdiction over prize and capture cases first heard by the state admiralty courts; it had no other appellate jurisdiction in relation to state courts. *See* Bourguignon, *supra* note 60, at 114–16.

⁶⁴ 1 RECORDS, *supra* note 56, at 21–22 (May 29, 1787) (quoting the resolution that a “National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made”).

⁶⁵ On this point, see Liebman & Ryan, *supra* note 18, at 713.

So it was understood by those who debated its terms. John Rutledge of South Carolina spoke “against establishing any national tribunal except a single supreme one” because “State Tribunals <are most proper> to decide in all cases in the first instance.”⁶⁶ A short while later, he put this sentiment into the form of a motion to delete the reference to “inferior” courts from the provision for the establishment of federal courts.⁶⁷ Rutledge argued that the “State Tribunals might and ought to be left in all cases to decide in the first instance,” with the “right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts.”⁶⁸ Madison and Wilson attacked the idea, noting that the absence of lower federal courts could leave state courts free to reach “improper Verdicts” under the “biased directions of [] dependent judge[s].”⁶⁹ While appellate review would help, it would not entirely solve the problem. Appeals were inconvenient (“oppressive”) and were not an effective remedy for biased decision-making by judges and juries at the state level.⁷⁰ Both sides of the debate, in short, treated the reference in the Virginia Plan to “established” federal courts as linked to the provision for life-tenured judges and as excluding the operation of state tribunals.

Shortly after the delegates narrowly voted to adopt Rutledge’s motion and eliminate mandatory lower federal courts, Madison and Wilson countered with one of their own. In the motion, Wilson and Madison moved that the legislature “be empowered to appoint inferior Tribunals.”⁷¹ This motion was a study in ambiguity. Its reference to the “appointment” of inferior tribunals naturally called to mind the appointment of state courts under the Articles of Confederation. But its defenders and critics discussed the motion as if it also contemplated the creation of federal courts. Thus, the movants drew a distinction between the Virginia plan, which would have “establish[ed] such tribunals absolutely” and the motion under consideration, which would give “a discretion to the Legislature to establish or not establish them.”⁷² Speaking in opposition, Pierce Butler of South Carolina worried that the “establishment” of lower federal courts, though useful, might encroach on the rightful role of the state courts.⁷³ In response, Rufus

⁶⁶ 1 RECORDS, *supra* note 56, at 119. Angle brackets reflect Madison’s editorial changes to his notes as he readied them for publication. *Id.* at xviii–xix.

⁶⁷ *Id.* at 124.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* (comments of Madison and Wilson).

⁷¹ *Id.* at 118, 125. Madison’s journal records the motion as one to “institute” inferior tribunals, rather than to “appoint” them. But the official Journal and the notes of Robert Yates both record the motion as one to “appoint,” as does Madison’s subsequent recapitulation. *Compare id.* at 125 (Madison’s journal) *with id.* at 118, 127 (official Journal, Yates’ notes) *and id.* at 237 (Madison’s restatement of the Virginia Plan, as amended).

⁷² *Id.* at 125.

⁷³ *Id.*

King argued that “establishing” inferior tribunals would be less expensive than the cost of the appeals that would otherwise occur.⁷⁴ Many of these comments assume that the motion, whatever its precise wording, was meant to clothe Congress with discretion to establish a new set of inferior federal courts.

Ambiguity remained throughout the refinement of the Virginia Plan in June and July. When Madison restated the Virginia Plan on June 13 as the report of the Committee of the Whole, he did so in a way that appears to have left open the appointment of state courts as inferior tribunals.⁷⁵ Subsequent debate in the Convention apparently assumed that such a possibility remained alive. Thus, on July 18, Nathaniel Gorham defended the provision for the appointment of inferior tribunals by noting that state courts were already serving as “<federal> Courts” under the Articles of Confederation and were doing so without complaints from the states.⁷⁶ Similarly, Roger Sherman (who had supported Rutledge’s motion to eliminate mandatory lower federal courts) was willing to give the power to the legislature to establish federal courts, but wished that the legislature would “make use of the State Tribunals whenever it could be done[] with safety to the general interest.”⁷⁷ Sherman thus read the provision as giving Congress discretion either to create lower federal courts, or to appoint state courts instead.

Eventually, the Committee of Detail appears to have adopted Sherman’s view of the two-fold nature of congressional power.⁷⁸ It implemented that understanding in four steps. It first separated the power to appoint inferior tribunals from the power to establish federal courts, placing the power over inferior tribunals in the precursor to Article I, section 8.⁷⁹

⁷⁴ *Id.*

⁷⁵ Madison separated the Eleventh Resolution (calling for the establishment of a national judiciary to consist of one supreme tribunal) from the Twelfth Resolution (empowering Congress to appoint inferior tribunals). *See id.* at 236–37. Importantly, the Eleventh Resolution included the requirement that federal judges serve during good behavior, but that requirement was not clearly made applicable to the inferior tribunals in the Twelfth. *Id.* at 237. The Official Journal and other sources restated the Committee’s mark-up of the Virginia Plan with similar separation of the Eleventh and Twelfth resolutions. *See id.* at 226, 230–31. The limited applicability of the tenure during good behavior provision thus left open the appointment of state courts as inferior tribunals.

⁷⁶ 2 RECORDS, *supra* note 56, at 46 (July 18, 1787).

⁷⁷ *Id.* at 46.

⁷⁸ For a summary of the work of the Committee of Detail, see Liebman & Ryan, *supra* note 18, at 734–44; Pfander, *Tribunals*, *supra* note 24, at 680–85. The Committee produced two important drafts of the Constitution, one by Edmund Randolph and a second by James Wilson, both with editorial changes by John Rutledge. Both drafts adopted a numbering system for the various articles of the draft Constitution that differ markedly from those in the final document. When the Essay refers to provisions of these drafts as appearing in Article I or Article III, it should be understood as referring to their appearance in the applicable precursor to those provisions.

⁷⁹ *See* 2 RECORDS, *supra* note 56, at 144 (Randolph draft includes power to “appoint tribunals, inferior to the supreme judiciary” in a list of congressional powers). The power to “establish” federal tribunals with life-tenured judges appeared in a subsequent provision dealing with the “Judiciary.” *Id.* at 147.

Second, the Committee drew a distinction between the “tribunals” that Congress was empowered to appoint or constitute in Article I from the “courts” that Congress was empowered to establish in Article III, thus abandoning the synonymous usage that had characterized earlier debates.⁸⁰ Third, the Committee agreed that all of the judges of federal courts in Article III (not just the judges of the Supreme Court) were to serve during good behavior.⁸¹ The good behavior rule, however, was not made applicable to inferior tribunals. Fourth, the Committee invented something called the judicial power of the United States that it vested in federal courts with life-tenured judges, but did not vest in the inferior tribunals of Article I.⁸² In the end, the Committee produced a draft that neatly broadened congressional

⁸⁰ Early drafts of Article III, including the Virginia Plan, all referred to the federal courts as federal tribunals. See *supra* note 67 (quoting Virginia Plan in relevant part). The Randolph draft followed this pattern, thereby potentially confusing the relationship between state and federal courts. See 2 RECORDS, *supra* note 56, at 144–47 (quoting Randolph draft as providing in Article I for the appointment of “tribunals” and in Article III for the establishment of “tribunals”). But in the Wilson draft, the Committee of Detail introduced a consistent distinction between the tribunals in Article I and the courts in Article III. See Pfander, *Tribunals*, *supra* note 24, at 682–83. Importantly, the Wilson draft made conforming changes to Article I by empowering the legislature to “constitute Tribunals inferior to the Supreme (national) Court,” see 2 RECORDS, *supra* note 56, at 168, thus abandoning the earlier requirement of inferiority to the “supreme judiciary.” *Id.* at 144. The Wilson draft thus drew a conscious distinction between Article I “tribunals” and Article III “courts.” It also recognized that Congress was free to implement Article III with a single federal court, and required inferiority to that court.

The Wilson draft did not, however, maintain the Randolph draft’s distinction between the “constitution” or “appointment” of inferior tribunals and the “establishment” of federal courts. The Wilson draft provided that both bodies were to be “constituted,” a term broad enough to encompass both appointment and creation. *Id.* at 168, 172–73. The Committee of Style returned to the language of earlier drafts, providing for the “constitut[ion]” of tribunals and the “establish[ment]” of courts. *Id.* at 595, 600. Professor Julius Goebel treated the Style Committee’s switch to ordination and establishment as operating to compel Congress to establish lower federal courts. See Julius Goebel, Jr., *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 246–47 (1971). I join other critics in believing that Goebel was wrong to conclude that lower federal courts were mandatory, but right to conclude that any such courts Congress chose to create under Article III were to be newly established federal courts and not state courts acting as such. See Collins, *Article III Cases*, *supra* note 25, at 124–26; Prakash, *supra* note 24, at 2007–08 & n.252. I differ from Goebel in thinking that Article I specifies the state court option.

⁸¹ As reported to the Committee of Detail, the good behavior rule applied to the judges of the Supreme Court. 2 RECORDS, *supra* note 59, at 132–33. The Randolph draft broadened that rule to apply to judges of both the supreme and inferior courts in Article III. See 2 RECORDS, *supra* note 56, at 146. It was apparently the extension of the requirement of good behavior that forced the Committee to consider and reject the possible appointment of state courts as inferior federal courts. Accordingly, the Randolph draft switched in Article III from a power to “appoint” inferior courts, to a power to “establish” such courts instead. *Id.*; Pfander, *Tribunals*, *supra* note 24, at 682. Yet the Randolph draft retained the Article I grant of power to “appoint” inferior tribunals, an apparent reference to state courts. 2 RECORDS, *supra* note 56, at 144.

⁸² 2 RECORDS, *supra* note 56, at 172 (vesting the judicial power in federal courts); *cf. id.* at 168 (omitting any vesting of judicial power in inferior tribunals). See generally Pfander, *Tribunals*, *supra* note 24, at 682–83 (describing the significance of the Wilson draft for the emerging distinction between tribunals and courts). See also Liebman & Ryan, *supra* note 18, at 740–41 (emphasizing the importance of the Wilson draft’s switch to a “judicial power” formulation).

power. Congress could proceed either by appointing state courts to serve as tribunals under Article I (as Sherman hoped), or by creating new federal courts under Article III (as Madison hoped).

C. State Courts and the Requirement of “Inferiority”

Article I not only empowers Congress to constitute tribunals; it requires that such tribunals be “inferior to the supreme Court.”⁸³ This inferiority requirement acts as a restriction on congressional power. While Congress may constitute tribunals by conferring jurisdiction on state courts to hear federal causes, it cannot do so in a way that evades the inferiority requirement. Inferiority as used in this context invokes the correlative relationship between supreme and inferior courts at common law, a relationship that the framers consciously built into their plan for the federal judicial establishment.⁸⁴ So understood, Article I ensures that any assignment of jurisdiction to the state courts will serve to constitute such courts as judicial inferiors, thereby requiring some provision for Supreme Court oversight and supervision, perhaps through the use of one of a variety of supervisory writs, including the writs of certiorari, mandamus, prohibition, and habeas corpus.⁸⁵

A variety of textual, structural, and historical arguments support the claim that the inferiority requirement of Article I serves to require inferiority in relation to a single Supreme Court. As for text, Article I specifically states that any tribunals must remain inferior “to” the Supreme Court—a formulation that suggests subordination as the likely meaning of the provision.⁸⁶ As for structure, Article I’s requirement that Congress incorporate state courts into the federal judicial establishment only as inferior tribunals

⁸³ U.S. CONST. art I, § 8, cl. 9.

⁸⁴ On the elements of supremacy and inferiority at common law, see Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1449–51 (reporting that, at the time of the framing, the state supreme courts widely viewed the power to issue supervisory writs to inferior courts as an element of their supremacy); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 376–79 (1965) (collecting examples of state laws that empower supreme courts to review inferior tribunals).

⁸⁵ For an account of the common law origins of the “prerogative” writs of mandamus, habeas corpus, and prohibition, see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917–20 (1997) [hereinafter Pfander, *Sovereign Immunity*].

⁸⁶ Johnson’s dictionary defines supreme as highest “in dignity” and “in authority” and defined “inferior” as lower “in place, . . . station, . . . rank of life, . . . value or excellency” or “subordinate.” JOHNSON, *supra* note 33. The Court has sometimes read the inferiority requirement in Article II, which provides for the appointment of “inferior” officers of the United States, to mean inferior in rank rather than subordinate. See *Morrison v. Olson*, 487 U.S. 654, 671–73 (1988); see also Caminker, *supra* note 23, at 831–32 (concluding after a survey of the possibilities that the most natural and plausible reading of the text requires that inferior courts be subordinate to the Supreme Court); cf. THE FEDERALIST NO. 81, *supra* note 42, at 546 n. (describing the power to constitute inferior tribunals as empowering Congress to “institut[e] [] local courts, subordinate to the supreme, either in states or larger districts”). But see *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting) (reading the term “inferior” to mean subordinate).

extends the requirements of unity, supremacy and inferiority—requirements that define the relationship among federal courts, federal agencies, and legislative courts—to state courts.⁸⁷ These requirements play a central role in the preservation of the judicial department’s independence from the political branches. By providing for a single Supreme Court, and requiring that all courts be inferior to that Court, Article III precludes the political branches from setting up a separate set of courts and placing them beyond the Supreme Court’s oversight and control. All congressionally established judicial bodies, in short, must answer to the nation’s only Supreme Court. The familiar pyramidal structure of the federal judiciary flows directly from these requirements of unity, supremacy and inferiority. Article I extends these rules of judicial hierarchy to state courts and any other bodies that Congress constitutes as tribunals.

As for history, a supreme court’s authority to use the supervisory writs to oversee the actions of inferior tribunals was a well-understood, defining aspect of “supremacy” that distinguished supreme courts from their judicial inferiors. The supervisory writs also grounded the common law presumption in favor of judicial review that English judges developed in the wake of the Glorious Revolution. As Justice Holt explained, the common law presumed that all inferior courts and tribunals were subject to review in the Court of King’s Bench; the common law or supervisory writs carried this presumption into effect.⁸⁸ Although the writs differed in their particulars,⁸⁹ they shared many common features that distinguished them from the writs that facilitated the exercise of appellate jurisdiction. In general, the supervisory writs issued in the exercise of the superior court’s discretion; appellate review, by contrast, was available to litigants as a matter of right.⁹⁰ Supervisory writs, moreover, were typically directed to the judge of the

⁸⁷ On the importance of unity, supremacy and inferiority to the structure of the federal judiciary, see Pfander, *Tribunals*, *supra* note 24, at 689–97. In brief, the unity of the Supreme Court secures uniformity of decision throughout the nation, while the supremacy and inferiority requirements ensure a hierarchical judicial department in which all bodies created by Congress to adjudicate federal matters must answer to the Supreme Court.

⁸⁸ See Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1447 (quoting *Groenvelt v. Burwell*, (1700) 91 Eng. Rep. 134, 1202) (all inferior courts subject to the “superintendency” of King’s Bench to keep them within “the limits of their jurisdiction”).

⁸⁹ The writ of mandamus enabled the superior court to compel the lower court to take action clearly required by law; thus, if the lower court failed to render a decision or failed to proceed in accordance with the clear dictates of law, mandamus could issue to compel appropriate action. See Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1490–98 (tracing the writ’s evolution in the United States). The writ of prohibition empowered the superior court to prevent the lower court from hearing matters that exceeded its jurisdiction. The writ of habeas corpus enabled superior courts to test the legality of detention. It thus provided the primary source of judicial oversight in criminal proceedings, where the common law afforded no right of appeal. See *infra* note 131.

⁹⁰ Thus, at the time of the framing, both of the two common modes of appellate review—the appeal (the form of appellate process relied upon in admiralty and equitable proceedings) and the writ of error (the form of appellate process in suits at common law)—were available to litigants as a matter of right. See Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1460–61.

lower court, threatening the inferior judge with contempt if he or she failed to comply with the superior court's orders; appellate jurisdiction typically acted on the parties, threatening them with enforcement proceedings if they failed to comply with the judgment.⁹¹ In addition to subjecting state courts to supervisory oversight, the Article I requirement of inferiority may oblige state courts to give effect to the meaning of federal law pronounced by their judicial superior as well. From the earliest days, the Supreme Court has insisted that state courts give effect to the rules of federal law as the Court pronounces them.⁹² Some have argued that this rule of hierarchical precedent flows from the existence of appellate jurisdiction under Article III or from the Supremacy Clause.⁹³ But as explored in greater detail in part III, the requirement of inferiority provides a better account of the obligation of state courts to respect Supreme Court precedent.⁹⁴

D. State Inferior Tribunals and the Ratification Debates

Alexander Hamilton's classic exposition of the federal judiciary in the Federalist Papers provides striking support for the Essay's claim that Article I empowers Congress to constitute state courts as inferior tribunals. In *The Federalist No. 22*, Hamilton noted the importance of establishing a judicial department with "one SUPREME TRIBUNAL."⁹⁵ Such a tribunal would bring uniformity to federal law, something that the country could not possibly achieve "[i]f there is in each State[] a court of final jurisdiction."⁹⁶ State courts inevitably disagree with one another, Hamilton thought, because of the "endless diversities in the opinions of men."⁹⁷ They may also fail to give adequate weight to national interests due to "local views and prejudices" and the tendency of government officials to "look with peculiar deference towards that authority to which they owe their official existence."⁹⁸ Hamilton's solution was to "establish one court paramount to the rest, possessing a general superintendance, and authorized to settle and declare in the last resort a uniform rule of civil justice."⁹⁹ Hamilton's comment here nicely captures the idea of supremacy and inferiority and the need for a single supreme court with power to superintend the work of inferior state (and federal) tribunals.

⁹¹ See Pfander, *Sovereign Immunity*, *supra* note 88, at 917.

⁹² See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 305–06, 313 (1816) (flatly rejecting a Virginia court's holding that "the appellate power of the supreme court of the United States does not extend to [the Virginia state court]").

⁹³ See *supra* notes 21–23 and accompanying text.

⁹⁴ See *infra* text accompanying notes 158–167.

⁹⁵ THE FEDERALIST NO. 22, *supra* note 42, at 143 (Alexander Hamilton).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 144.

⁹⁹ *Id.* at 143–44.

The Federalist No. 81 takes up the power of Congress to constitute inferior tribunals and clearly recognizes that Congress might proceed either by creating new federal courts or by assigning federal jurisdiction to existing state courts.¹⁰⁰ Hamilton's discussion of the two options appeared in the middle of the paper. He began by describing the Article I "power of constituting inferior courts" as evidently calculated to obviate the need for recourse to the Supreme Court in every case; the power allows Congress to "institute or *authorize*" a tribunal competent to determine federal matters in each State or district.¹⁰¹ The reference to the institution or authorization of inferior tribunals nicely captures the two meanings of Article I's Inferior Tribunal Clause that Hamilton had just quoted. In particular, Hamilton evidently understood that Congress had the power either to institute new federal courts such as those described in Article III or to appoint or authorize the state courts to act as lower federal tribunals under Article I.

Having established that Article I confers a two-fold power on Congress, Hamilton proceeded to explore likely criticisms of the two options. One criticism was that the power itself was unnecessary, that state courts were already competent to hear federal claims. A second criticism was that the Constitution should have *required* reliance on the state courts and have refrained from conferring power on Congress to create lower federal courts. Hamilton introduced both of these criticisms with rhetorical questions and he devoted the next several sentences of a single, dense paragraph to providing responses. It's important to keep the two elements of Hamilton's argument separate in thinking about the implications of his discussion for reliance upon state courts.

Hamilton first took up the question of state court competence to hear federal claims and the possibility that it was unnecessary to include language explicitly allowing Congress to rely on them. "But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts?" Hamilton's response was as follows:

Though the fitness and competency of [the state] courts should be allowed in the utmost latitude; yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to empower the national

¹⁰⁰ See THE FEDERALIST NO. 81, *supra* note 42, at 546–47. Hamilton began by restating the importance of creating "one court of supreme and final jurisdiction," making explicit reference to his earlier discussion. He then addressed the "partition of the judicial authority between different courts, and their relations to each other." Hamilton obviously regarded both Article III (which he quoted at the outset of the paper) and Article I's Inferior Tribunal Clause as relevant to the task of ascertaining the extent of congressional power; he repeatedly quoted or paraphrased the Inferior Tribunal Clause in the course of his discussion. See *id.* at 546 n. (quoting the Inferior Tribunal Clause in its entirety). He also explained, as noted in the text, that the Inferior Tribunal Clause authorized Congress to appoint state courts to hear federal claims.

¹⁰¹ *Id.* at 546 (emphasis in original). Hamilton's reference here to the power of Congress to institute or "authorize" lower federal tribunals seemingly contemplates the appointment of existing state courts to serve as inferior federal tribunals. See Collins, *Article III Cases*, *supra* note 25, at 124 n.245.

legislature to commit to them the cognizance of causes arising out of the national [C]onstitution.¹⁰²

Hamilton's argument here raised the possibility of federal judicial exclusivity, the possibility that state courts might lack power to hear claims arising out of the Constitution. If the Constitution were silent, then the state courts might be seen as capable of hearing only those matters that Hamilton would later describe in *No. 82* as falling within their pre-existing or primitive jurisdiction.¹⁰³ New federal claims, peculiar to the Constitution, might be regarded as off limits to the states.

In the very next sentence, Hamilton addressed this apparent problem of state competence by arguing that the Inferior Tribunal Clause explicitly provides for Congress to empower the state courts to hear federal claims. The sentence reads as follows:

To confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much "to constitute tribunals," as to create new courts with the like power.¹⁰⁴

This striking sentence confirms that Hamilton viewed the Inferior Tribunal Clause, which he quoted, as "perhaps" empowering Congress to constitute the state courts as federal tribunals by conferring on such courts the power to determine federal causes. The reference to "such causes" evidently meant the causes "arising out of the national Constitution" that Hamilton had just described. He thus depicted the Inferior Tribunal Clause as authorizing Congress to give the state courts jurisdiction over federal claims that might have otherwise been viewed as lying beyond state court authority under theories of federal exclusivity. Hamilton thus viewed the Inferior Tribunal Clause as conferring a two-fold power on Congress, either to constitute the existing state courts as federal tribunals or to "create new [federal] courts with a like power."

Hamilton next took up the argument that the Constitution should have ruled out the creation of new lower federal courts altogether; he asked why

¹⁰² THE FEDERALIST NO. 81, *supra* note 42, at 546–47.

¹⁰³ Thus, in a later number, Hamilton argued that the creation of a federal judiciary under Article III would leave the state courts with concurrent jurisdiction over the matters of which "[they] have previous cognizance." THE FEDERALIST NO. 82, *supra* note 42, at 554 (Alexander Hamilton). State courts would be divested of no part of this "primitive" jurisdiction "further than may relate to an appeal." *Id.* at 555. Yet the state courts' pre-existing jurisdiction did not extend to "cases which may grow out of, and be peculiar to the constitution." *Id.* at 554. Denial of jurisdiction over such cases would not be an "abridgement of a pre-existing authority." *Id.* at 555.

¹⁰⁴ THE FEDERALIST NO. 81, *supra* note 42, at 547. During debates over the Judiciary Act of 1789, the attorney general of Massachusetts described the incorporation of state courts into the federal judicial department in Hamilton's terms. See Letter from Robert Treat Paine to Caleb Strong (May 18, 1789), reprinted in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 393, 394 (M. Marcus ed., 1992) [hereinafter DHSC] (noting the importance of "forming the federal Infr Courts" and noting some problems that might result from "Constituting the State Supreme Jud Courts for that purpose").

the Constitution had failed to impose a “more direct and explicit” requirement of reliance on state courts.¹⁰⁵ His answer was familiar: the state courts might not all be equally competent to the adjudication of federal claims. State judges might be influenced by a spirit of localism, especially in view of the fact that they often held their commissions during pleasure or from year to year. The Constitution was right to give Congress a choice—one that Congress would make on the basis of an evaluation of how well the state courts would perform their federal assignments.¹⁰⁶ Nor was Congress obliged to make an exclusive choice between relying on the state courts or creating new federal courts; Hamilton expressed the view that Congress might well blend the state and federal courts together by creating several districts and “institut[ing] a federal court in each district.”¹⁰⁷ The judges of these federal courts, “with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts.”¹⁰⁸ By ensuring local federal review of state court decisions within the circuit, Hamilton argued that such a plan would circumscribe appeals to the Supreme Court within a narrow compass.

In addition to treating the Inferior Tribunal Clause as equally applicable to the constitution of state courts (by assignment or appointment) and of federal courts (by creation), Hamilton treated the requirement of inferiority as one of subordination to the Supreme Court. He made his most revealing comment in response to the “absurd” claim that the Constitution would require the creation of federal courts to displace the county courts of the various states.¹⁰⁹ Although he acknowledged that county courts were frequently referred to as inferior courts, Hamilton noted that the relevant clause did not call simply for the constitution of inferior courts, but for the constitution of tribunals “INFERIOR TO THE SUPREME COURT.”¹¹⁰ The evident design of the provision was, Hamilton thought, to “enable the institution of local courts subordinate to the [S]upreme, either in states or larger dis-

¹⁰⁵ THE FEDERALIST NO. 81, *supra* note 42, at 547 (posing the question: “But ought not a more direct and explicit provision to have been made in favor of the state courts?”). This passage appears to restate the anti-Federalist view that the Constitution should have made an exclusive provision for state courts to serve as federal courts. It follows the form of the earlier rhetorical question in the paragraph, which had similarly restated anti-Federalist concerns, and it leads into an argument against the wisdom of a constitutional “necessity” or requirement that Congress rely only on state courts. Hamilton answered the anti-Federalist argument by urging that required reliance on state courts would have been a mistake; state tribunals were not all equally competent to hear federal claims, and doubts on that score would require an unrestrained course of appeals to the Supreme Court, producing “public and private inconvenience.” *Id.* Importantly, Hamilton’s rhetorical question does not cast doubt on Congress’s power to rely on state courts; he is arguing that the Constitution was right to empower Congress to fashion new federal courts as well as to rely upon existing state courts.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 546 n.

¹¹⁰ *Id.*

tricts.”¹¹¹ Inferior courts were thus depicted as operating within a specified geographic area and as subordinate to the Supreme Court.

Hamilton was certainly not alone in arguing that the Constitution empowered Congress to rely on the state courts as inferior federal tribunals. Some argued, as Edmund Pendleton did in the Virginia ratification debates, that Congress might “appoint the state courts to have the inferior federal jurisdiction.”¹¹² Others contended that Congress should refrain from creating lower federal courts, and rely upon state courts instead.¹¹³ Roger Sherman, whose criticism of mandatory lower federal courts led to the Madisonian compromise, consistently argued in favor of Congress’s ability to rely on the state courts.¹¹⁴ Oliver Ellsworth argued that state courts could hear all of the federal judicial business in the first instance,¹¹⁵ just as James Madison suggested in *The Federalist No. 45* that the state courts would likely be “clothed” with the authority of lower federal courts.¹¹⁶

Of course not everyone agreed with Hamilton. Some Anti-Federalists argued that Congress was either constitutionally required to create an expansive set of federal courts or would doubtless do so at the first opportunity.¹¹⁷ Some Federalists expressed the same view of constitutional compulsion, especially after ratification cleared their way to urge the expansion of the federal government.¹¹⁸ But Hamilton provided the ratifica-

¹¹¹ *Id.*

¹¹² 3 JONATHAN ELLIOT, *THE DEBATES OF THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 517 (2d ed. 1836) (Lippincott reprint ed. 1937). Pendleton thought such appointment would bolster popular support for the Constitution and save money.

¹¹³ See Letter from Edward Carrington to James Madison (Aug. 3, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 493–94 (suggesting that “the State-Courts, where they are well established might be adopted as the inferior Federal Courts”).

¹¹⁴ During the ratification debates, Sherman noted that “the constitution does not make it necessary that any inferior tribunals should be instituted, but it may be done if found necessary.” Roger Sherman, Letters of a Citizen of New Haven (III), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 237, 241 (Paul Ford ed., 1970) (1892) [hereinafter ESSAYS].

¹¹⁵ See Oliver Ellsworth, Letters of a Landholder (IV), *reprinted in* ESSAYS, *supra* note 114, at 161, 164–65 (contending that, except for matters assigned to the Supreme Court’s original jurisdiction, all federal cases may be adjudicated “in the first instance . . . in the state courts and those trials be final except in cases of great magnitude”). Ellsworth may have qualified the scope of this claim of state court competence in later correspondence. See Letter from Oliver Ellsworth to Richard Law (Apr. 30, 1789), *reprinted in* FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 37 n. (1849) (stating that he did not believe admiralty matters and “perhaps” criminal matters were part of the pre-existing jurisdiction of the state courts, and that state courts, as state courts, would be incapable of hearing such matters, but could do so only as federal courts).

¹¹⁶ See THE FEDERALIST NO. 45, *supra* note 42, at 313 (James Madison) (describing it as “extremely probable” that in the “organi[z]ation of the judicial power” the officers of the states “will be clothed [sic] with the correspondent authority of the Union”).

¹¹⁷ See Essays of Brutus XV, *supra* note 55, at 431; Luther Martin, Genuine Information, *reprinted in* DHRC, *supra* note 55, at 379.

¹¹⁸ Following ratification, some Federalists changed their view of the state court option. Both James Madison and Oliver Ellsworth defended reliance on state courts in the ratification debates of

tion era's most complete assessment of the role of the state courts in the federal judicial system. Hamilton saw that state courts might hear federal matters by exercising their pre-existing jurisdiction, and be subject to a degree of federal judicial oversight by way of appellate review;¹¹⁹ he also recognized that they might be more formally incorporated into the federal judicial structure by being constituted or appointed as inferior tribunals under Article I. The Essay returns to Hamilton's distinction between pre-existing state jurisdiction and jurisdiction conferred by Congress in the next part.

II. TESTING THE STATE TRIBUNAL ACCOUNT

Having sketched the elements of the state tribunal account, this part of the Essay begins to test the account by considering how well it fits with certain features of our constitutional tradition. The state tribunal account nicely explains a range of accumulated evidence and provides more satisfying answers to certain puzzles in the literature than alternative accounts. This part relies on three sources: statements made by the framers during debates over the Constitution and its implementation in the Judiciary Act of 1789; perceived patterns of institutional growth and development in the relationship between the state courts and the federal judiciary; and the principles of jurisdiction that emerge from the comments of leading judicial decisions and scholars.

A. Incorporating State Courts into the Federal Judiciary

We lack an entirely satisfactory account of Congress's power to incorporate state courts into the federal judicial department. While the Madisonian compromise frames much of the discussion in this area, its provision for Congress to exercise discretion in deciding whether to establish federal courts, or to rely upon state courts as courts of first instance for federal matters, continues to pose a set of vexing questions. Under the conventional view of scholars in the field, Congress enjoys broad power simply to leave federal matters to the state courts to hear in the exercise of what Alexander Hamilton called their "pre-existing" jurisdiction.¹²⁰ Moreover, convention holds that state courts may exercise concurrent jurisdiction over many federal claims, even where those claims were, in Hamilton's words, "peculiar to the Constitution" and not part of the state courts' pre-existing authority.

1788, and both later argued during debates over the Judiciary Act of 1789 that such reliance would violate the Constitution. *See supra* notes 115, 128.

¹¹⁹ *See supra* note 103.

¹²⁰ *See supra* note 103; *see also* *Claffin v. Houseman*, 93 U.S. 130, 136–38 (1876) (adopting Hamilton's conception of the concurrent jurisdiction of the state and federal courts); *Justices v. Murray*, U.S. (9 Wall.) 274, 280 (1869) (noting that the Judiciary Act secures the aid of the state courts by "leaving to them concurrent jurisdiction" with a right of appeal to the Supreme Court).

Modern cases confirm the breadth of state court concurrent jurisdiction, establishing a strong presumption in favor of state competence.

I. Overcoming the Problem of Federal Exclusivity.—Despite the conventional understanding of Congress’s power to leave matters in the hands of state courts of general jurisdiction, however, Professor Michael Collins has raised important questions about this method of congressional reliance upon state courts. Professor Collins shows that, the Madisonian compromise notwithstanding, a strong theme of federal exclusivity ran through ratification-era discussions concerning the propriety of relying upon state courts: Actions to enforce federal criminal and penal laws, as well as actions within the nation’s admiralty and maritime jurisdiction, were commonly referred to as inherently federal.¹²¹ As to these inherently or exclusively federal proceedings, many expressed doubt as to Congress’s power to leave the state courts in charge of the litigation. These doubts would later inform Justice Story’s account of mandatory federal jurisdiction, and find a reflection in modern theories.¹²² A vestige of these doubts survives in *Tarble’s Case*, the nineteenth century decision that barred state courts from exercising jurisdiction over habeas corpus claims to contest the legality of detention by federal officials.¹²³ Claims of exclusivity cast doubt on Congress’s ability to rely on state courts by simply leaving federal matters to them in the exercise of their general jurisdiction.

An alternative model of reliance on state courts has fared little better. Rather than a power to leave matters to the state courts in the exercise of their general jurisdiction, some argued that Congress was free to appoint the judges of the state courts to serve as federal judges and thus to establish the

¹²¹ See Collins, *supra* note 25 (citing comments by such luminaries as Gouverneur Morris, Chancellor James Kent, and Justice Joseph Story, among others). In an important counter-narrative to that of Collins, Charles Warren showed that Anti-Federalist opinion initially opposed the creation of lower federal courts, and instead supported reliance on state courts (a view somewhat difficult to square with claims of federal exclusivity). See Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 548–49, 556 (1925). Only after the War of 1812, as New England flirted with secession and the mid-Atlantic states challenged the appellate jurisdiction of the Supreme Court, did conventional wisdom shift toward federal exclusivity. In support of his thesis, Warren collects a series of statutes from the early Republic in which Congress explicitly conferred jurisdiction on the state courts to hear federal claims. See *infra* text accompanying notes 138–141.

¹²² See Clinton, *A Mandatory View*, *supra* note 17, at 1581–84 (citing Story’s opinion in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in support of a theory of mandatory federal jurisdiction); Amar, *supra* note 17, at 210–16 (same).

¹²³ 80 U.S. (13 Wall.) 397 (1871). In *Tarble’s Case*, the Court proceeded upon the assumption that the government of the United States was separate from that of the states. In assessing the power of state courts to issue writs of habeas corpus to federal officers, the Court observed that the federal government had not conferred the necessary jurisdiction. It further noted that it was not in the power of the State to provide the state courts with the appropriate grant of jurisdiction: “no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government.” *Id.* at 405.

state courts as federal courts under Article III.¹²⁴ But participants in the ratification debates were quite critical of the proposal to appoint state judges to exercise federal jurisdiction. For one thing, leading statesmen in Massachusetts and elsewhere doubted that individuals could serve in a dual role as judges of both the state and federal courts. James Sullivan believed that the Massachusetts state constitution would forbid such dual office-holding.¹²⁵ Fisher Ames observed that state judges might thereby become federal officers, and gain an entitlement under Article III to permanent offices and salaries.¹²⁶ William Paterson shared this concern with the practicalities of dual office-holding.¹²⁷ James Madison joined the chorus, raising an objection based upon the President's power under the Constitution to appoint civil officers of the United States.¹²⁸ Madison argued that, by transforming state judges into federal officers, Congress would in effect be appointing

¹²⁴ David Sewall, a judge of the Massachusetts Supreme Judicial Court who later became a federal judge, presented such a plan to his state's congressional delegation. *See* Letter of David Sewall to Caleb Strong (Mar. 28, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 369, 370 (arguing that Congress should provide for suits at common law “in such of the Supreme Judicial, of the respective States, Where Judges hold their offices during good behaviour [sic]; and have [c]omp[er]tent provision made for their support . . . And offences arising from Transgressions of Penal Statutes of Congress, might be cognizable in the S.J. State courts”). Such a plan, which may have drawn its inspiration from the model of the Articles of Confederation, came under fire in later correspondence. *See* Letter from Caleb Strong to Nathaniel P. Sargeant (May 7, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 387 (noting that appointment of state judges to federal office could cause problems; different rules for removal or impeachment might result in a judge losing either the state or federal office and continuing in the other).

¹²⁵ Letter from James Sullivan to Elbridge Gerry (Mar. 29, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 372 (“the plan is to introduce the Judges of the Supreme Courts of each [s]tate to the office of Inferiour Tribunals but that cannot be done” in Massachusetts without an amendment to the state constitution); *see also* MASS. CONST. OF 1780, pt. 2, ch. VI, art. II, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 971 (Government Printing Office ed. 1877). Other states adopted statutes to bar state officials from executing federal functions. *See* An Act to Disable Certain Officers Under the Continental Government, from Holding Offices Under the Authority of this Commonwealth (Dec. 8, 1788), *reprinted in* 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 694 (William Waller Hening ed., 1823).

¹²⁶ Letter from Fisher Ames to John Lowell (Apr. 8, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 373 (expressing concern that the assignment of jurisdiction to the state courts to hear federal penalty and forfeiture proceedings might transform state judges into federal judges and entitle them to “permanent seats and salaries”).

¹²⁷ *See* Notes of William Paterson (June 23, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 414–15 (opposing motion to rely upon state courts as inferior federal courts and arguing that modes of state judicial selection vary with some appointed for a term of years and some during good behavior; and noting the awkward situation that would arise if state judges, holding a dual federal appointment, were to lose their state office; such judges would be “fixed upon you during good Behaviour [sic] & entitled to a permanent Salary”).

¹²⁸ *See* 1 ANNALS OF CONG., *supra* note 114, at 812–13 (comments of James Madison) (opposing motion designed to make the state courts into federal courts; and arguing that such a transformation would provide tenure during good behavior for state judges, and would usurp the prerogative of the president to appoint officers of the courts of the United States); *cf. supra* note 116 (quoting Madison's argument in Federalist No. 45 in favor of reliance on the state courts).

such officials to a federal office in violation of the President's appointment power.

The state tribunal account of the Madisonian compromise provides a model of reliance on state courts that may help to overcome the difficulties that have been identified with both models. If certain of the proceedings described in Article III were thought to lie beyond the power of the state courts in the exercise of their pre-existing jurisdiction, then Congress could constitute and appoint the state courts as federal tribunals by assigning them jurisdiction over federal claims along the lines Hamilton suggested in *The Federalist No. 81*. Congressional constitution of state courts as tribunals under Article I could solve the problems associated with dual office-holding as well. If the Constitution recognizes a distinction between tribunals and federal courts, and does not require tribunals to employ life-tenured judges, then Congress could constitute state courts as federal tribunals without being required to treat state judges as civil officers of the United States. Such an interpretation would free Congress from the many problems identified with the designation of state judges as federal judges.¹²⁹ While the judges of the federal courts that Congress establishes must serve during good behavior, these requirements would not necessarily apply to the judges of the state courts that Congress constitutes as Article I tribunals. Congress could simply take state courts as it finds them, constitute them as tribunals for certain federal purposes, and avoid structural problems. State judges would remain the employees of their states, and would not receive any formal appointment or commission as civil officers of the United States.¹³⁰ State judges might join and leave the state bench in accordance with state tenure-in-office provisions, without gaining any entitlement to tenure for federal service. By providing for the constitution of inferior federal tribunals, Article I appears to have solved, at least as a formal matter, the problems that were identified with the proposals to appoint state judges to act as federal judges.

In addition to offering a formal solution to the Appointment Clause and dual office-holding problems, congressional reliance on state courts as infe-

¹²⁹ Edward Carrington advanced precisely such a theory of reliance on the state courts in his letter to James Madison. See Letter of Aug. 3, 1789, reprinted in 4 DHSC, *supra* note 104, at 493. After noting that state courts could be adopted as inferior federal courts, Carrington took up the problems that were posed by a Virginia statute that barred officers of the federal government from holding offices in the Commonwealth. This dual office-holding prohibition presented no difficulty in Carrington's view: "the Act alluded to however only prohibits the acceptance of individual appointments, which are not necessary for the adoption of the State Courts into the federal system." *Id.*

¹³⁰ In a series of essays critical of Jefferson's proposal to repeal the Judiciary Act of 1801, Alexander Hamilton explored at some length the distinction between the federal courts and the offices of the judges appointed to serve in them. See Alexander Hamilton, *The Examination No. 12*, reprinted in 4 THE FOUNDERS' CONSTITUTION 176 (Philip B. Kurland & Ralph Lerner eds., 1987). While Hamilton wrote in the context of a debate over the power of Congress to turn sitting federal judges out of office, his remarks apply with equal force to the distinction between state courts and the judges that serve in them.

rior federal tribunals under Article I could make a difference of some substance. When constituted as inferior federal tribunals under Article I, state courts would be subject both to the Court's appellate jurisdiction and to the forms of supervision that flow from their constitutional inferiority to the Supreme Court. At common law, criminal proceedings were not subject to appellate review through the writ of error but only through the writ of habeas corpus and other supervisory writs.¹³¹ To the extent that the perceived inadequacy of appellate supervision in such proceedings was among the reasons for the claim of federal exclusivity, the additional oversight that comes with state court inferiority could make a significant difference.

2. *Congressional Power to Confer Jurisdiction on State Courts.*—

The state tribunal account may also provide a more complete account of the manner in which Congress relies upon state courts for the adjudication of federal claims. As noted above, the Court often takes the position that Congress has simply “left” matters for the state courts to hear in the exercise of their general jurisdiction.¹³² As a consequence, members of the Court have frequently explained that Congress lacks power to confer jurisdiction on state courts. Justice Frankfurter, for example, has described the jurisdiction of the state courts as purely a function of state legislation, explaining that “[n]either Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction on the New York courts.”¹³³ Justice Scalia has expressed similar doubts, explaining that state courts hear federal claims not because Congress has conferred jurisdiction on them nor because their general jurisdiction enables them to hear transitory causes of action but simply because federal laws operate with binding effect in state courts.¹³⁴

Although one can understand the Court's inclination to treat the state courts as hearing federal claims within their existing jurisdiction, this account does not mesh particularly well with the reality of current law. Since the Civil War, the Court has consistently applied a fairly robust presumption that the state courts may exercise concurrent jurisdiction over newly created federal rights of action.¹³⁵ When Congress creates a new federal right of action, as it did with the passage of the civil RICO statute, the presumption means that state and federal courts can both hear the claims.¹³⁶ To

¹³¹ On the absence of appellate review of such matters at common law, see *Brutus XIV* (Feb. 28 and March 6, 1788), reprinted in 16 *DHRC*, *supra* note 55, at 256 (noting the absence of appeals in criminal cases and expressing concern that such review might overturn acquittals). See also *McKane v. Durston*, 153 U.S. 684, 687 (1894). The Judiciary Act of 1789 broke with this tradition by subjecting state court judgments in criminal proceedings to review in the Supreme Court.

¹³² See *supra* text accompanying note 120.

¹³³ *Brown v. Gerdes*, 321 U.S. 178, 188 (1944).

¹³⁴ See *Tafflin v. Levitt*, 493 U.S. 455, 469–70 (1990) (Scalia, J., concurring).

¹³⁵ See *Clafflin v. Houseman*, 93 U.S. 130 (1876). For an account of the Hamiltonian origins of the presumption of state court concurrency, see *supra* text accompanying note 103.

¹³⁶ See *Tafflin*, 493 U.S. at 458, 459.

rebut the presumption, Congress can provide that the federal courts enjoy exclusive jurisdiction (perhaps by including an indication to that effect in the text). In addition, the Court has sometimes found the presumption rebutted on the basis of clear incompatibility between state court jurisdiction and the vindication of federal interests.¹³⁷ As a practical matter, the presumption of concurrency means that new federal rights of action emerge from Congress with an accompanying (if implicit) directive that the state courts may hear such claims.

But one can certainly question the coherence of this standard account. During the early history of the Republic, Congress frequently assigned jurisdiction to the state courts instead of simply adopting statutes that assumed the willingness of the state courts to hear federal claims. Thus, some early statutes provided for the state courts to take cognizance of actions to enforce penalties and forfeitures for violations of the nation's customs and tax laws.¹³⁸ Others authorized the state courts to hear federal criminal proceedings arising under laws regulating the federal postal service.¹³⁹ In a good many cases, these assignments of jurisdiction appear to have had an obligatory element. An early law provided that the state courts "shall and may" exercise the power to grant remissions of penalties under the tax laws.¹⁴⁰ Another exempted federal soldiers from arrest for debt and further provided that it "shall be the duty" of state and federal courts to issue the writ of habeas corpus to discharge a soldier imprisoned in violation of the exemption.¹⁴¹ One can certainly read these statutes as explicitly conferring federal jurisdiction on state courts. If nothing else, these laws illustrate the importance of the presumption. If Congress (or the Court) were to create a default rule under which state courts lack jurisdiction over federal claims (as Congress had done under the Judiciary Act of 1789¹⁴²), then Congress would have to make an explicit provision in favor of state adjudication to allow the state courts to proceed with the claim. Either way one sets the default rule, in short, the state courts' authority to hear federal claims depends on the say-so of Congress.

The standard view that Congress simply "leaves" federal matters to the state courts runs into a second difficulty. Convention holds that the state courts must entertain federal question claims, at least within the bounds of

¹³⁷ See *id.* at 459–60 (upholding state court concurrent jurisdiction while recognizing that in a different case such jurisdiction might be clearly incompatible with federal interests); *cf.* *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411–12 (1871) (concluding, in the absence of clear language to rebut a presumption of concurrent jurisdiction, that state courts lacked power to issue writs of habeas corpus to federal officers).

¹³⁸ See Warren, *supra* note 121, at 553.

¹³⁹ *Id.* at 554 (citing Act of March 2, 1799, 1 Stat. 733).

¹⁴⁰ *Id.* at 553 (quoting Act of March 3, 1797, 1 Stat. 506).

¹⁴¹ *Id.* (quoting Act of May 28, 1798, 1 Stat. 558).

¹⁴² See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (conferring exclusive jurisdiction over federal criminal and penalty proceedings).

their standing grants of general jurisdiction. This duty to afford federal claims a reasonably hospitable reception, or to refrain from discriminating against federal causes of action, has been traced to the Constitution's Supremacy Clause.¹⁴³ As the Supreme Court explained in *Testa v. Katt*, the Supremacy Clause requires state judges to give effect to federal law in cases of conflict with the state's constitution or laws.¹⁴⁴ The *Testa* Court read this obligation as depriving the state courts of the power to decline to hear federal claims, either on the basis that the state disagrees with the policy of the federal laws, or on the basis that it prefers to reserve its own judicial resources for the adjudication of state claims.¹⁴⁵ Only where the state court tenders a valid and non-discriminatory excuse (such as *forum non conveniens*) has it been permitted to decline to hear federal claims.¹⁴⁶ As a result, Congress need not procure the states' consent to the adjudication of federal claims but can simply assume the availability of state dockets to hear such claims.

Testa's conclusion that state courts owe an obligation to hear federal claims on the same basis as state claims stands in some tension with the notion that Congress lacks power to control the jurisdiction of the state courts.¹⁴⁷ One problem arises from the apparent conflict with the anti-commandeering principle expressed in *New York v. United States*,¹⁴⁸ and

¹⁴³ See *Felder v. Casey*, 487 U.S. 131 (1988) (concluding that state court could not apply a non-discriminatory notice-of-claim rule to bar a federal claim). Scholars continue to debate whether the *Testa* principle simply requires state courts to refrain from discriminating against federal actions or requires state courts to afford a reasonably hospitable forum for the adjudication of federal claims. Compare *Collins*, *supra* note 25, at 161–65 (state court duty does not extend beyond that of non-discrimination), with *H&W V*, *supra* note 8, at 450 (concluding that the claim of state court discrimination in *Felder v. Casey* was not very persuasive).

¹⁴⁴ See 330 U.S. 386, 389–91 (1947).

¹⁴⁵ In reaching its conclusion, the Court drew heavily on decisions that upheld the power of state courts to exercise concurrent jurisdiction over federal claims. See *Testa*, 330 U.S. at 390–92 (citing *Clafin v. Houseman*, 93 U.S. 130 (1876)). A previous and somewhat analogous decision upholding the right of state courts to decline to assert jurisdiction over the penalty claims of other states was relegated to a footnote. See *id.* at 393 n.11 (distinguishing *Huntington v. Attrill*, 146 U.S. 657 (1892), as a decision involving the duty of state courts under the Full Faith and Credit Clause). See generally Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006).

¹⁴⁶ See *Douglas v. N.Y., New Haven & Hartford R.R.*, 279 U.S. 377 (1929) (state court could validly decline to hear action under Federal Employers' Liability Act (FELA) that arose from an accident outside the state and named an out-of-state corporation as defendant); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (state court validly applied limitations period in dismissing federal FELA claim).

¹⁴⁷ Congress can compel state courts to hear federal claims (by relying on the combined force of the presumption of concurrency and the *Testa* obligation) or it can deprive state courts of their power by assigning exclusive jurisdiction to the federal courts. Congress can also assign exclusive federal jurisdiction over federal claims to the state courts, but it has rarely done so. (Even 28 U.S.C. § 1445, which prohibits removal of certain federal claims from state to federal court, would permit the plaintiff to file such claims in federal court as an original matter.) For a discussion, see *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (concluding that state courts enjoy concurrent, not exclusive, jurisdiction over claims under the federal Telephone Consumer Protection Act).

¹⁴⁸ 505 U.S. 144 (1992).

Printz v. United States.¹⁴⁹ Those decisions establish the principle that Congress may neither compel state officials to legislate in accordance with federal requirements nor require state officials to administer a federal regulatory program. In effect, the decisions oblige Congress to secure the states' cooperation through means other than the issuance of naked commands.¹⁵⁰ In its strongest form, the anti-commandeering principle would seem to cast doubt on the *Testa* rule, which operates in effect to empower Congress to commandeer the state courts as federal agents for the enforcement of federal law.

Although *New York* and *Printz* both distinguish *Testa v. Katt*,¹⁵¹ the decisions do not entirely succeed in explaining why the anti-commandeering principle does not apply to state courts. As a functional matter, federal reliance on the state courts as agents for the enforcement of federal law produces the same budget implications as reliance on other state officials. The legislation at issue in *Testa*, for example, authorized consumers to bring claims to recover penalties for violations of war-time price control provisions. (Testa's claim was worth \$210 before the application of any penalty.) By relying upon the state courts to hear such claims, Congress could reduce the expected cost of administering the price control statute by shifting a portion of the expense to state court budgets. Reliance on the state courts could reduce transparency (by obscuring the federal origins of the penalty provision) and undermine political accountability (by enabling Congress to avoid paying the full cost of its initiatives). The same tools that Congress uses to work around the anti-commandeering principle in other settings (the threat of preemption and the use of conditional spending inducements) would seemingly work just as well to secure the cooperation of state courts.¹⁵²

The Supremacy Clause was treated as a distinguishing factor in *New York* and *Printz* and may justify the commandeering of the state courts. The clause recognizes that issues of federal law were to come before the state courts for decision, and it directs state judges to treat such law as the supreme law of the land, notwithstanding anything to the contrary in the state's own constitution and laws. But questions of federal law, such as constitutional defenses to the institution of state criminal proceedings, were expected to arise in the course of suits brought within the state courts' pre-existing jurisdiction.¹⁵³ An obligation on the part of state judges to give ef-

¹⁴⁹ 521 U.S. 898 (1997).

¹⁵⁰ See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REVIEW 71, 88–89.

¹⁵¹ See *New York*, 505 U.S. at 178–79; *Printz*, 521 U.S. at 928–29 & n.14.

¹⁵² See Adler & Kreimer, *supra* note 150, at 102–03 (noting the availability of conditional preemption and spending as tools with which Congress might attempt to secure state cooperation); *cf. Printz*, 521 U.S. at 939 (1997) (Stevens, J., dissenting).

¹⁵³ Issues of federal law might appear as ingredients in common law claims, such as a suit brought as a debt action to recover a penalty created by federal law. On the importance of common law rights of

fect to valid federal law when it comes before them does not necessarily help to define the universe of valid federal law that the Constitution permits Congress to enact.¹⁵⁴ The Clause certainly does not in terms empower Congress to invest the state courts with jurisdiction over federal rights of action.¹⁵⁵ On its face, then, the Supremacy Clause offers no more basis for the commandeering of courts than for the commandeering of other state officials.¹⁵⁶

The state tribunal account may provide additional support for the obligation of state courts to exercise the jurisdiction that Congress has chosen to confer upon them. Article I confers power on Congress to constitute tribunals inferior to the Supreme Court. One can read the provision (in Hamiltonian terms) as empowering Congress to invest the state courts with jurisdiction over federal causes of action. Such authority flows naturally from the Madisonian compromise and its provision for Congress to exercise discretion in deciding whether and to what extent it wishes to create new stand-alone lower federal courts or to rely upon state tribunals to hear federal causes in the first instance.¹⁵⁷ But while the Madisonian compromise informs the discretionary language in Article III's provision for the establishment of lower federal courts and assumes that Congress has the authority to rely upon the state courts to hear federal claims, it does not confer that power in terms. The state tribunal account of Article I fills a gap in the constitutional structure by supplying the relevant grant of congressional authority to assign federal claims to state courts.

action to enforce federal government obligations in the nineteenth century, see David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 13–21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987).

¹⁵⁴ In *Alden v. Maine*, 527 U.S. 706 (1999), for example, the Court restated the exception to the *Testa* principle for suits against the state brought in state court to enforce federal regulatory statutes adopted in the exercise of Congress's commerce authority. The supremacy clause obliges state judges to give effect to valid federal law, but was not seen as validating a law that interfered with the state's role as a separate sovereign government under the Constitution.

¹⁵⁵ See Collins, *supra* note 25, at 190 (criticizing the supremacy clause as an inadequate justification for the imposition of a duty on state courts to entertain federal claims); see also Martin H. Redish and Stephen G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 75–76, 80–81 (1998) (same).

¹⁵⁶ Some have argued that the obligation of state court judges to take an oath to support the Constitution may provide the basis for a duty to entertain federal rights of action. *But see* William Maclay, Diary Entry (June 22, 1789), *reprinted in* 4 DHSC, *supra* note 104, at 412 (describing the state oath as an oath of allegiance, not as an oath of office, and thus suggesting that it would not support reliance on state officials).

¹⁵⁷ See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2186 & n.20 (1998) (viewing the combination of the Madisonian compromise, the supremacy clause, and the oath requirement as combining to impose on the states a firm constitutional obligation to furnish state courts for federal claims).

*B. Locating the State Courts' Obligation to Apply Supreme Court
Precedents*

The state tribunals account also offers a richer explanation of the state courts' obligation to apply Supreme Court decisional law. Courts and commentators tend to agree that state courts are bound by the Supreme Court's exposition of federal law,¹⁵⁸ but disagree about the origins of that obligation. Some trace it to the Supremacy Clause, which obligates state courts and judges to give effect to the Constitution, laws and treaties of the United States.¹⁵⁹ But this explanation has been subjected to pointed criticism. The Supremacy Clause does not make the pronouncements of the Supreme Court binding on state judges, but only imposes that obligation as to the Constitution, laws, and treaties themselves.¹⁶⁰ The Constitution may mean what the Justices say it does in a decided case, but judicial declarations do not necessarily bind other actors within the constitutional order when new cases arise.¹⁶¹

Other accounts of the origins of the state court obligation to apply Supreme Court decisional law fare little better. Some have traced the obligation to the existence of revisory jurisdiction, conferred on the Court in constitutional and statutory grants of appellate jurisdiction. These grants of appellate jurisdiction can do some of the work; state courts can predict reversal if they apply a legal standard different from that which the Supreme Court has recently applied in a similar case.¹⁶² But what happens if Congress curtails the Court's appellate jurisdiction by exercising its power to fashion exceptions and regulations? For many scholars, the withdrawal of appellate jurisdiction frees the state courts from any obligation to apply Supreme Court precedents.¹⁶³

Under the operating assumptions of the Madisonian compromise, however, the suggested link between state court duty and appellate jurisdiction makes little sense. A major premise of congressional authority to regulate the Court's appellate jurisdiction was to enable Congress to create a more convenient federal judicial establishment by refraining from requiring appellate review at the nation's center in every case that presented a federal

¹⁵⁸ See Donald H. Zielger, *Gazing Into the Crystal Ball: Reflections on the Standards States Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1143-44 (1999).

¹⁵⁹ See Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 390.

¹⁶⁰ Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24, 26-28 (1994) (urging lower court freedom to ignore Supreme Court pronouncements); Paulsen, *supra* note 22, at 82-84.

¹⁶¹ See Robert C. Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1031-32 (2004); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 318 (1992).

¹⁶² See, e.g., Amar, *supra* note 22, at 258 n.170 (ascribing the rules of hierarchical precedent to the statutory mechanisms of review that Congress puts in place).

¹⁶³ See *supra* note 25 and accompanying text.

question.¹⁶⁴ One way to avoid the expense and inconvenience of appellate review in every case was to create lower federal courts and give them final authority over disputes of modest size. Reliance on state courts as an alternative would make little sense if those courts were not similarly obliged to comply with the Supreme Court's decisions; Congress could not economize on the cost of appellate review by leaving cases of modest size for final resolution by the lower courts. The structural and geographic logic of the Madisonian compromise suggests that state courts should face the same obligation to apply Supreme Court precedents as the lower federal courts.

The state tribunal account provides a textual predicate for the obligation of state courts to respect the precedents of the Supreme Court. Article I requires that any state courts constituted as federal tribunals must remain "inferior to" the Supreme Court. This inferiority requirement also applies to any lower federal courts that Congress chooses to ordain and establish under Article III. By extending the obligation of inferiority to state tribunals, Article I provides a textual basis for requiring the state courts to give effect to the decisions of the Supreme Court.¹⁶⁵ The state tribunal account can also help to explain why state courts generally refuse to treat the decisions of the federal appellate courts for the regional circuits as binding statements of federal law.¹⁶⁶ To the extent that the duty of state courts to obey superior court precedents flows from the Article I requirement of inferiority, the text imposes the duty in relation to the Supreme Court, not in relation to any other tribunals within the judicial department of the federal government.¹⁶⁷

¹⁶⁴ For an account, see Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1459–65 (distinguishing between as-of-right review and discretionary review through the use of the supervisory writs, and noting the importance of geographic convenience in the structure of the federal judiciary).

¹⁶⁵ In general, appellate review operates to correct errors of law by a lower court. Mere errors of law do not trigger an exercise of the Court's supervisory or mandamus authority, but a deliberate refusal to follow controlling precedents might well do so. *See, e.g.*, *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989) (directing the issuance of mandamus to correct a clear error of law amounting to a usurpation of the judicial power). The obligation of inferior courts to follow superior court precedents thus gives rise to a justification for supervisory review that differs from error correction on appeal.

¹⁶⁶ *See generally* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 434 (2002) (noting the absence of any state court obligation to give binding effect to precedents of the regional federal appellate courts); Caminker, *supra* note 23, at 825 & n.32 (same).

¹⁶⁷ Viewing the obligation to obey superior precedents as rooted in the Article I inferiority requirement should not be seen as denying Congress's power to subject state court decisions to appellate review by lower federal courts. Hamilton expressly declared that Congress possessed such a power, and subsequent developments tend to confirm his conclusion. *See* James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 229 (1998). According to an influential account of judicial federalism in the early Republic, Congress passed at least one law that subjected state court decisions to appellate review in the federal circuit courts. *See* Warren, *supra* note 121, at 572–73. To the extent Congress authorizes lower federal courts to review state court decisions, the power of review may carry with it the power to insist on state court compliance with the precedents of the reviewing court.

C. *Explaining the Court's Power to Supervise State Courts*

So far, the Court has failed to provide a satisfactory account of its power to issue the supervisory writs to state courts. On the one hand, the Court has recognized that its powers under the All Writs Act include the power to issue writs of mandamus to the judges of state courts. Thus, in *General Atomic Co. v. Felter*,¹⁶⁸ the Court granted the petitioner leave to file a petition seeking a writ of mandamus to compel a state judge in New Mexico to effectuate the Court's decree. The state judge apparently failed to comply with the Court's earlier decision, which directed the state court to allow the petitioner to pursue its right to arbitration under federal law. In granting leave to file, the Court followed its usual pattern in declining to issue the peremptory writ, but it did so on the assumption that the state judge would come into compliance with its earlier decree.¹⁶⁹ The clear implication of the decision, then, was that mandamus would issue if the state judge continued to frustrate the Court's mandate.

Despite the Court's recognition of the propriety of mandamus, however, the opinion failed to explain the origins or define the limits of its authority to issue extraordinary writs to the state courts. The omission was significant, if only because previous cases treated the matter as difficult and unresolved. In the nineteenth century decision, *In re Blake*,¹⁷⁰ the Court expressed doubts about its authority to supervise the state courts through the issuance of the extraordinary writs, due in part to the summary nature of the process used in connection with such writs. Such proceedings might well apply within the federal judicial establishment, but were of questionable propriety when directed to the courts of another government.¹⁷¹ The *Blake* Court thus drew on the same separate spheres of rhetoric that informed the earlier decisions in *Tarble's Case*¹⁷² and *McClung v. Silliman*,¹⁷³ in which the Court denied the state courts power to issue writs of habeas corpus and mandamus to federal officers.¹⁷⁴ Some members of the Court expressed

¹⁶⁸ 436 U.S. 493, 497 (1978); *see also* *Deen v. Hickman*, 358 U.S. 57, 58 (1958) (per curiam) (granting motion to file writ of mandamus to compel state court to conform its proceedings to the Court's mandate without addressing nature of mandamus authority).

¹⁶⁹ *Cf. Ex parte Peru*, 318 U.S. 578, 587, 590 (1943) (similarly granting leave to file and assuming that formal issuance of the writ would prove unnecessary).

¹⁷⁰ 175 U.S. 114 (1899).

¹⁷¹ *Id.* at 119–20.

¹⁷² 80 U.S. (13 Wall.) 397 (1872).

¹⁷³ 19 U.S. (6 Wheat.) 598 (1821).

¹⁷⁴ *See McClung*, 19 U.S. at 604–05 (characterizing the issuance of mandamus to federal officers as outside the state court's pre-existing jurisdiction and concluding that the actions of a federal official can only be controlled through the supervisory writs by agents of the same (federal) governmental power that had created the office).

similar doubts in other settings.¹⁷⁵ In light of this background, the *Felter* Court's explanation of its authority was decidedly thin; it simply invoked the principle that "lower court[s]" were subject to oversight by way of mandamus and cited a case involving mandamus to a lower *federal* court.¹⁷⁶

The state tribunal account provides an entirely straightforward basis on which the Court might treat the state courts as lower courts for purposes of the issuance of supervisory writs. Under the account, Congress constitutes the state courts as tribunals "inferior to" the Supreme Court under Article I by empowering them to entertain federal claims. This requirement of state court inferiority provides a textual predicate for the exercise of the Court's supervisory authority. The Article I requirement of state court inferiority, moreover, essentially tracks the inferiority requirement that Article III imposes on any lower federal courts that Congress ordains and establishes. If state and federal courts were to be on an equal footing under the Madisonian compromise as tribunals for the adjudication of federal claims, then the state tribunal account sensibly places the two bodies on an equal footing in terms of the degree to which the Court may subject them to supervision and control.

A small but important piece of evidence from the Judiciary Act of 1789 tends to confirm this conception of appointed or constituted state courts as subject to the supervisory powers of the Supreme Court. In section 13 of the Act, Congress empowered the Supreme Court to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed . . . under the authority of the United States."¹⁷⁷ The provision's reference to "appointed" courts may have been meant to extend the reach of the Court's mandamus authority to encompass both the lower federal courts that Congress had established in the Act itself (an act to "establish the Judicial Courts of the United States") and any other courts that were appointed to hear federal claims. One possible function of the provision was to ensure that the Court's mandamus authority would apply to state courts, at least to the extent they were given authority to adjudicate federal claims (as indeed they later were¹⁷⁸).

D. Accounting for the Current Role of the State Courts in the Federal System

Several important changes in the structure of state–federal judicial relations have occurred since the adoption of the Judiciary Act of 1789. Under

¹⁷⁵ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 379–82 (1816) (Johnson, J., concurring) (questioning the Court's power to act directly on the state courts and suggesting instead that the Court's decrees were to be directed to the parties).

¹⁷⁶ See *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895)).

¹⁷⁷ See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73.

¹⁷⁸ See *supra* text accompanying notes 148–151.

section 25 of the Act, the Supreme Court was authorized to review by writ of error decisions in which the state courts denied a right, title, or interest set up under federal law.¹⁷⁹ The writ of error provided review as of right in the Supreme Court, but only where the state courts rejected a claim or defense based upon federal law. This one-way mechanism doubtless reflected some distrust of the state courts: it was not the simple presence of a decisive federal question in the case, but state court rejection of a federal claim or defense that provided the trigger for further review. By way of contrast, the Court could review *any* decision of the federal circuit courts above a specified monetary threshold;¹⁸⁰ review was not limited to situations in which the lower federal court upheld federal claims or denied defenses or titles based upon state law.

Over time, Congress modified the procedure for review of state and federal decisions. The first step in the process of evolution was the introduction of a discretionary appellate jurisdiction. Congress first installed discretionary review for federal courts cases during the Gilded Age, in response to the serious backlog that had developed in the Court's appellate docket.¹⁸¹ The next step was to extend this model of discretion to the review of state court decisions. That occurred in 1914, when Congress first extended the statutory certiorari jurisdiction to review of certain final decisions of the state courts. Later, in 1925, Congress adopted the Judges' Bill, extending discretionary review to virtually all cases coming from the state courts. At about the same time, Congress expanded the scope of appellate review to include any dispositive issue of federal law; the Court was now entitled to review state court decisions that both denied *and upheld* federal claims and defenses. Current law follows this two-way trigger of review: the statute today provides for discretionary review of final state court judgments whenever a federal claim or interest has been "drawn in question"; the statute does not limit review to cases involving a denial of the federal claim.¹⁸²

This change in the model of review, coupled with changes in the Court's own management of its discretionary appellate docket, has fundamentally altered the role of the state courts in the federal system. With the Court granting review in fewer than eighty cases a year, and with only a

¹⁷⁹ See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

¹⁸⁰ Section 22 of the Act provided for review by writ of error of the "final decrees and judgments" of the federal circuit courts where the matter dispute was greater than \$50. *Id.* § 22.

¹⁸¹ In 1860, the Court decided 91 cases, and had some 310 cases pending on its docket. By 1886, the Court's backlog of pending cases had grown to nearly 1400. The Court had responded to the increasing caseload by disposing of more cases each year; it decided 280 in 1870, 365 in 1880, and 451 in 1886. But it was still falling behind; the backlog in 1886 would take the Court three years to clear, even at a disposition rate (unimaginable today) of 400 to 500 cases per year. See Edward A. Hartnett, *Questioning Certiorari: Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650 (2000).

¹⁸² 28 U.S.C. § 1257(a) (2000).

relatively modest number of those cases coming from the state courts, state courts now exercise final authority in virtually every federal question case that comes before them.¹⁸³ To be sure, certain federal question claims that begin in state court may be subject to removal to federal district court, and state criminal proceedings predictably give rise to the assertion of federal constitutional defenses that can eventually lead to post-conviction review by way of federal habeas corpus. But even with these avenues of federal oversight available, state courts play a vastly different role in the adjudication of federal issues than they did during the early Republic. They enjoy far greater decisional independence today than they did two hundred years ago, when any denial of a federal claim gave rise to as-of-right review in the Supreme Court without regard to the amount in controversy.¹⁸⁴

The state tribunal account, with its characterization of state courts as inferior federal tribunals, provides a more accurate portrait of the role of the state courts in our federal system than does the traditional appellate-review model.¹⁸⁵ Under the presumption of concurrent jurisdiction, plaintiffs in civil actions can almost always choose between a state or federal court as the court of first instance for the assertion of a federal claim.¹⁸⁶ Defendants can respond to the plaintiff's selection of state court either by accepting the state forum or by removing the action to federal court. If both parties opt for the state forum, then the state court will in most cases provide the final disposition of all legal questions, state and federal. In state criminal proceedings, federal defenses rarely provide a basis for litigation in federal

¹⁸³ Statistics from a recent five-year period provide a portrait of the limited role of the Supreme Court in reviewing state court decisions. Of some 1900 "paid" petitions for review that the Court receives each year (a figure that excludes the 6000 *in forma pauperis* or prisoner petitions), the Court grants full review in only about 80 cases. See James E. Pfander, *Kobler v. Austria: Expository Supremacy and Member State Liability*, 17 EUR. BUS. L. REV. 275 (2006). Of those 80 cases, roughly 65 come from the federal courts (83%) and the remainder from the state courts (17%). *Id.*

¹⁸⁴ During the most recent reporting year, 2003, state appellate courts (including both the intermediate appellate courts and courts of last resort) disposed of 294,000 cases. See NATIONAL CENTER FOR STATE COURTS, COURT STATISTICS PROJECT, tbl. 1 at 105 (2004). The report does not provide information about the number of cases in which the state appellate court resolved a dispositive issue of federal law, but surely such cases number well into the tens of thousands. By way of comparison, the federal appellate courts disposed of some 56,000 cases during the year ending March 2004. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, tbl. B (2005). Some portion of these decisions would have turned on state law.

¹⁸⁵ Professor Amar's two-tier theory holds that state court decisions on issues of federal law must be subject to appellate review in the Supreme or other federal court. See Amar, *supra* note 17, at 229–30. But the Court today reviews only a fraction of the decisions in which state courts resolve federal questions, a reality that Amar acknowledges as somewhat in tension with his account of Article III. See *id.* at 268–69. The state tribunal account, by contrast, demands not appellate review in every case, but only the possibility of discretionary review sufficient to preserve state court inferiority.

¹⁸⁶ See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER* 109–38 (2d ed. 1990) (discussing the presumption in favor of state concurrency); cf. Bellia, *supra* note 145, 968–69 (2006) (questioning the extent of congressional power over state court jurisdiction).

courts, except in post-conviction proceedings.¹⁸⁷ In both settings, then, it no longer makes sense to think of state courts as acting within the framework of the appellate review model of 1789. Instead, state courts operate more as inferior federal tribunals, comparable to inferior federal courts in being both bound to apply supreme federal law and subject to discretionary review in the Supreme Court.

E. Understanding the Limits of Congressional Power

A brief review of the literature on jurisdiction-stripping reveals some continuing support for the orthodox view of congressional power over the jurisdiction of the federal courts. Orthodoxy holds that Congress has complete control over the jurisdiction of the inferior federal courts, and essentially unrestricted power over the Court's appellate jurisdiction.¹⁸⁸ There have, of course, been challenges to the orthodox view. Two theorists, Clinton and Amar,¹⁸⁹ have advanced the claim that Article III limits the power of Congress to strip the jurisdiction of the federal courts, but their positions have yet to attract broad support within the academy.¹⁹⁰ Others have taken aim at Amar's reading of the text as mandating that the judicial power "shall extend" to specified cases and controversies.¹⁹¹ Still others have offered a detailed reconstruction of the debates that shaped Article III, arguing that the judicial article leaves Congress with control over the extent of federal jurisdiction.¹⁹² On the whole, the orthodox view of Article III appears to have survived the revisionist work of Clinton and Amar.

Of the remaining accounts of the way Article III limits the power of Congress, the most successful account focuses on the unique role that the Supreme Court plays as the head of the judicial department. Beginning with Henry Hart, many scholars have been troubled by the notion that Congress might curtail the "essential role" of the Court by fashioning exceptions and regulations to its appellate jurisdiction.¹⁹³ On this account, which

¹⁸⁷ Removal of state criminal proceedings may occur in cases where federal officials tender official immunity defenses and where individuals charged with crimes cannot enforce their civil rights in state court. See 28 U.S.C. §§ 1442, 1443 (2000). Individual defendants in state criminal proceedings can also seek to enjoin the proceeding as a violation of their federal constitutional rights, but only within very narrow exceptions to the general rule of equitable restraint. See *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁸⁸ For the text of the appellate jurisdiction clause, see *supra* note 34. While Article III confers appellate jurisdiction in "all the other cases," it also qualifies the grant of jurisdiction by subjecting the Court's appellate jurisdiction to such "exceptions and regulations" as the Congress shall make. See *supra* note 3.

¹⁸⁹ See sources cited *supra* note 17.

¹⁹⁰ Professor Meltzer's detailed critique of Amar's account challenges both the textual claim and argues that the two-tier theory departs from the understanding of the Congress that first implemented Article III. See Meltzer, *supra* note 25, at 1573–1602.

¹⁹¹ See Harrison, *supra* note 18, at 207–08; Velasco, *supra* note 18, at 702–04.

¹⁹² See Liebman & Ryan, *supra* note 18, at 712–60.

¹⁹³ See Hart, *supra* note 7, at 1365.

remains fairly open-ended, Congress may have power to regulate appellate jurisdiction, but such restrictions may not go so far as to impair the Court's essential function. The most complete statement of the essential function thesis appears in the work of Professor Ratner, who argues that Congress may not impede the Court's role in ensuring the uniform and effective enforcement of federal law.¹⁹⁴ Such an approach, by emphasizing the need for uniformity, would apparently ensure Supreme Court review in all matters as to which the lower courts (state and federal) developed differences of opinion as to the meaning of federal law.¹⁹⁵

Note that these theorists suggest a range of limits on the scope of congressional power. Some consider the judicial power as a whole, and suggest that either the lower federal courts or the Supreme Court must hear federal question claims.¹⁹⁶ Others, like Ratner, focus on the jurisdiction of the Supreme Court (and seemingly assume that Congress may exercise broad control over the lower federal courts). Efforts to strip jurisdiction of both the inferior federal courts and the Supreme Court present a graver threat to the preservation of an independent Article III judiciary. Some, indeed, have gone so far as to suggest that zoning constitutional claims out of the Article III courts would tend to burden the enforcement of the rights at issue and would violate the Constitution on that basis.¹⁹⁷ But such an argument depends heavily on the claim that litigation of federal claims in the state courts represents an unconstitutional burden on their enforcement, a claim hard to square with the Madisonian compromise and its assumption that the state courts may play a role as equal partners in the adjudication of federal claims.¹⁹⁸

The state tribunal account identifies a significant textual limit on the power of Congress while permitting Congress to rely on the state courts under the Madisonian compromise and to fashion exceptions and regulations to the Court's appellate jurisdiction. Congress may rely upon the state courts by assigning them jurisdiction over federal causes of action, thereby constituting them as inferior tribunals within the meaning of Article I. Congress may also qualify the Supreme Court's appellate jurisdiction by creating exceptions to the Court's as-of-right authority to review state court decisions. But Congress must preserve a measure of supreme judicial oversight, oversight sufficient to maintain the Court's supremacy in relation to the inferior tribunals. At a minimum, the Court must retain the power to

¹⁹⁴ See Ratner, *supra* note 19, at 201–02.

¹⁹⁵ My earlier contribution to the debate emphasizes the Article III requirement that Congress preserve the “inferiority” of all inferior federal courts in relationship to the “supremacy” of the one Supreme Court identified in the Constitution. See Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1457–59.

¹⁹⁶ See Amar, *supra* note 17, at 211–59.

¹⁹⁷ See Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. REV. 129, 141–42 (1981).

¹⁹⁸ See *H&W V*, *supra* note 8, at 335.

review state court decisions through the exercise of the supervisory writs of mandamus, habeas corpus, and prohibition.

The state tribunal account adds two elements to the claim that the Court's power to review state court decisions would survive jurisdiction curtailment by Congress. First, the account has the advantage of providing a textual predicate for the obligation of Congress to preserve supreme judicial review of state courts.¹⁹⁹ Second, the state tribunal account may also provide a more determinate test with which to assess the legality of jurisdiction-stripping measures. Rather than focus on whether the legislation threatens the essential role of the Supreme Court, the state tribunal account would invite the Court to consider whether the legislation preserves the state courts' inferiority in relation to the Supreme Court. Inferiority, in turn, has long been defined in terms of the power of the superior court to oversee the processes of the lower court through the use of supervisory writs. Such writs enable the Court to confine the lower court within the boundaries of its proper authority, to correct clear errors in the application of federal law, and to insist that the state courts give effect to the Court's mandates.²⁰⁰

III. JURISDICTION STRIPPING AND THE STATE TRIBUNAL ACCOUNT

The state tribunal account provides a firm basis for questioning the constitutionality of the latest crop of jurisdiction-stripping legislation. The Pledge Protection Act, the Marriage Protection Act, the Sanctity of Life Act, and the Constitution Restoration Act all include provisions that would deprive the inferior federal courts of jurisdiction to entertain certain federal claims.²⁰¹ But although the bills would bar the federal district courts from hearing constitutional challenges, they would leave state court dockets intact. As noted above, state courts enjoy presumptive jurisdiction over federal rights of action under *Tafflin v. Levitt*²⁰² and cannot refrain from hearing such claims under *Testa v. Katt*²⁰³ unless they tender a valid excuse. Practically speaking, then, the bills confer exclusive original jurisdiction on the state courts.

Such grants of exclusive original jurisdiction should be regarded as constituting the state courts as federal tribunals within the meaning of Article I. To be sure, the legislation does not make a formal proclamation of its

¹⁹⁹ Scholars have criticized the essential function claim of Professors Hart and Ratner on the ground that it lacks any textual predicate and thus fails to provide a constitutional basis for restricting Congress's unqualified power under the exceptions and regulations clause. See Wechsler, *supra* note 16, at 1005.

²⁰⁰ In addition, the common law writ of certiorari (available under the All Writs Act) entitles the superior court to correct non-jurisdictional errors. See *McClellan v. Carland*, 217 U.S. 268, 278 (1910).

²⁰¹ For a description of these bills, see *supra* notes 1–4, 13.

²⁰² 493 U.S. 455 (1990).

²⁰³ 330 U.S. 386 (1947).

intention to constitute state courts as federal tribunals. Moreover, Congress may well have power under the Madisonian compromise to exercise discretion in assigning claims as between the state and federal courts. But as Hamilton recognized in *The Federalist No. 81*, to confer jurisdiction on the state courts over federal claims would be as much to constitute them as federal tribunals as to create federal courts with a like power.²⁰⁴ Hamilton's comment suggests that Article I provides the framework for analyzing the assignment of jurisdiction to the state courts. Such assignments, particularly those that operate exclusively of the lower federal courts, should be regarded as a constitution of the state courts as federal tribunals.²⁰⁵

If the legislation operates to constitute state courts as federal tribunals, then it would appear to present two serious constitutional issues under Article I's inferiority requirement. As we have seen, the inferiority requirement compels state courts to apply the decisional law of the Supreme Court. Legislation purporting to eliminate this obligation would apparently violate Article I. Second, the inferiority requirement obligates Congress to respect the Court's ability to control subordinate tribunals through the issuance of the common law writs. To the extent the legislation would foreclose the Court from exercising judicial oversight of the state courts as to the claims in question, it would violate the requirement that the Court remain supreme in relation to all inferior courts and tribunals.

CONCLUSION

In exploring Congress's power to rely upon state courts to hear federal claims, this Essay has developed what it has called a state tribunal account. The account developed here helps to resolve a number of problems in the literature of judicial federalism. For one thing, the account would clarify that Congress may appoint state courts to hear federal question claims by constituting them as inferior tribunals under Article I. As Hamilton explained, this power of constitution may extend to matters that others portrayed as exclusively federal. Second, the account clarifies that state courts, when acting as federal tribunals, must remain inferior to the Supreme Court, respecting the Court's precedents and acting within the boundaries set by their judicial superior. The account casts doubt on the constitutionality of the latest generation of jurisdiction-stripping bills. If such bills were enacted, the Court could plausibly resist them by invoking its constitutional supremacy in relation to the state courts and its power under the All Writs

²⁰⁴ See *supra* text accompanying note 104.

²⁰⁵ A grant of exclusive jurisdiction to state courts represents a clear example of congressional constitution of state courts as tribunals to which the obligations of inferiority apply. It may make sense to extend the obligation of inferiority to situations in which Congress authorizes state courts to exercise concurrent jurisdiction as well, but the jurisdictional legislation before Congress does not present such a situation.

Act.²⁰⁶ State courts that openly refused to give effect to the Court's precedents would be subject to summary reversal.

If one steps back from the immediate debate over this legislation, it becomes clear that Congress has, to a degree often overlooked, already exercised its power to fashion exceptions and regulations to the Supreme Court's appellate jurisdiction. As-of-right appellate review of state court decisions ended over eighty years ago, with Congress substituting a form of judicial supervision based upon the statutory writ of certiorari. Legislation now before Congress to restrict the Court's jurisdiction represents less a regulation of its appellate jurisdiction than a challenge to the constitutional requirement that state courts, when constituted as federal tribunals, remain inferior to the Supreme Court.

²⁰⁶ Use of the tools of supervision may enable the Court to avoid these questions. The All Writs Act provides the Court with a statutory source of supervisory power that encompasses virtually any form of supervisory writ that one can fairly characterize as invoking its appellate jurisdiction. Under established law, writs serve an appellate function so long as they seek to revise or correct the decisions of a lower court. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803); Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1484–87 (providing an account of *Marbury's* distinction between original suits (which create the cause) and appellate proceedings that seek to revise and correct the proceedings of an inferior tribunal in a cause already constituted). The Court might thus respond to legislation that seeks to qualify or curtail its statutory certiorari jurisdiction by invoking its power under the All Writs Act. The Act's provision for the Court to issue all writs necessary for the exercise of its jurisdiction can best be understood as providing a free-standing source of appellate jurisdiction that directly implements the Court's constitutional grant of appellate jurisdiction in Article III. See Pfander, *Jurisdiction-Stripping*, *supra* note 24, at 1494–98. So understood, the jurisdiction conferred in the All Writs Act would survive restrictions on other statutory sources of appellate jurisdiction and would be available to ground the Court's ongoing oversight of state courts in the wake of the adoption of jurisdiction-stripping legislation.