ESSAY

THE UNITARY EXECUTIVE, JURISDICTION STRIPPING, AND THE *HAMDAN* OPINIONS: A TEXTUALIST RESPONSE TO JUSTICE SCALIA

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In Hamdan v. Rumsfeld, *a five to three majority of the United States Supreme Court held unlawful the Bush Administration's use of military commissions to try alien combatant detainees held at the United States airbase in Guantanamo Bay, Cuba. The most basic issue in* Hamdan *was whether the Supreme Court had jurisdiction to hear the case. Justice Scalia's dissenting opinion argued that the Detainee Treatment Act of 2005 stripped the Supreme Court and all other courts of jurisdiction to hear habeas cases such as Hamdan's.*

Hamdan argued in the Supreme Court that to read the Detainee Treatment Act to strip jurisdiction over pending habeas cases, as Justice Scalia did, would raise constitutional questions about Congress's power to limit the Supreme Court's appellate jurisdiction. The Hamdan *majority did not address this constitutional question because it read the Detainee Treatment Act to preserve jurisdiction over pending cases. But Justice Scalia's construction of the statute required him to address Hamdan's constitutional claims. He casually dismissed concerns about Congress's power to strip the Supreme Court's jurisdiction by reference to the Exceptions Clause of Article III, § 2, which he viewed as an explicit authorization for Congress to limit the Court's jurisdiction. While Justice Scalia may have been right on the specific facts of* Hamdan*, his broader claims about Congress's power to strip jurisdiction from the Supreme Court are textually wrong.*

Simply put, Article III requires that the federal judiciary be able to exercise all of the judicial power of the United States that is vested by the Constitution and that the Supreme Court must have the final judicial word in all cases, such as Hamdan's, that raise federal issues. These conclusions flow quite naturally from an originalist methodology that looks to the objective meaning of the Constitution that would have been held by a hypothetical

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reasonable observer in 1788 and that relies primarily on textual, intratextual, and structural arguments. Ironically, one can make a strong case for Justice Scalia's view of congressional power to control Supreme Court jurisdiction using legislative history and consequentialist arguments—tools that Justice Scalia normally abjures. But the more one focuses on formalist arguments from text and structure, the more clear it becomes that the Supreme Court is constitutionally vested with the final judicial say on matters within (at least the first three of) the heads of jurisdiction granted to the federal courts in Article III.

Relying on textual, intratextual, and structural arguments, this Essay argues that, in the same way that the Constitution vests all of the executive power of the United States in a unitary executive department, the Constitution vests all judicial power in the federal judiciary, with the Supreme Court having supervisory power over all other inferior tribunals within the judicial department. While the Constitution leaves Congress with the option of creating or not creating lower federal courts, it does not give Congress the option of creating or designating lower federal courts over which the Supreme Court does not, at the end of the day, have the last word.

INTRODUCTION

In *Hamdan v. Rumsfeld*, a five to three majority of the United States Supreme Court held unlawful the Bush Administration's use of military commissions to try alien combatant detainees held at the United States airbase in Guantanamo Bay, Cuba—at least until and unless Congress enacted more specific authorization for the composition and procedures of the commissions.[1] There are many features of the Court's opinion that we find questionable: its analysis of the wartime scope of the "executive

1. See 126 S. Ct. 2749, 2808 (2006) (Kennedy, J., concurring in part) ("[A]s presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority . . . . Because Congress has prescribed these limits, Congress can change them . . . ."). The commissions were authorized by presidential order on November 13, 2001, see Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833–36 (Nov. 13, 2001), and the procedures for the commissions were established by order of Secretary of Defense Rumsfeld on March 21, 2002, and revised on August 31, 2005. See Dep't of Def., Military Commission Order No. 1 (Aug. 31, 2005), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, codified at 32 C.F.R. § 9 (2006). In the fall of 2006, Congress enacted what many assume the Court will acknowledge as the necessary authorization. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Professor Calabresi had originally thought that the provision for military commission trial of the Guantanamo detainees was permissible, but he has now come to the conclusion that the question is unclear. He thinks that aliens resident in the United States, its territories, and the leasehold property belonging to the United States (which includes the base at Guantanamo) enjoy the same constitutional rights as do citizens except that they may not be elected to be Representatives, Senators, Vice President, or President. Cf. Gerald L. Neuman, Strangers to the Constitution 52–63 (1996) (describing debate over rights of aliens in early American history). If this is correct, then the Guantanamo detainees are entitled to the privilege of the writ of habeas corpus, unless Congress has validly suspended the writ (which it may have done because Guantanamo was recently the scene of a prisoner rebellion).

Power"[2] vested in the President by Article II of the Constitution,[3] its construction of the statutes that supposedly limit the President's power to create and empower military commissions,[4] its interpretation and application of treaty provisions,[5] its understanding of the scope of the Authorization for Use of Military Force passed after the September 11th terrorist attacks,[6] and its understanding of the appropriate role of courts when reviewing military decisions in times of war.[7] The most basic issue in *Hamdan*, however, was whether the Supreme Court even had jurisdiction to hear the case. Justice Scalia's dissenting opinion vigorously argued that the Detainee Treatment Act of 2005, which declared that "no court, justice, or judge shall have jurisdiction to hear or consider . . . [inter alia] an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba"[8] as of the statute's effective date of December 30, 2005,[9] stripped the Supreme Court and all other courts of jurisdiction to hear habeas cases such as Hamdan's.[10] If this is correct, the opinion in *Hamdan* should not have addressed any other issues.

Professor Calabresi also thinks, as does Professor Lawson, that the Constitution requires the use of Article III courts when judicial power is exercised in the territories or leaseholds belonging to the United States. Since military commissioners lack life tenure and are being asked to punish the Guantanamo detainees, Professor Calabresi thinks the Military Commissions Act may well be unconstitutional insofar as it allows the judicial punishment of the Guantanamo detainees, assuming the writ has not been validly suspended. He further notes that the detention of alien enemy combatants apprehended on the battlefield for substantial periods of time is not a punitive act requiring an exercise of judicial power but is rather an exercise of the President's executive power to protect the nation. Indeed, after World War II some alien enemy combatants were detained on U.S. bases for as long as ten years after the conclusion of the war, and none of them were ever held to have habeas rights. See Johnson v. Eisentrager, 339 U.S. 763, 777–79 (1950) (denying habeas relief to prisoners held abroad).

2. U.S. Const. art. II, § 1, cl. 1.

3. For a brief account of how the executive power functions, and expands, in wartime under the Constitution of 1788, see Gary Lawson, Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis, 87 B.U. L. Rev. (forthcoming 2007) (on file with the *Columbia Law Review*) [hereinafter Lawson, Crisis].

4. For a detailed critique of the Court's interpretation of these statutes, see *Hamdan*, 126 S. Ct. at 2840–42 (Thomas, J., dissenting).

5. See id. at 2850–54 (Alito, J., dissenting).

6. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). For a detailed analysis of the Authorization, see generally Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047 (2005).

7. See Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2006) (defending strong rule of judicial deference to executive decisions in times of crisis on historical and policy grounds); Lawson, Crisis, supra note 3 (manuscript at 9–21) (grounding Posner/Vermeule thesis in Constitution's original meaning).

8. Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (to be codified as amended at 28 U.S.C. § 2241(e)(1)).

9. See id. § 1005(h)(1), 119 Stat. at 2743.

10. See *Hamdan*, 126 S. Ct. at 2810 (Scalia, J., dissenting).

Hamdan argued in the Supreme Court that to read the Detainee Treatment Act to strip jurisdiction over pending habeas cases, as did Justice Scalia, "raises grave [constitutional] questions about Congress' authority to impinge upon this Court's appellate jurisdiction."[11] The *Hamdan* majority did not need to address this constitutional question because it (wrongly, in our view) read the Detainee Treatment Act to preserve jurisdiction over pending cases,[12] but Justice Scalia's construction of the statute required him to address Hamdan's constitutional claims. He casually dismissed the possibility of any "lurking questions"[13] about Congress's power to strip the Supreme Court's jurisdiction "in light of the aptly named '*Exceptions* Clause' of Article III, § 2, which, in making our appellate jurisdiction subject to 'such Exceptions and under such Regulations as the Congress shall make,' explicitly permits exactly what Congress has done here."[14] We think that while Justice Scalia may have been right on the specific facts of *Hamdan*,[15] his broader claims about Congress's power to strip jurisdiction from the Supreme Court are textually wrong.

Simply put, Article III requires that the federal judiciary be able to exercise *all* of the judicial power of the United States that is vested by the Constitution and that the Supreme Court must have the final judicial word[16] in *all* cases, such as Hamdan's, that raise federal issues. These conclusions flow quite naturally from an originalist methodology that looks to the objective meaning of the Constitution that would have been held by a hypothetical reasonable observer in 1788 and that relies primarily on textual, intratextual, and structural arguments.[17] Ironically,

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11. Id. at 2764 (majority opinion).

12. See id. at 2764–69. While we take serious issue with Justice Scalia's constitutional analysis in *Hamdan*, we agree with his reading of the Detainee Treatment Act, the language of which pretty clearly purports to deprive federal courts of habeas jurisdiction over cases filed before December 30, 2005.

13. Id. at 2819 (Scalia, J., dissenting).

14. Id.

15. Our residual doubts about the proper resolution of the jurisdictional issues in *Hamdan* stem from considerations external to the broad concerns about jurisdiction stripping on which we focus in this Essay. See infra text accompanying notes 30–38.

16. We emphasize strongly the word "judicial." We *do not* mean to suggest that the Supreme Court must have the final word with respect to the executive and legislative departments. To the contrary, we have both long maintained that the interpretative powers of the Supreme Court, the President, and the Congress are all coequal and coordinate. See Steven G. Calabresi, Thayer's Clear Mistake, 88 Nw. U. L. Rev. 269 (1993); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1270 (1996) (defending departmentalist claim that each branch of government has "an obligation, in the exercise of its granted powers, to interpret and apply the Constitution"). Our point goes only to the relationship between the Supreme Court and other federal courts.

17. For descriptions and defenses of this methodology from different but complementary directions, see Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 551–59 (1994); Gary Lawson & Guy Seidman, Originalism as a Legal Enterprise, 23 Const. Comment. 47 (2006) [hereinafter Lawson & Seidman, Originalism]. Professor Calabresi, unlike Professor

one can make a strong case for Justice Scalia's view of congressional power to control Supreme Court jurisdiction using legislative history and consequentialist arguments—tools that Justice Scalia normally abjures. But the more one focuses on formalist arguments from text and structure, the more clear it becomes that the Supreme Court is constitutionally vested with the final judicial say on matters within (at least the first three of) the heads of jurisdiction granted to the federal courts in Article III.

Justice Scalia has famously argued, as have we, that the Vesting Clause of Article II constitutionally vests all of the "executive Power" of the United States[18] in a President, who personally stands at the apex of a unitary executive department and exercises supervisory power over all subordinates within his department.[19] Similarly, the Vesting Clause of Article III vests the federal judiciary with *all* of the federal judicial power, and by designating the Supreme Court as "Supreme" and other federal tribunals as "inferior to" the Supreme Court, the Constitution requires the Supreme Court to have supervisory power over all subordinates within its department.[20] Justice Scalia made precisely such an argument

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Lawson, thinks that a practice long accepted by all three branches of the federal government can become a binding precedent as to constitutional meaning where the text is ambiguous. He does not think the text of Article III discussed herein is ambiguous, and he would thus interpret it according to its original plain public meaning. He notes moreover that since 1875 Congress has read Article III the way we argue it ought to be read in this Essay and that therefore there are no reliance interests upset by adopting a formal originalist reading of the text. See infra Part III.

18. The Article II Vesting Clause does not specify that the "executive Power" vested in the President is the executive power of the United States. Cf. U.S. Const. art. III, § 1 (referring to "judicial Power of the United States"). But as a default rule, the Federal Constitution refers only to federal powers or institutions unless it specifically says otherwise—which is why the Bill of Rights in 1791 did not apply to the States notwithstanding the generality of Amendments II–IX, see Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 251 (1833), and why Article II does not make the President the Chief Executive of Illinois or Massachusetts.

19. See, e.g., Morrison v. Olson, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) ("[T]he Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power."); Calabresi & Prakash, supra note 17, at 551–59; Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1176–79 (1992); Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377, 1401 (1994) [hereinafter Calabresi, Vesting] ("Congress's tremendous power to create, abolish, or restructure the whole panoply of governmental offices below the President and Vice President does not include a power to free those officers from their constitutional boss."); Gary Lawson & Guy Seidman, The Jeffersonian Treaty Clause, 2006 U. Ill. L. Rev. 1, 22–43 [hereinafter Lawson & Seidman, Treaty Clause] (discussing significance of Constitution's three vesting clauses for each federal department).

20. See Laurence Claus, The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III, 96 Geo. L.J. (forthcoming 2007) (on file with the *Columbia Law Review*) (identifying ultimate decisional authority as key element of "supreme"); James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 648–49 (2004) [hereinafter Pfander, Judicial Power] (discussing Framers' decision to create unitary judicial department).

in the context of Article II in *Edmond v. United States*, which established that an officer can only be "inferior" for purposes of the Appointments Clause[21] if he or she has an effective superior.[22] Similarly, a federal court can be an "inferior" court only if it is subject to review and correction by a superior. If Congress were, for example, to vest final jurisdiction over military detention cases from Guantanamo Bay in the D.C. Circuit (or final jurisdiction over some category of federal cases in the state courts) without the possibility of Supreme Court review, it would be akin to Congress vesting prosecutorial authority in a special prosecutor without the possibility of presidential review. Such a special prosecutor, as Justice Scalia famously argued in *Morrison v. Olson*, would not be an inferior officer and would improperly wield a portion of the "executive Power" that is constitutionally vested in the President.[23] Similarly, a lower court not ultimately answerable to the Supreme Court would not be "inferior" and would improperly wield a portion of the "judicial Power" that belongs to the Supreme Court. Thus, while the Constitution leaves Congress with the option of creating or not creating lower federal courts, it does not give Congress the option of creating or designating lower federal courts over which the Supreme Court does not, at the end of the day, have the last word.

In Part I of this Essay, we sketch Congress's constitutional power to structure the federal courts. We identify the restraints placed on that power by the Vesting Clause of Article III and by the Constitution's use of "supreme" and "inferior" to describe different kinds of federal courts. While there are strong historical and consequentialist reasons to read those terms to allow the creation of "inferior" courts that have the last judicial word on various questions, the weight of textual, intratextual, and structural arguments points toward a hierarchical federal judiciary with the Supreme Court at the apex.[24] In particular, the term "inferior" in the Appointments Clause and "supreme" in the Supremacy Clause are best understood to describe hierarchical relationships, which points strongly toward a hierarchical understanding of the identical terms in Articles I and III.

In Part II, we show that, contrary to Justice Scalia's suggestion, the Exceptions Clause does not provide authority for altering this structure.

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21. U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law 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.").

22. 520 U.S. 651, 662–64 (1997).

23. 487 U.S. at 697, 715–23 (1988) (Scalia, J., dissenting). The majority in *Morrison* disagreed and concluded that the special prosecutor was indeed an inferior officer. See id. at 670–73 (majority opinion). We think that the *Morrison* Court's conclusion was completely absurd, and we think that history (not to mention an 8-1 majority in *Edmond*) has vindicated our and Justice Scalia's position.

24. This portion of our analysis develops ideas that we briefly foreshadowed fifteen years ago. See Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the *Harris* Execution, 102 Yale L.J. 255, 273–75 (1992).

As David Engdahl has convincingly demonstrated, the Exceptions Clause is not a grant of power to Congress at all but is instead a reference to power that is granted by the so-called Necessary and Proper Clause[25]—or, as the founding generation called it, the Sweeping Clause.[26] That power, in turn, does not authorize Congress to deprive the Supreme Court of jurisdiction over constitutionally granted subject matter. Rather, the "Exceptions" referenced in the Exceptions Clause are instances where Congress has made an "Exception[ ]" to the Supreme Court's *appellate* jurisdiction by instead granting it *original* jurisdiction. In other words, the Sweeping Clause and Article III permit Congress to move cases back and forth between the Supreme Court's original and appellate jurisdiction but not to remove cases from that jurisdiction altogether.[27]

This latter conclusion, of course, flies in the face of *Marbury v. Madison*'s holding that the Constitution's grants of original jurisdiction to the Supreme Court are exclusive.[28] Accordingly, in Part III we show that *Marbury* was wrong on this point.[29] We further argue that neither precedent nor practice trumps the original meaning of the constitutional text with regard to jurisdiction stripping.

As it happens, the Detainee Treatment Act at issue in *Hamdan* might not violate correct constitutional understandings of Congress's power to structure the federal courts, though a full resolution of this question involves issues beyond the scope of this Essay. While the statute takes away habeas jurisdiction,[30] the statute specifically grants to the D.C. Circuit power to review the government's determination of the status of detainees[31] and also "any final decision rendered"[32] by a Guantanamo military commission, including:

> (i) whether the final decision was consistent with the standards and procedures specified in the military order . . . ; and (ii) to

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25. See David E. Engdahl, Intrinsic Limits of Congress' Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 119–32 [hereinafter Engdahl, Intrinsic Limits].

26. See, e.g., The Federalist No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to "the sweeping clause, as it has been affectedly called").

27. Professor Claus has reached the same conclusion by focusing on the drafting, ratification, and early judicial history of Article III, and we view his arguments as strongly complementary to our textual and structural analysis. See Claus, supra note 20. The idea that Article III specifies a constitutional minimum for the Supreme Court's original jurisdiction, to which Congress can add by shifting cases from appellate to original jurisdiction, has been part of the Article III dialogue since William Van Alstyne's classic discussion in 1969, see William W. Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1, 31–33, but for reasons that we do not fully understand, the idea has not thus far gained much traction in the academic community.

28. See 5 U.S. (1 Cranch) 137, 173–75 (1803).

29. We accordingly disavow our earlier reliance on this aspect of *Marbury* as precedent. See Calabresi & Lawson, supra note 24, at 272.

30. Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (2005) (to be codified as amended at 28 U.S.C. § 2241(e)(1)).

31. Id. § 1005(e)(2), 119 Stat. at 2742 (to be codified as amended at 28 U.S.C. § 2241(e)(2)).

32. Id. § 1005(e)(3)(A), 119 Stat. at 2743.

> the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.[33]

The statute does not purport to take away the Supreme Court's general power to review D.C. Circuit decisions by certiorari,[34] so the Supreme Court has the final judicial say as to the legality of actions of the Guantanamo military commissions. Congress has substituted one judicial remedy, with the Supreme Court at the end of the trail, for another. One can, we suppose, argue as an original matter that a suspension of habeas corpus under the Constitution can occur even when a substitute remedy is provided.[35] Alternatively, one could argue that the *delay* in review occasioned by the substitution of post-decision review for habeas review[36] is itself a constitutional violation.[37] Thus, while the Detainee Treatment Act does not present an unalloyed example of jurisdiction stripping, it may slide into that category through the back door. If it does, it may well be unconstitutional *if* the writ of habeas corpus must be universally available to all persons—another question on which we express no view.[38]

Our analysis in this Essay is shaped by the principles of objective-meaning textualism that we learned from clerking for Justice Scalia, and for that reason we dedicate this Essay to him. One can disagree with giants even when standing on their shoulders.

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33. Id. § 1005(e)(3)(D), 119 Stat. at 2743.

34. See 28 U.S.C. § 1254(1) (2000).

35. Case law holds that there is no suspension of the writ when Congress instead provides an alternative remedy. See, e.g., Swain v. Pressley, 430 U.S. 372, 381 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."). We offer no opinion on whether this is a sound construction of the Suspension Clause.

36. Under the Detainee Treatment Act, review is postponed until there has been a determination by a military commission. See § 1005(e)(3)(A), 119 Stat. at 2743. Justice Scalia was unmoved by this concern. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2819 n.7 (2006) (Scalia, J., dissenting) ("[I]t is unclear . . . that delay would inflict any injury on petitioner, who . . . is *already* subject to indefinite detention under our decision in *Hamdi v. Rumsfeld*.").

37. Could Congress, for instance, impose a thirty day waiting period on the effectiveness of any presidential pardon to give the President a chance to reconsider? Such a statute would not disable the pardon power but would merely delay its effect. We are quite confident that such a statute is unconstitutional. Whether there is a material difference between such a statute and a statute delaying the exercise of jurisdiction constitutionally vested in the Supreme Court is not obvious.

38. Professor Calabresi is of the view that the writ of habeas corpus must be universally available to all persons resident in the domestic United States but not to aliens held outside the United States. Accord Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006). Whether the U.S. military base at Guantanamo is within the United States for these purposes is a question beyond the scope of this Essay. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (holding that Guantanamo Bay is within sovereignty of Cuba rather than United States and that right to habeas corpus extends only to American sovereign territory).

I. Congress and Judicial Structure

A. *Some Structural Basics*

The Constitution directly creates very few of the federal institutions that govern everyday life. It creates, and provides detailed rules for the selection and removal of members of the House[39] and the Senate,[40] the President, and the Vice President.[41] Although the Constitution assumes that there will be officers of the House and Senate,[42] heads of executive departments[43] (specifically including a Treasury department),[44] "Ambassadors [and] other public Ministers and Consuls,"[45] and various other "Officers of the United States,"[46] it does not itself create any of these legislative or executive offices. Rather, it is left to Congress to create (or not to create) these institutions pursuant to its power 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."[47] If Congress created no executive departments or officers, it would be foolish beyond measure, but (with one possible exception) it would not be strictly unconstitutional.[48]

What about the federal courts? The Article III Vesting Clause provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[49] This clause constitutionally creates the Supreme Court, in the same way that the Article I Vesting Clause creates Congress, the Article II Vesting Clause creates the President, and Article II, Section 1, Clause 3 creates the Vice President. The existence of "inferior Courts" is conditional on congressional action, but the existence of the Supreme Court is not. Nothing in Article III, of course, spells out the size or other details of the Supreme Court (although the Impeachment Clause indicates that there must be a Chief

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39. See U.S. Const. art. I, § 1; id. art. I, § 2, cls. 2–4; id. art. I, § 4, cl. 1; id. art. I, § 5, cl. 1; id. art. I, § 6, cl. 2.

40. See id. art. I, § 3, cls. 1–3; id. art. I, § 4, cl. 1; id. art. I, § 5, cl. 1; id. art. I, § 6, cl. 2; id. amend. XVII.

41. See id. art. II, § 1; id. amends. XII, XX, XXII–XXIII, XXV.

42. See id. art. I, § 2, cl. 5; id. art. I, § 3, cl. 5.

43. See id. art. II, § 2, cl. 2.

44. See id. art. I, § 9, cl. 7.

45. Id. art. II, § 2, cl. 2.

46. Id.

47. Id. art. I, § 8, cl. 18.

48. The possible exception involves the Treasury. The Constitution mandates that the President and federal judges receive compensation. See id. art. II, § 1, cl. 7; id. art. III, § 1. It also provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Id. art. I, § 9, cl. 7. In order for the President and courts to receive their constitutionally mandated compensation, it therefore seems necessary for Congress to create a treasury out of which those salaries can be paid.

49. Id. art. III, § 1.

Justice to preside over presidential impeachment trials[50]); those matters are left to Congress under the Sweeping Clause. Thus, Article III is not self-executing in the same sense as Articles I and II.[51] Congress and the President, through the lawmaking and appointment power, must act in order to make the Supreme Court a functioning reality. But they are constitutionally *obliged* to act to bring a Supreme Court, with at least one member styled the Chief Justice, into existence.[52]

If the Article III Vesting Clause were the Constitution's only reference to federal courts, it could conceivably be read by inference to authorize Congress to create inferior federal courts. As it happens, however, Article I includes a prior and more specific authorization among the primary powers delegated to Congress: It declares that Congress shall have power "[t]o constitute Tribunals inferior to the Supreme Court."[53] Thus, when Article III speaks of "such inferior Courts as the Congress may from time to time ordain and establish," it is referring to courts that Congress can constitute pursuant to its specific—and textually prior—Article I power. The "inferior courts" language in Article III is a cross-reference rather than a power grant.

These two provisions regarding inferior courts present several distinct textual puzzles. First, there is no specifically targeted constitutional authorization for Congress to create executive officers inferior to the President; the power to create executive officers is part of Congress's general power under the Sweeping Clause to implement all other federal powers. So why does the Constitution contain a specific provision allowing Congress to "constitute" tribunals inferior to the Supreme Court but no such provision for inferior executive officers? Second, the Constitution does not ever say precisely that Congress may "create" inferior federal courts. Rather, the Article I Tribunals Clause vests the power to "*constitute* Tribunals inferior *to* the Supreme Court." The Article III Vesting Clause then refers, not to tribunals that have been "constitute[d]," but instead to "such inferior Courts as the Congress may from time to time *ordain and establish*." Is there some significance to this difference in language between the Tribunals Clause and the Article III Vesting Clause? Third, the Tribunals Clause, as its name indicates, refers to "Tribunals," while Article III speaks of "Courts." Do these terms describe different legal entities?

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50. See id. art. I, § 3, cl. 6.

51. See Engdahl, Intrinsic Limits, supra note 25, at 81–82 (comparing Article III to Articles I and II and concluding that Article III "cannot be considered 'self-executing'").

52. In one arcane sense, Articles I and II are no more self-executing than is Article III. A Congress and President exist only if people elect them. If an election was held and nobody came, no one would be authorized to act as Congress or the President.

53. U.S. Const. art. I, § 8, cl. 9. Congress's power to specify the size and term of the Supreme Court, in contrast, flows from the Sweeping Clause which also grants Congress some power over the Supreme Court's original and appellate jurisdiction as we explain below. See infra Part II.

We will shortly offer some answers to these puzzles,[54] but first we must briefly look at the power vested by the Constitution in the federal judiciary. Both of us have extensively argued in prior scholarship that the Vesting Clauses of Articles II and III, unlike the Vesting Clause of Article I, are best read as grants of power to the President and the federal courts, respectively.[55] We will not rehearse those lengthy arguments here, though they form an essential predicate to everything else that we argue in this Essay. Indeed, the *only* power directly granted to the federal courts by the Constitution is the "judicial Power" granted by the Article III Vesting Clause. Other clauses give the Chief Justice power to preside over presidential impeachment trials[56] and authorize the "Courts of Law" to receive from Congress statutory power to appoint inferior officers,[57] but no other clauses of the Constitution give power directly to the federal courts as an institution. Thus, the only power constitutionally vested in federal courts is the judicial power to decide cases in accordance with governing law,[58] along with any powers (such as the power to identify and interpret governing law) that are incidental to that primary power.[59] Sec-

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54. See infra Part I.C.

55. See Calabresi & Prakash, supra note 17, at 570–71; Calabresi & Rhodes, supra note 19, at 1175–79; Calabresi, Vesting, supra note 19, at 1389–400; Lawson & Seidman, Treaty Clause, supra note 19, at 22–43. The relevant definition from Samuel Johnson's *Dictionary of the English Language* defines "vest" as meaning: "3. To make possessor of; to invest with." Samuel Johnson, A Dictionary of the English Language (photo. reprint 1990) (1755). The examples given in the dictionary are: "'To settle men's consciences, 'tis necessary that they know the person, who by right is vested with power over them.' Locke. 'Had I been vested with the monarch's pow'r,—Thou must have sigh'd, unlucky youth! In vain.' Prior." Id.

The word "vest" here comes from the Latin word "vestire" which means to clothe, as with the robes of office. The official in question is clothed with "vestments" from the Latin "vestis" which means garment or clothing. Thus the ceremony of empowering a judge or a church official is called an "investiture" and is one where the judge's or church official's robes of office are placed on him to symbolize his being clothed with the powers of his office. See The Barnhart Dictionary of Etymology 1201 (Robert K. Barnhart ed., 1988).

56. U.S. Const. art. I, § 3, cl. 6.

57. Id. art. II, § 2, cl. 2. The Supreme Court has held that some administrative bodies that are not constituted as Article III courts qualify as "Courts of Law" under this provision. See Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 888–90 (1991). As Justice Scalia demonstrated in his concurrence in *Freytag*, that holding is flatly wrong. See id. at 901–02, 909–11 (Scalia, J., concurring).

58. See Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 202–03 (2001) [hereinafter Lawson, Controlling Precedent]; Lawson & Moore, supra note 16, at 1273–74.

59. For thoughtful looks at what other incidental powers federal courts might have by virtue of the grant of the judicial power, see Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 353–66 (2006) (arguing that Constitution does not grant Supreme Court supervisory power over inferior courts); James E. Pfander, Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1500–11 (2000) [hereinafter Pfander, Jurisdiction-Stripping] (arguing for supervisory powers of Supreme Court that may prevent Congress from jurisdiction stripping); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 843–66 (2001) (explaining powers of federal courts).

tion 2 of Article III further specifies that this judicial power "shall extend"[60] to nine categories of disputes: to "all cases" arising under federal law or admiralty or involving ambassadors or similar officials and to "controversies" involving six combinations of parties.[61] Justice Story and Akhil Amar have famously argued that Section 2 creates two "tiers" of federal jurisdiction: The provisions that vest jurisdiction over "all cases" mean that federal courts must have jurisdiction over the entirety of those classes of disputes, while the provisions vesting jurisdiction over various "controversies," without the qualifier "all," permit but do not require federal jurisdiction over those disputes.[62] We want to sidestep that argument here and focus attention only on the categories of jurisdiction that explicitly make reference to "all cases." If Professor Amar's two-tiered theory is incorrect, then our analysis of mandatory Supreme Court jurisdiction must apply to diversity cases and all other cases within the compass of the federal judicial power.[63]

We can now see the constitutional effect of Article III on Congress's power to control federal courts' jurisdiction. The Article II and Article III Vesting Clauses both say that the powers they vest "shall" be vested in the President and federal courts, respectively. As Professor Akhil Amar and Justice Story have vigorously—and we think correctly—argued,[64] the word "shall" as it appears in the Constitution, and elsewhere, normally means "must" rather than "may." Thus, the plain meaning of the Vesting Clause of Article III is that the judicial power of the United States "[*must*]

While it may seem odd to provide an account of Article III that explicates the crucial phrase "judicial Power" in one simple sentence, we believe that the definition of judicial power that we have offered is so basic that it would have been taken for granted by reasonable eighteenth-century observers. On the dearth of direct discussions of the meaning of "judicial Power" in the eighteenth century, see Lawson, Controlling Precedent, supra note 58, at 202–03.

60. U.S. Const. art. III, § 2, cl. 1.

61. Id.

62. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333–34 (1816); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 240–46 (1985) [hereinafter Amar, Two Tiers].

63. For vigorous criticisms of the two-tiered theory, see Engdahl, Intrinsic Limits, supra note 25, at 143–53; 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 (1997) [hereinafter Harrison, Limit the Jurisdiction]; Martin H. Redish, Text, Structure, and Common Sense in the Interpretation of Article III, 138 U. Pa. L. Rev. 1633 (1990). For defenses, see Akhil Reed Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U. Pa. L. Rev. 1651 (1990); Robert J. Pushaw, Jr., Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III, 1997 BYU L. Rev. 847. Professor Calabresi believes that it is settled by longstanding practice that Congress does not need to give the Supreme Court appellate jurisdiction over all of the six combinations of party-defined controversies. Whether the Supreme Court could assert such jurisdiction relying on the non-statutory constitutional grant of power in Article III presents a different question.

64. See *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 328–30; Amar, Two Tiers, supra note 62, at 231–32, 239.

be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Vesting Clause itself grants the judicial power. Section 2 of Article III then specifies that this judicial power "shall extend" to "all cases" arising under federal law or admiralty or involving ambassadors or similar officials, thus delineating and limiting (as is appropriate for a Constitution of limited and enumerated powers) the maximum potential extent of federal judicial power. Section 2 of Article III then states that the Supreme Court "shall have" original jurisdiction over certain cases and that "[i]n *all the other Cases before* mentioned, the supreme Court *shall have* appellate Jurisdiction, both as to Law and Fact . . . ." Within this class of disputes, the Supreme Court *must* have either original or appellate jurisdiction. Based on this language (and we will get to the "Exceptions Clause" that is omitted by the ellipsis soon enough), Article III creates a field of constitutionally mandatory federal court jurisdiction. The Supreme Court *must* have power to decide *all* cases within these heads of jurisdiction.[65]

Congress has no power to reduce this constitutionally granted jurisdiction. The Sweeping Clause does not provide any such power. First, the Sweeping Clause only authorizes Congress to pass laws "for carrying into Execution" other powers granted by the Constitution. A law taking away jurisdiction that is granted by the Constitution does not "carry[ ] into Execution" the judicial power; it *prevents* that power from being executed. For the same reasons, Congress cannot use the Sweeping Clause to prohibit the President from exercising prosecutorial discretion over a particular class of offenses. Such a law does not help "carry[ ] into Execution" the executive power vested in the President but instead prevents that power from being exercised.[66] Second, any law passed by Congress under the Sweeping Clause must be "*necessary and proper* for carrying into Execution" federal powers. As one of us has argued to tedium, a "necessary and proper" law must be consistent with the structural principles embodied in the Constitution.[67] If Article III truly makes a field of federal jurisdiction mandatory, it would take a grant of power far more pointed than the Sweeping Clause to allow Congress to undo that result.

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65. We recognize that by summarily endorsing a mandatory view of federal jurisdiction, we are glossing over one of the most hotly contested issues in all of American constitutional law. But there is only so much that we can do in an essay, and we see no escape from the clear import of the mandatory language that infuses both Article II and Article III.

66. For a similar argument, see Engdahl, Intrinsic Limits, supra note 25, at 102–03 (arguing that while Congress may pass laws to help effectuate executive power, Sweeping Clause prevents Congress from passing laws that inhibit executive power).

67. See, e.g., Gary Lawson, Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine, 73 Geo. Wash. L. Rev. 235, 256–64 (2005) [hereinafter Lawson, Discretion] (construing Sweeping Clause as having jurisdictional meaning that constrains Congress's "choice of means to execute federal powers"); Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 297–326 (1993) (similar).

The only question is *which federal courts* must exercise this constitutionally granted judicial power. The Article III Vesting Clause, we have seen, makes reference both to the Supreme Court and to "such inferior Courts as the Congress may from time to time ordain and establish." Section 2 of Article III at least presumptively gives the Supreme Court either original or appellate jurisdiction over all cases within the scope of the federal judicial power, and Article I expressly gives Congress power "[t]o constitute Tribunals inferior to the supreme Court." In order to know how federal judicial power must be divided between the supreme and inferior courts, one must learn what it means for a tribunal to be "inferior *to* the Supreme Court." And that proves to be no simple task.

B. *A Complex Inferiority*

There is a robust and growing body of scholarship concerning the constitutional relationship between the "inferior" and "supreme" federal courts.[68] For our purposes, one of the most important contributions was made by David Engdahl, who has argued at great length that, at the time of the founding, the words "inferior" and "supreme" as applied to judicial tribunals did not necessarily carry any connotations of hierarchy of authority.[69] Rather, he argues, the terms often simply described the breadth of a tribunal's jurisdiction, geographic scope, or some other status, but did *not* mandate that a "supreme" court be able to review the judgments of a so-called "inferior" court.[70] This explains how an early draft of Article III could, without raising a hue and cry, propose "one or more supreme tribunals,"[71] a judicial structure that was common in many of the states in the late eighteenth century.[72] The notion of an "inferior" court having the final judicial say on some matters also made excellent practical sense in the founding era. If all federal cases could ultimately be brought to a single, distant Supreme Court, then every litigant would

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68. Without intending to slight anyone, see, e.g., Barrett, supra note 59; Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power," 80 B.U. L. Rev. 967 (2000); Evan Caminker, Allocating the Judicial Power in a "Unified Judiciary," 78 Tex. L. Rev. 1513 (2000) [hereinafter Caminker, Unified Judiciary]; David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L.J. 457 (1991) [hereinafter Engdahl, What's in a Name?]; Pfander, Judicial Power, supra note 20; Pfander, Jurisdiction-Stripping, supra note 59.

69. See Engdahl, What's in a Name?, supra note 68, at 473 (noting Founders' discussion of "inferior" courts as having final jurisdiction in many instances). A number of prominent scholars agree with Professor Engdahl's conclusions. See, e.g., Bhagwat, supra note 68, at 983–94 (noting ambiguity of "inferior" as discussed in several cases); Edward A. Hartnett, Not the King's Bench, 20 Const. Comment. 283, 292–93 (2003) (explaining original meaning of "inferior" as simply not "highest court" rather than as establishing hierarchical structure).

70. See Engdahl, What's in a Name?, supra note 68, at 466–72.

71. 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., rev. ed. 1966).

72. See Engdahl, What's in a Name?, supra note 68, at 468–72. It also explains why some state trial courts are labeled "supreme" courts.

potentially face the burden of lengthy travel—in an era when such travel was perilous, expensive, and time-consuming. One might therefore expect the Constitution to permit *local* federal courts to be the forums of last resort for at least some federal issues, reserving the Supreme Court for matters of great import or high stakes. Professor Clinton's classic study of Article III demonstrates that there was a widespread expectation among prominent founding-era figures that Congress would have broad authority to allocate the federal judiciary's constitutionally vested jurisdiction in precisely this fashion between the Supreme Court and lower federal courts.[73] Based both on the Constitution's legislative history and on the likely practical consequences of alternative constructions, the best reading of the terms "supreme" and "inferior" in Article III and the Tribunals Clause would seem to have nothing to do with decisional hierarchy and would permit Congress to vest final federal jurisdiction in some class of inferior courts.

Although some details of Professor Engdahl's historical arguments have been criticized,[74] we find his case, along with Professor Clinton's survey of the drafting and ratification history of Article III, very impressive, and we are prepared to stipulate that these arguments likely should be decisive for those who regard legislative history and/or consequentialist arguments as the primary tools of constitutional interpretation.[75] For formalists who look first and foremost to text and structure, however, a very different picture emerges.[76]

1. *Inferiority and Constitutional Text.* — As a matter of pure linguistic usage, while the terms "supreme" and "inferior" can potentially bear either a hierarchical meaning or the kind of scope-based meaning proposed by Professor Engdahl and others,[77] the standard, and therefore presumptive, meanings of those terms describe a hierarchical relationship. Samuel Johnson's eighteenth century *Dictionary of the English Language* defined "supreme" as "1. Highest in dignity, highest in author-

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73. 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 (1984).

74. See Barrett, supra note 59, at 349; Pfander, Jurisdiction-Stripping, supra note 59, at 1448–49 (disagreeing with assertion that founding era English courts had no court whose judgment was inherently final).

75. Professor Laurence Claus has recently challenged this orthodox account of the legislative history of Article III. See Claus, supra note 20. If he is right, we may be conceding too much here, but given our interpretive approach, we leave that question to other worthy hands.

76. It is noteworthy here that the formal text of Article III has shaped constitutional practice more than did the legislative history that Professor Engdahl finds so dispositive. This is why for more than 130 years since 1875, Congress has provided for general federal question jurisdiction in important cases. Enacted constitutional texts are likely to shape subsequent practice more than do less widely known legislative histories which may help explain why texts as diverse as the Equal Protection Clause and the Establishment Clause often have a transformative dimension.

77. See Barrett, supra note 59, at 344–53; Bhagwat, supra note 68, at 983–84.

ity. 2. Highest, most excellent"[78] and defined "inferiour" as "1. Lower in place. 2. Lower in station or rank of life. 3. Lower in value or excellence. 4. Subordinate."[79] These usages, which reek of hierarchy, are consistent with the Latin roots "supremus" and "inferus." The former means "highest . . . above . . . OVER,"[80] while the latter means "below or beneath."[81] The educated members of the founding generation were well versed in Latin, so one can assume that the hierarchical meaning would have been foremost in the mind of any reasonable reader of the Federal Constitution.

The ultimate interpretative question, however, is always how words are best understood *in the specific context in which they are found*. For present purposes, the question is which understanding of the term "inferior" best fits the specific contexts in which that term appears in Articles I and III of the Federal Constitution. For an objective-meaning originalist, the best place to start—with dictionaries and general linguistic usage playing a supporting role—is with evidence of usage drawn from elsewhere in the Constitution itself.[82]

2. *Inferiority and Constitutional Structure.* — The term "inferior" appears in the Constitution in only one other place besides the references to inferior courts or tribunals. The Appointments Clause generally requires federal officers to be appointed by the President by and with the advice and consent of the Senate, but it states that "the Congress may by Law 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."[83] What makes a federal officer "inferior" for this purpose?

In *Morrison v. Olson*, the Supreme Court applied a vague balancing test[84] to reach the peculiar conclusion that special prosecutors who cannot be removed at will and who receive some powers not possessed by the Attorney General of the United States[85] are "inferior" officers who could be appointed by courts of law. Justice Scalia subjected the *Morrison* test to withering criticism in his dissent in that case. For Justice Scalia, the key fact was that the special prosecutor was not subject to complete direction

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78. Johnson, supra note 55.

79. Id.

80. The Barnhart Dictionary of Etymology, supra note 55, at 1095.

81. Id. at 525.

82. See Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 748, 791–92 (1999) (suggesting that Constitution itself may be better place to look than dictionaries when attempting to define constitutional words or phrases).

83. U.S. Const. art. II, § 2, cl. 2 (emphasis added).

84. See 487 U.S. 654, 670–73 (1988). The Court considered whether the officer "is subject to removal by a higher Executive branch official," whether the officer can "perform only certain, limited duties," whether the office "is limited in jurisdiction," and whether the office "is limited in tenure." Id. Of course, every single federal executive official other than the President and Vice President, including the Secretary of State and the Attorney General, is potentially "inferior" under this test.

85. See id. at 716–17 (Scalia, J., dissenting).

or control by the President (or anyone else) in the exercise of his or her prosecutorial functions. The special prosecutor did not answer to anyone and therefore had no effective superior. According to Justice Scalia, "it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer . . . [b]ut it is surely a *necessary* condition for inferior officer status that the officer be subordinate to another officer."[86]

Nine years later, Justice Scalia authored the majority opinion in *Edmond v. United States*, which refined the *Morrison* inquiry to accord more with Justice Scalia's position.[87] Writing for eight members of the Court, Justice Scalia said:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[88]

Edmond effectively overruled *Morrison* sub silentio on the appropriate standard for evaluating inferior officer status,[89] and *Edmond* was right.

Admittedly, it is not immediately obvious that the word "inferior" in the Appointments Clause must mean a hierarchical relationship. After all, one could easily imagine calling an officer "inferior" because his or her sphere of authority, tenure of office, or scope of duties was less robust than that of other officers. Amy Coney Barrett, in an important recent treatment of the inferior/supreme relationship in the Constitution, accordingly concludes (while expressing sympathy for Justice Scalia's position) that the Appointments Clause is too ambiguous to shed significant light on the meaning of "inferior" and "supreme" in Articles I and III.[90]

We respectfully disagree. The structure of the Appointments Clause provides good grounds for reading the term "inferior Officers" as Justice Scalia read it in *Edmond*. The permissible recipients of power to appoint "inferior Officers" are the President alone, the "Courts of Law," and the "Heads of Departments." The President is obviously not an inferior officer since he is by definition the highest officer in the land. Moreover,

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86. Id. at 722.

87. 520 U.S. 651 (1997).

88. Id. at 662–63.

89. But see Barrett, supra note 59, at 352 n.118 (noting that *Edmond* expressly did not overrule *Morrison* and maintaining that *Morrison* may still be valid case law).

90. See id. at 352–53.

the clear import of this provision is that the "Courts of Law" and "Heads of Departments" who can receive appointment power are also *not* themselves inferior officers. There is, we suppose, nothing logically impossible about having inferior officers appoint other inferior officers, but the fact that the Appointments Clause singles out two classes of officers (other than the President) as permissible appointing authorities certainly suggests that these officers stand apart from the people who they are appointing and thus do not themselves fall into the class of inferior officers who may be appointed without Senate confirmation.

This conclusion is linguistically unassailable with respect to the "Heads of Departments." The relevant definition of "head" in Samuel Johnson's *Dictionary of the English Language* is "Chief; principal person; one to whom the rest are subordinate; leader; commander."[91] There is simply no way that the "Head" of a department within the meaning of Article II can be understood to be an inferior officer. It is less obvious textually that "Courts of Law" must of necessity be principal officers, but the conjunction of "Courts of Law" with the indisputably principal "President" and with the "Heads of Departments," and the separation of all three classes of officers from the "inferior Officers" who they are empowered to appoint, seals the deal.

A "Department[ ]," in turn, is any unit of government that has sufficient distinctness and authority to be viewed as a "Department[ ]."[92] As Justice Scalia wrote in his concurring opinion in *Freytag v. Commissioner of Internal Revenue*:

> As an American dictionary roughly contemporaneous with adoption of the Appointments Clause provided, and as remains the case, a department is "[a] separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person. . . ." 1 N. Webster, American Dictionary 58 (1828) . . . . [T]he Founders . . . chose the word "Departmen[t]," . . . not to connote size or function (much less Cabinet status), but separate organization—a connotation that still endures even in colloquial usage today ("that is not my department").[93]

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91. Johnson, supra note 55.

92. To those who find this kind of circularity in a definition unserious or unlikely: Many of the Constitution's most important structural provisions involve such circularity. The proper formulation of the nondelegation doctrine is similarly circular. See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (distinguishing "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details"); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 376–78 (2002) (defending this formulation at length). Within the Appointments Clause itself, the critical term "Officers" is undefined, but it pretty clearly means anyone who is important enough to be an officer. See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (defining, correctly we think, an "officer" as "any appointee exercising significant authority pursuant to the laws of the United States").

93. 501 U.S. 868, 920 (1991) (Scalia, J., concurring) (first omission in original).

Samuel Johnson's *Dictionary of the English Language* almost precisely tracks Webster's *Dictionary* (or, rather, vice versa given the temporal sequence), defining "department" as "Separate allotment; province or business assigned to a particular person."[94] Given these meanings, there is no way that inferior officer status can be determined by extent of authority rather than by hierarchy. Nothing in the Constitution determines how extensive the powers and responsibilities of any "Departments," and therefore any "Heads of Departments," must be. The structure and functions of executive departments are determined by Congress pursuant to the Sweeping Clause, and if Congress wants to create a Department of Banality, complete with a Secretary of Ineffectiveness with relatively little actual authority,[95] that is within the purview of Congress. From a constitutional standpoint, the person at the top of the Department of Banality is the head of a department—and therefore a principal officer under the Appointments Clause.

The text and structure of the Appointments Clause thus forecloses the idea that one can determine inferior officer status without reference to hierarchy. An officer can be answerable to someone else and yet still be a principal officer because of the importance of the scope of the duties, but an officer who does not answer to anyone other than the President[96] is *necessarily* a principal officer because he or she will be the head of a department.

Against this reading, one might object that the only officers mentioned by title in the Appointments Clause are "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court." There is no specific mention in the first portion of the Appointments Clause of

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94. Johnson, supra note 55. The obvious objection to this understanding of a "Department[ ]" is that Justice Scalia wrote for only four Justices, while a majority of the Court in *Freytag* adopted a quite different view of what counts as a constitutional "Department[ ]." The *Freytag* majority stated that "[c]onfining the term 'Heads of Departments' in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power." *Freytag*, 501 U.S. at 886. That may be true, but it is unclear (1) what it means to be "like the Cabinet-level departments"; (2) why that is a plausible construction of the Appointments Clause given that the Cabinet is an informal construct rather than a constitutionally created institution; and (3) why the modern Supreme Court's view of what best constrains the distribution of power is a better guide to original meaning than a consensus of founding-era dictionaries. Our focus in this Essay is on original meaning rather than current doctrine, and on that score Samuel Johnson and Noah Webster are likely to be more reliable than Harry Blackmun.

95. There are limits to how little authority an official can have while still ranking among the "Heads of Departments." In order to be a principal officer, one must first be an officer, and someone with no or minimal authority to execute the laws of the United States simply is not an "Officer of the United States." See *Buckley*, 424 U.S. at 126 (noting requirement of "significant authority pursuant to the laws of the United States").

96. *All* executive officers, whether principal or inferior, necessarily are subordinate to the President, in whom the totality of the "executive Power" is vested. The principal/inferior relationship described in the Appointments Clause refers to the relationship among those officers created by congressional statute.

either "Courts of Law" other than Supreme Court Justices or "Heads of Departments," so why assume that people in these positions must be principal officers? But this objection misunderstands the Appointments Clause.[97] The Appointments Clause does *not* say that all of the specifically named officers must be appointed by the President with the advice and consent of the Senate, no matter what. The Appointments Clause does not in any way distinguish the named officers from "all other Officers of the United States, whose Appointments are not herein otherwise provided for."[98] The important distinction in the Appointments Clause is not between officers who are named and those who are not, but between officers who are "inferior"—whether named or not—and those who are not inferior. If certain "public Ministers and Consuls" are in fact "inferior Officers," then Congress can vest their appointment in the President without Senate confirmation, and if some of the "other Officers of the United States, whose Appointments are not herein otherwise provided for," are not inferior, then they must be appointed by the President with the advice and consent of the Senate. And if any officers are among the "Courts of Law" or "Heads of Departments," they are principal officers who may receive power to appoint inferior officers.

In sum, the best understanding of the word "inferior" in the Appointments Clause is that an inferior officer must be subordinate to some other executive officer besides the President (to whom everyone in the executive department is subordinate). An officer who is not supervised or directed by some other executive officer is, of necessity, a principal officer. On this point, Justice Scalia was entirely correct.

It is possible that Article I and Article III use the term "inferior" in a wholly different sense than does the Appointments Clause of Article II. But there is no good reason to suspect that this is true. There were plenty of terms that the Constitution could have used to describe the relationships between various executive officers and between the Supreme Court and other federal courts. In each case, however, the Constitution uses the word "inferior," so a good starting point for analysis is that the words have the same meaning. Because an "inferior Officer" must be subordinate to some other executive official, it is reasonable to assume that an "inferior Court," or a "Tribunal[ ] inferior to the supreme Court," must be subordinate to some other court. It is also striking in this regard that the Tribunals Clause uses the term "inferior *to* the Supreme Court" whereas the Appointments Clause of Article II does not specify that inferior executive officers are inferior *to* principal executive officers. This

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97. We have previously acknowledged our debt to Lee Liberman Otis for bringing this point to our attention. See Calabresi & Lawson, supra note 24, at 275 n.103.

98. Who are these officers whose appointments are "otherwise provided for"? The list is short but important: the Vice President, see U.S. Const. art. II, § 1, cl. 3; id. amend. XII; the officers of the House and Senate, see id. art. I, § 2, cl. 5; id. art. I, § 3, cl. 5; and the officers of the militia, see id. art. I, § 8, cl. 16.

wording reinforces the notion of hierarchy which we have shown is already implicit from the use of the word "inferior."

This conclusion is confirmed—we think decisively—by the other appearance in the Constitution of the word "supreme." The Supremacy Clause of Article VI provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[99]

In this provision, the word "supreme" unambiguously denotes a hierarchical relationship: In any conflict-of-laws encounter between federal law and state law, federal law is hierarchically superior.[100] By choosing to describe the constitutionally created federal court as a "supreme Court," the Tribunals Clause and the Article III Vesting Clause invite an intratextual comparison to the Supremacy Clause, which strongly pushes in favor of a hierarchical understanding of "supreme."

For objective-meaning originalists like ourselves and Justice Scalia, the intratextual and structural arguments in favor of executive and judicial hierarchy are compelling confirmation of the original public meaning exhibited in the dictionaries we quoted. When the Constitution refers to tribunals "inferior *to* the supreme Court," it is describing tribunals that are effectively *subordinate* to the Supreme Court in some hierarchical fashion. The remaining question is the character of the subordination.

3. *Inferiority and Constitutional Context.* — Inferior executive officers must be subject to the decisional supervision and control of principal officers and, ultimately, the President. Indeed, the President can personally veto any decision made by a subordinate executive official.[101] By the same token, inferior federal courts must be subject to the decisional supervision and control of the Supreme Court, which must be able to veto

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99. Id. art. VI, cl. 2 (emphasis added).

100. Vasan Kesavan has argued that there is also an internal hierarchy within the Supremacy Clause, with the Constitution trumping both statutes and treaties and statutes in turn trumping treaties. See Vasan Kesavan, The Three Tiers of Federal Law, 100 Nw. U. L. Rev. 1479, 1499–503 (2006). The first relationship is now settled law, and Kesavan makes an intriguing originalist case for the second. See id. at 1514–612 (finding historical support for three tiers interpretation).

101. Or so we maintain. See Calabresi & Prakash, supra note 17, at 595–96 (arguing that since President exercises exclusive control over execution of all federal laws, he "must be able to nullify an action taken by an inferior executive officer"); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1243 (1994) [hereinafter Lawson, Rise and Rise] ("[A]lthough the President cannot directly exercise power vested by statute in another official, any action by that subordinate contrary to presidential instructions is void."). A full defense of this position would require a separate article.

(reverse) any decision made by a subordinate court.[102] Otherwise, they are not hierarchically inferior. The minimum content of the inferior/supreme relationship established by the Tribunals Clause and confirmed by the Article III Vesting Clause is that any exercise of authority by an inferior federal court must be subject to ultimate review by the Supreme Court. Accordingly, when the Constitution vests *all* judicial power over *all* of a certain class of cases in the federal courts, it means that the last, "supreme" judicial word over that class of cases must rest in the Supreme Court. That is what it means for the Supreme Court to be constitutionally supreme.

The precise character of the superior/subordinate relationships laid out in Articles II and III, however, can perhaps differ in important respects because the "executive Power" and "judicial Power" vested by those clauses are not identical powers. For example, the President's "executive Power" authorizes him or her to issue binding instructions to subordinates, but whether the Supreme Court has analogous power to bind inferior courts to follow its precedent or to prescribe rules for the administration of the inferior courts is a difficult question that we put aside here.[103] The President by long tradition has considerable power to remove subordinates,[104] while the Supreme Court has no power to remove inferior judges. But these differences in power stem from the difference between a (unitary) grant of "executive Power" and a (unitary) grant of "judicial Power" rather than from anything pertaining to hierarchical inferiority. The power to review decisions of subordinates is essential to the very concept of subordination and therefore to the very concept of inferiority written into the Constitution.

Consequently, we respectfully disagree with Akhil Amar (among others), who argues vigorously for the parity of the supreme and inferior courts under Article III.[105] Professor Amar thinks that the Supreme Court can be stripped of the last word over federal questions as long as

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102. See Pfander, Judicial Power, supra note 20, at 649 ("The existence of a hierarchical relationship among federal courts implies that lower courts must respect the decisions of their judicial superiors as controlling authority.").

103. For some thoughts on vertical precedent, see Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 865–72 (1994) (discussing varying justifications for mandatory adherence to vertical precedent). For a careful analysis of the Court's so-called "supervisory" power, see generally Barrett, supra note 59 (arguing that supervisory power is largely unsupported by constitutional text or historical practice).

104. Steven G. Calabresi & Christopher S. Yoo, A History of the Unitary Executive: Executive Branch Practice from 1789 to 2007 (forthcoming 2007). One of us has some lingering doubts about the constitutional pedigree of this removal power, but will stifle them for the moment. See Lawson, Rise and Rise, supra note 101, at 1244 & n.74 (arguing that removal power is not supported by constitutional text and cannot be justified by operational needs of executive branch).

105. See Amar, Two Tiers, supra note 62, at 230 (noting that Congress has "power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that [it] may create").

some inferior federal court is empowered to hear those cases.[106] Thus, Professor Amar would find unobjectionable a bill that stripped the Supreme Court and all lower courts except the D.C. Circuit of the power to hear appeals filed by Guantanamo detainees. In this situation, however, the D.C. Circuit would cease to be inferior to the Supreme Court—just as special prosecutors such as Kenneth Starr and Lawrence Walsh were not really inferior executive officers because they were not subject to presidential direction, control, and revision.

This account of the relationship between the Supreme Court and other federal courts is reinforced by the precise language of the Article III Vesting Clause. The clause states that "[t]he judicial power of the United States shall be vested in one supreme Court, *and in* such inferior Courts as the Congress may from time to time ordain and establish."[107] As a consequence, every quantum of federal judicial power is vested in the Supreme Court even if it is also vested in an inferior court as well. If the object was to allow lower federal courts to wield judicial power independently of the Supreme Court, the clause would have had to vest the judicial power in the Supreme Court *or* such inferior courts as Congress might ordain and establish.[108] By vesting the power in the conjunctive rather than the disjunctive, the effect is to vest the Supreme Court with *all* of the federal judicial power[109]—just as the Article II Vesting Clause vests the President with *all* of the federal executive power. Subordinate executive officers, of course, are capable of exercising executive power (the President need not personally conduct all criminal investigations and prosecutions, for example), but that exercise of power must ulti-

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106. For a recent restatement of Professor Amar's now-classic position, see Akhil Reed Amar, America's Constitution: A Biography 226 (2005) [hereinafter Amar, America's Constitution]. As a gratuitous aside concerning our mutual friend and former schoolmate: Professor Amar's latest book may well be the best book on the American Constitution yet written, and notwithstanding the brevity of this Essay, we never take disagreement with Professor Amar lightly.

107. U.S. Const. art. III, § 1 (emphasis added).

108. To be sure, because the Article III Vesting Clause vests the "judicial Power" as an undifferentiated whole, the precise effect of simple disjunctive language in Article III would have been somewhat ambiguous, as it could have been taken to mean that (1) the federal judicial power must vest either entirely in the Supreme Court or entirely in the lower federal courts or (2) the federal judicial power could be divided in some fashion between the supreme and inferior courts. Language that unambiguously vested a measure of unreviewable power in lower federal courts would have had to be relatively complex. But the effect of the actual conjunctive language that appears in Article III is plain. We are grateful to David Shapiro for prompting our deeper consideration of this point.

109. The word "and" here has to be used in the conjunctive sense because otherwise one cannot explain how the Constitution grants both the Supreme Court and the inferior courts the judicial power to decide cases or controversies. Recall that there is no other clause in Article III, other than the Vesting Clause, which can be read as conferring on judges the power to act. Article III is in this respect different from Article II. Even if one wrongly read the Article II Vesting Clause as not being a grant of power, as do many scholars, one could still claim the President was granted powers by clauses in Sections 2 and 3 of Article II.

mately be subject to presidential direction and control. Similarly, inferior courts may exercise federal judicial power, but always subject to the control and supervision of the Supreme Court.[110]

C. *Whither the States?*

If Congress creates lower federal courts, they must be subject to the control and supervision of the Supreme Court. But what if Congress does not create any lower federal courts at all? May state courts then decide federal cases free of Supreme Court supervision?

At this point we address the principal textual puzzles that we posed near the beginning of this Part: (1) Why does the Constitution contain a clause specifically authorizing Congress to constitute tribunals inferior to the Supreme Court while leaving the creation of executive actors inferior to the President to the Sweeping Clause? (2) Why does the Tribunals Clause of Article I say that Congress may "constitute" tribunals inferior to the Supreme Court while the Article III Vesting Clause references such inferior courts as those that Congress may "ordain and establish"?[111] Our answers have been anticipated and developed by James Pfander in an important—and we think superb—recent article.[112] We independently reach conclusions very similar to Professor Pfander's through a different line of reasoning. We think that our textual and intratextual arguments are strongly complementary to Professor Pfander's textual, functional, and historical arguments. Together, they form a very strong case for an unconventional account of the relationship between the state courts and the Supreme Court.

When state courts decide issues of federal law, they can do so for several reasons. First, they might do so because they are courts of general jurisdiction, and cases that come before them might raise federal issues. Deciding an issue of federal law in that circumstance is no different in principle than deciding an issue of Norwegian law when the case properly presents it. The one difference between federal and Norwegian law is that the Supremacy Clause *mandates* that in any conflict between applicable federal law and any other source of law, the federal law takes prece-

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110. Professor Amar suggested in his first published work as an academic that the "in" language in the Article III Vesting Clause was inserted solely for grammatical clarity and has no substantive implications. See Amar, Two Tiers, supra note 62, at 231 n.88. That may or may not have been the intentions of the drafters, but the language as it appears is strongly consistent with our hierarchical reading of the clause. Evan Caminker has noted (while rejecting on functional and historical grounds) the strength of the textual reading that we endorse. See Caminker, Unified Judiciary, supra note 68, at 1536–39.

111. We will address the tribunals/courts distinction in due course as well, but the first two textual puzzles are more closely integrated, so we deal with them first.

112. See James E. Pfander, Federal Supremacy, State-Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 Nw. U. L. Rev. (forthcoming 2007) (manuscript at 10, on file with the *Columbia Law Review*) [hereinafter Pfander, Federal Supremacy] (concluding "certain forms of jurisdiction stripping violate the constitutional requirements of supremacy and inferiority").

dence. The Supremacy Clause thus provides a *conflict of laws* rule, but the *power to hear the case and decide the federal issue* stems from the court's internal authority as a state court.

State courts might also decide federal issues because Congress orders them to do so. If Congress chooses to rely on state courts for much, or even all, of the federal judicial business that is not constitutionally vested in the Supreme Court directly, Congress may wish formally to designate state courts as forums for hearing federal cases. If such a congressional statute is constitutionally valid, the Supremacy Clause prevents state law from overriding it and effectively forces the state courts to hear the cases. In this latter case, if Congress passes such a statute, has it "ordain[ed] and establish[ed]" the relevant state courts as inferior federal courts?

If the answer is yes, some startling consequences would follow. All of the courts mentioned in Article III—the courts that may exercise the "judicial Power of the United States"—share certain properties: "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."[113] Thus, the "inferior Courts" which Congress may "ordain and establish" have salary and tenure guarantees specified by the federal Constitution. If state courts are "ordain[ed] and establish[ed]" as federal courts, they too must have the constitutionally requisite salary and tenure guarantees. The result is not unthinkable, but it does seem rather peculiar.

We do not believe that any such thing happens. Here is where the constitutional difference between *constituting* a tribunal and *ordaining and establishing* a court comes into play. The intratextual argument here gets a bit intricate, so we ask for patience.[114]

As a matter of pure linguistic usage, one can "establish" a body such as a court either by creating it from scratch or by designating an existing body. Samuel Johnson's *Dictionary* contains definitions of "establish" that could support either reading.[115] Indeed, a similar dispute over the meaning of "establish" in another part of the Constitution consumed a great deal of attention in the nation's first fifty years. The Constitution authorizes Congress "[t]o establish Post Offices and post Roads."[116] Many founding era figures, including Thomas Jefferson and James Monroe, staunchly maintained that this *only* gave Congress the power to designate

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113. U.S. Const. art. III, § 1.

114. For linguistic and historical treatments of this question that complement our analysis, see Pfander, Federal Supremacy, supra note 112 (manuscript at 11–20); Pfander, Judicial Power, supra note 20, at 674–79.

115. Samuel Johnson defined "establish" (excluding several archaic usages) as: "1. To settle firmly; to fix unalterably. 2. To settle in any privilege or possession; to confirm. 3. To make firm; to ratify. 4. To fix or settle in an opinion. 5. To form or model." Johnson, supra note 55. The fifth definition conforms to the idea of creating a court, while the first three seem more consistent with designating an existing body.

116. U.S. Const. art. I, § 8, cl. 7.

existing state roads as postal routes and *did not* include the power to construct a new road. Others, including Joseph Story, strongly disagreed. The issue divided the Supreme Court as late as 1845.[117] The intratextual evidence, however, strongly favors those who supported the congressional power to create and construct new roads as well as the power to designate existing roads. A mere three clauses before the Postal Roads Clause in Article I, Section 8, the Constitution gives Congress power "[t]o *establish* an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[118] This obviously grants the power to *create* rules of naturalization and bankruptcy rather than merely the power to *designate* preexisting rules as binding. There is no good reason to think that Article I, Section 8 uses the same term in two different senses in such close proximity.

This means that the term "establish" as used in the Constitution can mean *either* the creation *or* the designation of an institution; surely the Postal Roads Clause at least *permits* Congress to designate existing state roads as postal roads (and by the same token the Bankruptcy Clause would surely *permit* Congress to pick an existing state bankruptcy law and give it uniform nationwide effect). The same would presumptively be true of the Article III Vesting Clause. Does Article III therefore refer *either* to courts created by Congress *or* to state courts designated by Congress as federal tribunals, with all of the startling consequences for the tenure and salary of state court judges that we have described?

This might well be the case if Article III, paralleling the Bankruptcy Clause and the Postal Roads Clause, referred simply to courts that Congress might "establish." But the Article III Vesting Clause uses a formulation subtly but importantly different from the uses of "establish" elsewhere in the Constitution: Article III speaks of inferior courts that Congress may from time to time "*ordain* and establish." This formulation is striking and significant.

As a matter of common usage, the word "ordain" would seem to mean to confer a status upon something, or at most to replicate the word "establish." Samuel Johnson's *Dictionary* is consistent with this intuition: The word "ordain" is defined as "1. To appoint; to decree. 2. To establish, to settle; to institute. 3. To set in an office. 4. To invest with ministerial function, or sacerdotal power."[119] So understood, there would be little or no difference between the word "establish" and the phrase "ordain and establish."

The Constitution, however, uses the precise phrase "ordain and establish" in one other place, and in context the phrase has significant

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117. For a short summary of the founding era debate over postal roads, see Lawson & Granger, supra note 67, at 267 n.3. For the longer version, see Lindsay Rogers, The Postal Power of Congress: A Study in Constitutional Expansion 61–96 (Johns Hopkins Univ. Stud. in Hist. & Pol. Sci. Vol. 34, No. 2, 1916).

118. U.S. Const. art. I, § 8, cl. 4 (emphasis added).

119. Johnson, supra note 55.

meaning and effect that goes beyond its ordinary usage. The Preamble declares that "We the People . . . do ordain and establish this Constitution for the United States of America."[120] Since the Constitution obviously was not a preexisting legal institution that could be designated as having status in some fashion, the usage of the phrase in the Preamble clearly refers to bringing something into existence that did not previously exist. This is highlighted by comparison to and contrast with the ratification provision in Article VII, which states that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the *Establishment* of this Constitution between the States so ratifying the Same."[121] To "establish" the Constitution through ratification is to "make firm; to ratify"[122] a document that already exists. By contrast, to "ordain and establish" the Constitution must be to bring it into existence so that it may subsequently be "establish[ed]," or given the designated status of supreme law, through ratification. As the Constitution uses the terms, to "ordain and establish" an institution is a markedly different act than to "establish" it: The latter can mean either to create or to designate a status for, while the former can only mean to create.[123]

Intratextually, then, when Article III refers to courts that Congress has "ordain[ed] and establish[ed]," it refers most naturally to courts that Congress has itself *created*—just as "We the People" created the Constitution.[124] Those congressionally created courts automatically share in the Article III "judicial Power" by virtue of the Article III Vesting Clause, they possess tenure and salary guarantees, and because they are "inferior" courts, they are subject to supervision and control by the Supreme Court.

The Article I Tribunals Clause, by contrast, does not give Congress power to "establish," or to "ordain and establish," tribunals inferior to the Supreme Court. Instead, it grants power to "constitute" such tribunals. The word "constitute" does not appear anywhere else in the Constitution,

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120. U.S. Const. pmbl.

121. Id. art. VII (emphasis added).

122. Johnson, supra note 55. For a more complete review of Samuel Johnson's definitions of "establish," see supra note 115.

123. Professor Pfander has recognized the relevance of the Preamble to the construction of Article III, but he concludes that the term "ordain and establish" describes a degree of *permanence* rather than, as we believe, a pure act of creation. See Pfander, Judicial Power, supra note 20, at 674–75. But the linkage between the Preamble and Article VII strongly supports our construction. Nor do either the inferior federal courts or the Constitution itself necessarily have any particular degree of permanence. What Congress or the People today ordain and establish they can tomorrow unordain and disestablish.

124. Of course, as a matter of historical fact, the Constitution was not created by "We the People" but instead by a small subset of people. For legal purposes, however, the Constitution's pretension is more important than the historical facts—just as parties are viewed in law as the creators of contracts, wills, leases, etc. that are actually drafted by other people. For a more detailed discussion of the meaning of "ordain and establish" in the Preamble, see Lawson & Seidman, Originalism, supra note 17, at 58–59.

so we must turn to background usages to glean its meaning. Johnson's *Dictionary* indicates that the word "constitute," like the word "establish," can readily support *either* the creation *or* the designation of an institution. Johnson defines the term as "1. To give formal existence; to make any thing what it is; to produce. . . . 2. To erect; to establish. . . . 3. To depute; to appoint another to an office."[125] In the context of a judicial body in the Constitution of 1788, to designate an existing institution as a "tribunal inferior to the supreme Court" most naturally means to designate an existing *state court* to be such an institution—which was precisely the practice under the Articles of Confederation, with which the founding generation would therefore have had considerable familiarity.[126] Johnson's second and third definitions of "constitute" thus correspond perfectly to the two distinct senses in which Congress might "constitute" a tribunal inferior to the Supreme Court. The Tribunals Clause is most naturally read to give Congress power both to create federal courts and to designate existing state courts as "Tribunals inferior *to* the supreme Court."[127]

When Congress exercises its power to constitute a state court as a "Tribunal[ ] inferior *to* the supreme Court," it does *not* thereby vest that state court with a portion of the federal judicial power. That power can only be exercised by "one supreme Court, and . . . such inferior Courts as the Congress may from time to time *ordain and establish*," and to ordain and establish a court is different from constituting one. The constitutional effect of a congressional designation of a state court as a "Tribunal[ ] inferior to the supreme Court," however, is to give the Supreme Court *hierarchical authority over that state tribunal.* Even without any congressional designation, state courts are generally free to decide federal issues that arise in the normal course of their jurisdiction. When acting purely as state courts, however, they are not, from a federal constitutional standpoint, "Tribunals inferior to the supreme Court" any more than would be a court of Mexico or Denmark that happened to decide an issue of federal law in the course of its duties. State courts, unlike foreign courts, have a duty to give federal law *precedence* in any conflict-of-laws situation, but there is nothing in the Supremacy Clause that subjects state

125. Johnson, supra note 55.

126. See Michael G. Collins, The Federal Courts, the First Congress, and the Non-Settlement of 1789, 91 Va. L. Rev. 1515, 1525–26 (2005) [hereinafter Collins, Non-Settlement]; Pfander, Judicial Power, supra note 20, at 679–80.

127. We are, at least for the present, agnostic about whether Congress can designate state courts to hear *all* cases under the Constitution or whether some classes of cases must be heard in the first instance in federal court. For a thoughtful presentation of the evidence for the latter position, see Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 43, 49–54; Collins, Non-Settlement, supra note 126, at 1570–74. Professor Pfander maintains that the "Tribunals" mentioned in the Tribunals Clause are such entities as territorial courts, courts martial, and administrative adjudicative organs. See Pfander, Judicial Power, supra note 20, at 672–89. For our discussion of this theory, see infra text accompanying notes 137–149.

courts to oversight by the Supreme Court. If Congress wishes to do so, however, it may subordinate state court decisions to the Supreme Court by exercising its power to "constitute" the state courts as "Tribunals inferior to the supreme Court." In this way, Congress can make the state courts part of the federal judicial hierarchy without otherwise implicating state courts in the issues surrounding Article III.

Recall, however, that the Article III Vesting Clause is a power grant that is *mandatory* in nature. If Professor Amar and other advocates of mandatory vesting are right about at least the first three heads of jurisdiction in Article III, Section 2, then with respect to cases arising under those heads, the Supreme Court *must* have the last judicial word. Congress *must* either create inferior federal courts to hear those cases under the supervision of the Supreme Court *or* must constitute state courts as "Tribunals inferior to the supreme Court." If Congress does neither, the Constitution itself vests appellate jurisdiction over those cases in the Supreme Court.[128] All roads must end at the Supreme Court.

The idea that the Supreme Court has constitutionally-based jurisdiction to review state court cases that involve the first three heads of jurisdiction in Section 2 of Article III is striking enough to require some additional elaboration. The key is to determine exactly which cases are within the Article III extension of federal judicial power to "all Cases" arising under federal law or involving ambassadors or admiralty. When Article III declares that the federal judicial power vested in the Supreme Court shall extend to "all Cases" within the enumerated categories, it can mean any of four different things, each of which has very different consequences for the role of the Supreme Court in the constitutional scheme.

First, the reference to "all Cases" could literally mean "all Cases," in whatever forum they are brought. This would be too absurd even for the most arid of textualists (and we are as dry as they come). As we have already noted, courts of foreign countries might have to decide issues of American federal law in the course of their duties, just as American courts must often decide issues of foreign law. The American Constitution could not, under any theory of constitutionalism that would occur to a reasonable observer in 1788, authorize American courts to review decisions of foreign tribunals. The Constitution is the Constitution of the United States, not the Constitution of North America, Western Christendom, or the world community.

Second, the reference in Article III to "all Cases" might simply mean all cases brought in federal courts, specifically excluding any cases brought in state court. This interpretation draws upon the background rule of interpretation which holds that the Constitution refers only to the federal government and federal institutions unless it directly says other-

128. If the Supreme Court's constitutionally specified original jurisdiction is a floor rather than a ceiling, see infra Part II, then as a theoretical matter, perhaps the constitutional command could also be satisfied by vesting original jurisdiction in all federal cases in the Supreme Court.

wise,[129] so that in the absence of a specific reference to state courts, Article III does not authorize review of state court judgments. This, of course, was precisely the argument advanced by the Virginia Supreme Court in *Martin v. Hunter's Lessee* when it refused to recognize the authority of the United States Supreme Court to review its judgments under section 25 of the Judiciary Act of 1789.[130] We will not rehearse here Justice Story's famous rejection of this claim,[131] in part because much of Justice Story's argument is circular and unconvincing. But Justice Story's conclusion was, in the end, correct. The notion of a national tribunal capable of resolving, with national uniformity, issues of national interest was familiar to the founding generation from the Articles of Confederation onward.[132] And if the "all Cases" language at the beginning of Section 2 of Article III is tacitly limited to "all Cases brought in federal court and excluding cases brought in state court," the same must surely be true a fortiori of the language elsewhere in Section 2 extending the federal judicial power to various "Controversies," most notably including controversies involving states.[133] It makes no structural sense to create federal jurisdiction over such a class of cases that could be circumvented by an interested state through the simple expedient of ensuring that the cases are first brought in the state's own courts. Furthermore, if Section 2 of Article III truly reads "all Cases brought in federal court and not cases brought in state court," then the Supreme Court could *never*, even with the aid of congressional statutes, hear appeals from state courts. The Sweeping Clause only permits Congress to pass laws "for carrying into Execution" powers vested by the Constitution in some federal institution, and if Article III by its terms is limited only to cases brought in federal court, Congress could not carry that power into execution by giving the Supreme Court jurisdiction over state court cases. We agree with Justice Story that the balance of arguments strongly tips in favor of federal authority to review state court judgments involving federal issues, so that "all Cases" must have another meaning.

A third and far more plausible possibility is that the language of Article III includes only "all Cases brought within the federal judicial system," but that it does not categorically exclude cases brought in state court *if* Congress has chosen to "constitute" state courts as part of the federal judicial hierarchy. That is, Article III might extend the federal judicial power to "all Cases brought before courts that are part of the federal judicial system, either because they are federal courts ordained and established by Congress or because they are tribunals inferior to the Supreme

129. See supra note 18.

130. 14 U.S. (1 Wheat.) 304, 305–06 (1816).

131. See id. at 331–42 (concluding that Supreme Court may review state court judgments involving federal law).

132. See id. at 347–48 (describing need for uniform national resolution of certain questions, such as treaty interpretation).

133. See U.S. Const. art. III, § 2.

Court that Congress has included within the federal judicial system." On this understanding, Congress retains the ultimate power to determine whether state court judgments are reviewable in the Supreme Court. Because Article I enumerates a congressional power to "constitute Tribunals inferior to the Supreme Court," Congress can use its power under the Sweeping Clause to carry into effect the Tribunals Clause power by authorizing Supreme Court review of state judgments. But absent a congressional designation of a state court as part of the federal judicial system, such a state court would stand to the Supreme Court in much the same position as a court of Finland or Australia. This is essentially the view put forward by Professor Pfander.[134]

A fourth possibility is that the words "all Cases" in Section 2 of Article III mean "all Cases brought in courts that are within the political jurisdiction of the American Constitution," which would include both federal and state courts. On this reading, the mandatory vesting of jurisdiction in the Supreme Court would extend to state court cases encompassed within the first three heads of federal jurisdiction in Article III by constitutional command, with or without a congressional designation of the relevant state court as part of the federal judicial hierarchy. But if the Constitution already gives the Supreme Court power to review judgments of state courts that raise issues of federal law, what purpose is served by the Tribunals Clause, which allows Congress to make state courts part of the federal judicial hierarchy? The answer is that the federal judicial hierarchy entails more than simply the ability of the Supreme Court to review judgments of lower courts. The Supreme Court, by virtue of its position at the top of the judicial hierarchy, can bind inferior courts to follow its pronouncements through the doctrine of vertical precedent[135] and can exercise whatever ancillary supervisory powers the Supreme Court may have. Under this view, without a congressional designation of a state court as a "Tribunal[ ] inferior to the supreme Court," state courts may be reversed by the Supreme Court on issues of federal law, but they are under no obligation to follow the Supreme Court's precedents—no more than is the President, the Congress, a state legislature, or any other body that is not an inferior court or tribunal. Nor can it be supervised or directed by the Supreme Court in any way. But once Congress has made a state court part of the federal judicial hierarchy, these collateral consequences kick in.

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134. See Pfander, Judicial Power, supra note 20, at 672–89.

135. Professor Lawson's grave doubts about the constitutionality of *horizontal* precedent do not apply to the doctrine of *vertical* precedent. If the Constitution wishes to give one actor (the Supreme Court) the power to force other actors (inferior courts) to set aside their own views on the meaning of the Constitution, it certainly may do so. Professor Lawson simply does not believe that the Constitution has done any such thing at the horizontal level—or, indeed, in any context other than the Supreme Court/inferior court relationship.

We think that the fourth interpretation, with its constitutionally vested jurisdiction in the Supreme Court, is the most plausible interpretation of Article III. For reasons that we have already given, a literal interpretation of the words "all Cases" cannot be right; the Constitution is plainly not giving the Supreme Court appellate jurisdiction over Swiss or Nigerian cases that arise under American federal law. Nor can the normal "federal only" background rule of constitutional interpretation apply to Article III. Unless *Martin v. Hunter's Lessee* was wrongly decided—which is a result far more startling than anything we suggest here—Article III must include at least some cases brought initially in state court.

Thus the choice of plausible interpretations of Section 2 of Article III is between either "all Cases brought in courts that are within the federal judicial hierarchy, either because the courts are federal courts ordained and established by Congress or because they are state courts that Congress has constituted as tribunals inferior to the Supreme Court" or "all Cases brought in courts within the political jurisdiction of the American Constitution." Both possibilities require significant interpolations of the actual language of Article III, but the latter is closer to the textual command "all Cases" and is therefore preferable. Once the phrase "all Cases" is cut loose from the presumption that it refers exclusively to cases brought in federal courts, the only principle limiting the scope of the language is the jurisdictional reach of the American Constitution.

We can now understand why the Constitution contains a Tribunals Clause allowing Congress to constitute tribunals inferior to the Supreme Court but no "Administrators Clause" allowing Congress to constitute executive officials inferior to the President. The power to create executive officials stems from the Sweeping Clause, which authorizes Congress to enact laws that are necessary and proper for carrying into execution, inter alia, the President's executive power. Laws creating subordinates to help the President in those duties obviously are paradigmatic laws under this clause. A law designating state officials as federal officers and thus conscripting state officials into the service of the President, however, is another matter. Even if such a law could somehow survive review as "necessary," it would hardly be "proper" for Congress to take over state institutions in this fashion.[136] By the same token, it would not be "proper" for Congress, under the Sweeping Clause, to commandeer state judicial institutions either. Instead, a specific constitutional authorization beyond the general grant of power in the Sweeping Clause was necessary to allow Congress to impose upon state courts the burden of subservience to the Supreme Court. The Tribunals Clause represents a huge grant of power to Congress, made necessary by the Madisonian compromise that neither

136. This is why the anti-commandeering cases are properly (no pun intended) grounded in the Sweeping Clause. See Printz v. United States, 521 U.S. 898, 923–24 (1997).

directly created nor directly mandated the creation of inferior federal courts.

There is one textual puzzle remaining to be solved. The Article III Vesting Clause speaks of "Courts," while the Tribunals Clause, per its name, speaks of "Tribunals." What is the significance of this difference in wording? Professor James Pfander has addressed this question at length in an important article. His conclusion is that the "Tribunals" in the Tribunals Clause include such institutions as territorial courts, courts martial, and administrative adjudicators.[137] For this premise, he develops a comprehensive theory of the permissible scope of federal adjudication by non-Article III bodies.[138] While it is a vast understatement to say that we admire his effort, we think it is more likely that the "Tribunals" in the Tribunals Clause are simply Article III federal courts and state courts.

As far as we can tell, the terms "courts" and "tribunals" were generally used interchangeably during the founding era.[139] If there is no significance to the difference in wording in Articles I and III, then Article I only describes a power to create federal courts (in accordance with Article III norms by virtue of the Article III Vesting Clause) or to designate an existing institution as part of the federal judiciary. It would be structurally bizarre to allow Congress to designate federal institutions other than Article III federal courts to be part of the Article III judicial hierarchy, so the best reading of the Tribunals Clause would include only Article III federal courts and state courts. For Professor Pfander's theory to work, the terms "Tribunals" and "Courts" must bear different meanings. We believe that there is a good case that they do in fact bear different meanings, but those meanings support our position rather than Professor Pfander's.

A "tribunal," according to Samuel Johnson, is "1. The seat of a judge. . . . 2. A court of justice."[140] These are the sorts of institutions that Congress may "constitute" under its Tribunals Clause power. A "court," on the other hand, includes "7. Any jurisdiction, military, civil, or ecclesiastical."[141] Thus, perhaps counterintuitively, the term "court" in the eighteenth century appears to have had a broader meaning than the term "tribunal." In the context of the Constitution, the sorts of institutions that might be "courts" but not "tribunals" could include such things as the territorial judges, courts martial, and administrative adjudicators on which Professor Pfander focuses. Indeed, the use of the word "courts" in the phrase "courts martial" points strongly in this direction. On this reading of the Tribunals Clause and the Article III Vesting Clause, *Congress has no power to create or in any way designate courts martial, administrative adjudicators, or territorial judges under Article I, Section 8, Clause 9*, because the

137. See Pfander, Judicial Power, supra note 20, at 672–89.
138. See id. at 747–74.
139. See id. at 677–78.
140. Johnson, supra note 55.
141. Id.

Tribunals Clause power extends only to regular courts ("Tribunals"), either federal or state. This makes excellent sense, because federal power with respect to the institutions that are courts-but-not-tribunals stems neither from the Tribunals Clause nor from Article III. The power to create territorial courts comes straight from the Territory and Other Property Clause of Article IV[142]—or, in the case of the District of Columbia, from the District Clause.[143] These provisions constitute Congress as a general government over federal territory,[144] which means that Congress need not rely on its other particularized enumerations of power, such as the Tribunals Clause, when legislating for territories or the District. The congressional power to create territorial legislatures and executives obviously stems from Article IV or the District Clause; the natural conclusion is that the power to create territorial judges comes from the same source. Similarly, administrative adjudicators, as with all other executive officers other than the President and Vice President, are created pursuant to the Sweeping Clause rather than the Tribunals Clause. Finally, courts martial are created either by Congress under the Sweeping Clause through implementation of its powers "To make Rules for the Government and Regulation of the land and naval Forces"[145] and for "disciplining[ ] the Militia"[146] or by the President pursuant to the grant of the "executive Power." The Tribunals Clause simply is not implicated in the creation of any of these institutions.

To the extent that such institutions are "courts," however, then they must, if created by Congress, *conform to the dictates of Article III*, which makes clear that all "inferior Courts as the Congress may from time to time ordain and establish" must have tenure during good behavior and guarantees against diminishment in salary while in office. Thus, if Congress uses its District Clause or Article IV power to create territorial courts, those courts must satisfy the dictates of Article III—a proposition that one of us has long championed on other grounds.[147] Similarly, if Congress creates administrative adjudicative bodies that qualify as "courts," those bodies must also conform to Article III.[148] Finally, if Con-

142. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2.

143. "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . ." Id. art. I, § 8, cl. 17.

144. See Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 122, 128, 189–90 (2004) [hereinafter Lawson & Seidman, Empire].

145. U.S. Const. art. I, § 8, cl. 14.

146. Id. art. I, § 8, cl. 16.

147. See Lawson & Seidman, Empire, supra note 144, at 139–50; Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 887–93 (1990).

148. The extent to which executive adjudication shades into an exercise of the judicial power is one of the most difficult questions in constitutional law, and we hurriedly run away from it here. For some very tentative thoughts, in which the author has very little confidence, see Lawson, Rise and Rise, supra note 101, at 1246–47.

gress creates courts martial or other military courts, they too must seemingly satisfy Article III (because the term "Courts" includes military jurisdictions). However, such bodies would *not* have to satisfy Article III if they were created by the President pursuant to the "executive Power" because Article III only covers courts that are ordained and established by *Congress*. Thus, the distinction between tribunals and courts may in fact shed some light on the ancient puzzle of the permissible limits of adjudication by non-Article III bodies, though we leave a full analysis of this problem for another day.

One possible consequence of the tribunals/courts distinction for our present purpose is that it may forbid Congress from designating state administrative bodies as inferior federal tribunals. Congress's Tribunals Clause power extends only to tribunals, which means, in the state context, only to state courts of justice rather than to all state adjudicative bodies. Congress may thus have more power to "commandeer" state courts than to "commandeer" state administrative agencies, in which case the Supreme Court's case law to this effect at least vectors in the right direction.[149]

D. *Summing Up*

Congress can "constitute" tribunals inferior to the Supreme Court or it can "ordain and establish" inferior courts, but it cannot either create or designate a judicial body equal or superior to the Supreme Court. If Article III ended with Section 2, Paragraph 2's designation of the Supreme Court's original and appellate jurisdiction, there would be no doubt that stripping the Supreme Court of its appellate jurisdiction over federal cases, by committing final determinations either to state courts or to inferior federal courts, would be unconstitutional. We have thus far, however, cut off the story in the middle of Article III.

II. Exceptional Authority

Justice Scalia's strong commitment to a hierarchical understanding of the inferior/superior relationship in Article II seems to commit him as well to a hierarchical understanding of the inferior/superior relationship in Article III. If that relationship forbids jurisdiction stripping, at least in those instances in which the Constitution extends the federal judicial power to "all cases," then Justice Scalia's assertion of categorical congressional authority to engage in jurisdiction stripping would seem to be prima facie wrong.

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149. See Printz v. United States, 521 U.S. 898, 907–08 (1997) (holding that Congress has more power to impose duties on state judges than on state administrators); cf. Testa v. Katt, 330 U.S. 386, 394 (1947) (holding, correctly under our analysis, that Congress may direct state courts to hear federal cases).

Justice Scalia's response in *Hamdan* was to invoke the following clause at the conclusion of Section 2 of Article III, popularly known as the Exceptions Clause:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*[150]

Justice Scalia is not the only textualist to read this italicized provision as plainly empowering Congress to remove cases from the Supreme Court's jurisdiction (perhaps subject to limitations derived from elsewhere in the Constitution).[151] But a closer look at this clause reveals some critical flaws in this analysis.

The "Exceptions" referred to in the clause are, it is clear, exceptions to the Supreme Court's appellate jurisdiction.[152] But what happens to cases formerly within the Supreme Court's jurisdiction when Congress makes such exceptions? The conventional wisdom is that such cases disappear from the Supreme Court's jurisdiction altogether. We think, however, that the Exceptions Clause describes a much less dramatic maneuver: Congress makes "Exceptions" to the Supreme Court's *appellate* jurisdiction when it adds those cases to the Court's *original* jurisdiction. The Exceptions Clause contemplates that Congress might move cases back and forth between the Court's original and appellate jurisdiction, but does not contemplate that the Supreme Court will be totally deprived of jurisdiction over cases within the mandatory jurisdiction of the federal courts.[153] When read without the groove that *Marbury v. Madison* and the Judiciary Act of 1789 have worn in our minds, this reading of the Exceptions Clause makes perfect sense.

First, this reading comports with the reading of the Tribunals Clause and the Article III Vesting Clause that we have just outlined, whereas Justice Scalia's reading of the Exceptions Clause as a power to strip the Supreme Court of jurisdiction altogether puts that clause in sharp ten-

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150. U.S. Const. art. III, § 2, cl. 2 (emphasis added).

151. See, e.g., Harrison, Limit the Jurisdiction, supra note 63, at 209. People who champion a broad congressional power to regulate the Supreme Court's jurisdiction under the Exceptions Clause can find limits under other rubrics, such as due process or equal protection. See, e.g., 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, 902–03 (1982).

152. As a grammatical matter, it is possible that the exceptions are not to jurisdiction per se but merely to that jurisdiction's inclusion of matters of both law and fact. On this reading, Congress could not remove cases altogether from the Supreme Court's jurisdiction but could limit Supreme Court review to law only (or perhaps fact only). Because this interpretation has not been historically predominant, we do not address it.

153. In fact, an earlier version of the clause explicitly gave Congress the power to move cases back and forth between the Supreme Court's original and its appellate jurisdiction. See Clinton, supra note 73, at 773.

sion with the rest of the constitutional structure. It is possible, of course, that the Constitution contains such a sharp tension—and contains one that is generated by ambiguous language at the end of a clause defining the original jurisdiction of the Supreme Court—but it is a reading that should be compelled rather than preferred.

Second, when read as we propose, the two sentences of the second paragraph of Article III, Section 2 fit together like a glove. The first sentence sets out a minimal, irreducible baseline of cases over which the Supreme Court "shall"—that is, *must*—have original jurisdiction: cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Note that all of these categories of cases or controversies involve politically sensitive matters of either foreign policy or federalism which ought to be tried as an original matter at the seat of the government in Washington, D.C. The second sentence of this paragraph then says, "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.*" The phrase "the other Cases before mentioned" clearly refers back to the nine heads of jurisdiction mentioned in the first paragraph of Article III, Section 2. We thus know for a fact that this critical sentence is meant to be read in the context of the rest of Article III, Section 2. The sentence then ends by saying that whenever it does not have original jurisdiction, "the supreme Court shall"—that is, *must*—"have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make." The logical inference is that sentence two of this paragraph should be read holistically with sentence one of the paragraph, so that when exceptions are made to the Supreme Court's appellate jurisdiction, the effect is to add to its original jurisdiction and not to strip the Court of jurisdiction altogether. The obvious import of this clause is to allocate jurisdiction between the Court's original and appellate jurisdiction; it would be passing strange if one of the possible allocations was "none of the above." Those like Justice Scalia who emphasize the plain words of the Exceptions Clause need to read the clause together with the sentence which precedes it and with the Tribunals Clause and the Vesting Clause.

Read holistically, the constitutional text makes perfect sense. It says that there must be one Supreme Court which will have the last word on all questions of federal law; that this Court must have original jurisdiction over a minimum of three categories of especially controversial cases; and that it must have appellate jurisdiction over "*all* the other Cases before mentioned" except where the Congress decides to add to the Supreme Court's original jurisdiction by making exceptions to or regulations of the Court's appellate jurisdiction.[154] It makes far more sense to construe the

154. Why would the Framers have specified such an extensive but discretionary appellate jurisdiction for the Supreme Court? There are several reasons. First, they did not know whether Congress was going to create any inferior federal courts: Therefore it

Exceptions Clause holistically in the manner just suggested rather than to conclude that it granted Congress a power to give the "inferior" federal courts or the state supreme courts the last word on a matter of federal law. The state supreme courts are not even mentioned anywhere in Article III. Why would the Constitution grant Congress the power to give state courts, which Article III does not even mention, the last word on questions involving the meaning of *federal* law? The allegedly "literal" reading of the Exceptions Clause is superficially plausible only if one reads the Clause in isolation. Read together with the rest of Article III, the Exceptions Clause most likely describes only the congressional "good housekeeping" power to move cases back and forth between the original and appellate jurisdictions of the Supreme Court.

There is a second, even more fundamental problem with reading the Exceptions Clause to authorize Congress to remove jurisdiction from the Supreme Court: The Exceptions Clause grants no such power *because it does not grant Congress any power at all*! This conclusion is contrary to the received wisdom, but the received wisdom is simply wrong. The textual, structural, and historical case against reading the Exceptions Clause as a grant of power has been most powerfully made in the modern literature by David Engdahl in an important, and grossly overlooked, article that first drew this central point to our attention.[155] Because the point is crucial to a proper understanding of the Constitution, we lay out in some detail the case against reading the Exceptions Clause as a power grant.

Textually, the Exceptions Clause does not read like a grant of power. It does not say, "Congress shall have power to make exceptions and regulations to the Supreme Court's appellate jurisdiction." Instead, the clause seems to recognize that power to make exceptions and regulations to the Court's appellate jurisdiction has been *elsewhere granted*, and the clause is simply acknowledging the possible exercise of that power as a limitation on what would otherwise be a categorical grant to the Supreme Court of either original or appellate jurisdiction over every case within the federal judicial power. In this respect, the clause is like the Suspension Clause, which recognizes that Congress may at times suspend the writ of habeas corpus but does not grant the power of suspension, and the Takings

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would have made sense to give Congress a lot of discretion over the Supreme Court's original and appellate jurisdiction. Second, the Framers were well aware that one of the fears that people would have about the new federal court system was that they might be sued in federal court and forced to travel on horseback thousands of miles to the seat of government in Washington, D.C., to defend themselves. To alleviate that fear, which did in fact get expressed loudly during the ratification debates, the Framers would have wanted to make most of the Court's jurisdiction appellate while giving Congress the power to add to the Court's original jurisdiction when the gravity of the case suggested a need that it do so. Giving this power to Congress to add to the Court's original jurisdiction would have seemed quite safe because Congress was the branch of the government closest to the people, so it could be trusted not to force people to travel to Washington to litigate their cases unless public necessity demanded it.

155. See Engdahl, Intrinsic Limits, supra note 25, at 119–26.

Clause, which assumes that the federal government will at times take private property for public use but does not itself grant the power of eminent domain. Indeed, the technique of referring to a power previously granted appears elsewhere in Article III: Section 1's mention of "inferior courts" is not a grant of power to Congress to create inferior courts but is instead a cross-reference to any such inferior courts that Congress created pursuant to its Tribunals Clause power in Article I.[156] The Exceptions Clause, when approached without any historical baggage, is most plausibly read as a similar cross-reference.

The textual case against reading the Exceptions Clause as a grant of power becomes even clearer when one contrasts (in a felicitous parallel) Article III, Section 2, Clause 2 with Article II, Section 2, Clause 2. The Appointments Clause of Article II says that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [officers of the United States] . . . but the Congress may by Law 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.[157]

This clause constitutionally vests a power—a jurisdiction, if you will—in the President, and then specifically gives Congress, in unmistakably power-granting language, the ability to alter that baseline jurisdictional vesting. A parallel formulation of the Exceptions Clause would read something like "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, but the Congress may by Law make exceptions and regulations to the supreme Court's jurisdiction." The actual language of the Exceptions Clause is quite different from the power-granting language of the Appointments Clause.

The structural case for reading the Exceptions Clause as a grant of power is even weaker. As Professor Engdahl put it:

> For persons committed both to the separation of powers and to the principle of enumerated powers, it would have been remarkably offhanded to grant to one branch hegemony over another by two words placed as subordinate terms in prepositional phrases. The framers were otherwise careful to articulate grants of power in straightforward, unequivocal terms; for them to bestow by such indirection a power sufficient to cripple a coordinate branch would have been very peculiar.[158]

This is an understatement. The ability to remove one third of the national government from the decisionmaking structure with the stroke of a pen is an extraordinary power, and to find it buried at the end of a

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156. See id. at 123–24 (noting language used elsewhere in Constitution to grant power and calling into question plausibility of reading Exceptions Clause as grant of power).

157. U.S. Const. art. II, § 2, cl. 2.

158. Engdahl, Intrinsic Limits, supra note 25, at 123.

clause whose principal focus is mandatory vesting of jurisdiction in the Supreme Court over all federal cases is simply untenable.

If the Exceptions Clause references power but does not grant it, from where does the acknowledged power to regulate the Supreme Court's jurisdiction spring? The power to suspend habeas corpus and the power of eminent domain both come from the Sweeping Clause. Similarly, the power to make "Exceptions" to the Supreme Court's appellate jurisdiction (by expanding its original jurisdiction) also comes from the Sweeping Clause. The clause gives Congress power to make all laws which are "necessary and proper for carrying into Execution" the other powers enumerated in the Constitution, including the judicial power vested in the federal courts and the congressional powers to constitute tribunals inferior to the Supreme Court and to ordain and establish inferior federal courts. We think that the Sweeping Clause is most likely the source of *all* congressional power to pass jurisdictional statutes for the courts.[159] It would be surprising, therefore, if it were not also the source of Congress's power to apportion the Supreme Court's original and appellate jurisdiction.

Once the Sweeping Clause is properly seen as the source of Congress's power to regulate federal court jurisdiction, it has important implications for the jurisdiction stripping debate. As we have already pointed out,[160] any laws enacted pursuant to the Sweeping Clause must "carry[ ] into Execution" some federal power and must be "necessary and proper" for that purpose. A law that moves some cases from the Supreme Court's appellate jurisdiction and places them into its original jurisdiction can obviously satisfy both concerns, but a law that removes a class of federal cases altogether from the Supreme Court's jurisdiction fails dismally. One can no more carry the judicial power into execution by stripping the Supreme Court of the final word on a question of federal law than one can carry the executive power into execution by stripping the President of control over a special prosecutor. Conceivably, one could try to argue that a law making a class of cases the exclusive province of the inferior

159. It is perhaps clearest that the power of Congress to pass statutes implementing the Supreme Court's original jurisdiction comes from the Sweeping Clause. This simply has to be the case since there is no other constitutional grant of power that could enable Congress to legislate as to the Supreme Court's original jurisdiction. (It is also obvious for similar reasons that the Sweeping Clause empowers Congress to set the size and term of court for the Supreme Court.)

As to the inferior federal courts, it is of course possible that the power to "ordain and establish" them includes the power to set their jurisdiction, but this seems technically unlikely. The act of "ordaining and establishing" an inferior federal court seems separate from the act of granting that court its jurisdiction. We think the Constitution is best read as empowering Congress to create inferior federal courts with the Ordain and Establish Clause and to set their jurisdiction with the Sweeping Clause. Admittedly, this is not the only nor even the usual reading that can be given to the constitutional language on congressional power to establish the jurisdiction of the inferior federal courts, but it makes the most sense of the constitutional language and structure.

160. See supra notes 66–67 and accompanying text.

federal courts is somehow "for carrying into Execution" the Tribunals Clause, but this would confound the plain meaning of the Constitution. The Tribunals Clause authorizes Congress to "constitute Tribunals inferior *to* the Supreme Court." It is very hard to see how giving an inferior court power that cannot be reviewed by the Supreme Court helps carry into effect the power to create "inferior" tribunals—which is the *only* power conferred by the Tribunals Clause. For the same reason, Congress cannot "carry[ ] into Execution" the President's executive power by creating executive officers who do not answer to the President.

Second, any law enacted pursuant to the Sweeping Clause must be "necessary and proper" for executing some federal power. We will not engage here what is required for a law to be "necessary" (though one of us has argued at some length that the standard for necessity prescribed by the Constitution—and quite possibly contemplated by Chief Justice Marshall in *McCulloch v. Maryland*[161]—is stricter than modern doctrine supposes[162]), because a law stripping the Supreme Court of constitutionally vested jurisdiction is not "proper." A "proper" law must respect the structure of federalism, separation of powers, and individual rights embodied in the Constitution,[163] and if we are right about the role of the Supreme Court under the Constitution, a law removing jurisdiction from the Supreme Court rather than allocating it between the Court's original and appellate jurisdiction undoes that structure. It is akin to a statute that tries to strip the President of his power to remove or control a subordinate in the executive department, which is equally improper.

When Exceptions Clause cases are correctly understood to be Sweeping Clause cases, it becomes clear that stripping the Supreme Court of both its original and appellate jurisdiction over federal cases is neither "proper" nor "carrying into Execution" any federal power. There simply is no enumerated congressional power to remove cases from the Supreme Court's jurisdiction. The Exception Clause's reference to exceptions and regulations does not provide a credible textualist grounding for such a power. For these reasons, there is nothing in the Constitution which defeats the inference drawn from the Tribunals Clause and the Article III Vesting Clause that jurisdiction stripping is always unconstitutional in disputes over which the Supreme Court is granted jurisdiction in "all cases."

III. Practice Does Not Always Make Perfect

The obvious rejoinder to our argument that Congress may move cases between the Supreme Court's original and appellate jurisdiction is

161. 17 U.S. (4 Wheat.) 316, 413–15 (1819) (arguing that "necessary" means "calculated to produce the end").

162. See Lawson, Discretion, supra note 67, at 242–48.

163. See id. at 255–64 (arguing that laws delegating too much discretion are not "proper"); Lawson & Granger, supra note 67, at 291–326 (discussing meaning of "proper" and jurisdictional meaning of Sweeping Clause).

to dismiss it as inconsistent with the bedrock holding of *Marbury v. Madison*—a cornerstone of our whole judicial system—that Congress cannot expand the Supreme Court's original jurisdiction.[164] This rejoinder essentially says to discard the plain meaning of the text of the Constitution because precedent demands that we do so—much as it is often argued that because we have had substantive due process precedents for over 100 years, we should therefore abandon the constitutional text which suggests that those cases have mangled the plain meaning of the Due Process Clause.

Many Supreme Court Justices might be able to argue for precedent over text, but we are unwilling to go along with this. One of us takes seriously the idea that following precedent over the Constitution may itself be unconstitutional.[165] The other does not agree, but at least regards the constitutional text as controlling in all but the most extraordinary circumstances.[166] This circumstance is not extraordinary. After all, *Marbury*'s dicta upholding congressional limits on the president's removal power[167] was rightly discarded in *Myers v. United States*.[168] There is no reason why *Marbury*'s holding that Congress cannot add to the Supreme Court's original jurisdiction should fare any better.

Even by conventional standards of precedent, which we do not endorse, the case for adherence to *Marbury* in this respect is weak. There has been essentially no reliance on *Marbury*'s 200-plus-year-old holding that Congress cannot add to the original jurisdiction of the Supreme Court. In contrast, there are substantial reliance interests that are implicated by reading the Exceptions Clause as granting Congress the power to strip the Supreme Court totally of jurisdiction over cases. The thing that makes *Marbury* foundational and memorable is not its holding as to congressional power to add to the Supreme Court's original jurisdiction but its defense of judicial review. Overruling the holding of *Marbury*

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164. 5 U.S. (1 Cranch) 137, 173–76 (1803).

165. See Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 27–28 (1994) (asserting that *Marbury*'s reasoning applies to judicial review of prior judicial action); Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 Ave Maria L. Rev. (forthcoming 2007) (arguing that Court should "mostly never" choose precedent over text of Constitution).

166. See Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 Const. Comment. 311, 328 (2005) (stating that precedent should be followed over Constitution only where text is vague and all three branches of government are content with governing precedent).

167. If Marbury, as an executive official, was subject to plenary removal by the President, then there could not have been any issue about his entitlement to a commission because President Jefferson's refusal to deliver the commission was an effective removal from office. Chief Justice Marshall accordingly noted on five separate occasions that Marbury could not be removed at will. See *Marbury*, 5 U.S. (1 Cranch) at 156, 157, 162, 167, 172.

168. See 272 U.S. 52, 139–40 (1926) (finding that *Marbury* is not controlling with respect to removal power).

would actually protect the institution of judicial review from jurisdiction stripping. It would be better to jettison *Marbury* and safeguard judicial review than to jettison judicial review and safeguard *Marbury*.

The fact of the matter is that scholars have long recognized that *Marbury* was a highly questionable and political ruling by a very political Chief Justice, issued at a time when the Supreme Court was badly beleaguered and under attack.[169] Many scholars have argued, rightly in our view, that Marshall misread the congressional statute at issue in *Marbury* as adding to the Supreme Court's original jurisdiction,[170] and it would not be surprising if Marshall misread the Constitution at the same time.[171]

Alternatively, one could retain the *Marbury* precedent even though it is wrong but decline to construe the Exceptions Clause as allowing Congress to give the last word in federal question cases to entities other than the Supreme Court. But just because the Court in *Marbury* misread the Original Jurisdiction Clause is no reason for it also to misread the Exceptions Clause. One could perfectly well leave *Marbury* in place but decline to allow its gravitational force to turn the Exceptions Clause into a threat to judicial review that it was not meant to be.

Another argument from practice that is likely to be made in opposition to our argument is that, since the Judiciary Act of 1789, Congress has passed laws purporting to make exceptions to the Supreme Court's appellate jurisdiction. Because the Judiciary Act of 1789 was passed by the First Congress, a body filled with many of the Framers, the Act itself has long been thought to be an especially significant gloss on the constitutional text. Surely, it might be argued, a practice so venerable that it dates back to 1789 cannot seriously be impugned as being unconstitutional.

We plan to address this topic at greater length in a subsequent work, but for present purposes three short comments are sufficient. First, the authority of the Judiciary Act of 1789 as an interpretation of the Constitution should not be overestimated. *Marbury*, after all, declared unconstitutional a portion of the Judiciary Act of 1789, so it was evidently not beyond the ken of the founding generation that the First Congress might be a fallible constitutional interpreter. The First Congress's proximity to the ratification of the Constitution is interesting and relevant but not decisive. It is not uncommon for Congress to pass laws inconsistent with recently enacted constitutional provisions. Indeed, the Reconstruction Congress did precisely this when it provided for segre-

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169. See, e.g., Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 8 (2005) ("Rather than a ringing vindication of judicial power, it was part of a large strategic retreat, rationalizing a stunning judicial concession to the Republicans' proud claim to a mandate from the People.").

170. See, e.g., Amar, America's Constitution, supra note 106, at 232.

171. Professor Amar, to be sure, defends Marshall's understanding of the constitutional scope of the Supreme Court's original jurisdiction, see id. at 231–32, but he does so largely based on historical and consequentialist arguments.

gated schooling in the District of Columbia at the same time that it barred racial discrimination by passing the Fourteenth Amendment.[172] This kind of disjunction between contemporaneous constitutional provisions and implementing legislation should not be surprising. Even if there is some degree of overlap between the constitution-making and constitution-implementing bodies, as there was in the founding era, legislators have very different incentives, and operate under very different institutional restraints, than do constitutional drafters or ratifiers. The authors of the Judiciary Act of 1789, for instance, included many Anti-Federalists elected to the First Congress who were hostile to the new system of national courts. As a result, it would not be surprising if the Judiciary Act of 1789 contained compromises with Anti-Federalists that were in tension with the nationalizing thrust of Article III; for example, the new inferior federal courts were given no federal question jurisdiction,[173] and the new Supreme Court was not statutorily confirmed in the full extent of its federal question jurisdiction. Why should we today defer to the Anti-Federalist-influenced Judiciary Act of 1789 rather than enforcing the plain words of the Constitution? Nor should one exaggerate the significance of actions taken by the First Congress. While that body was capable of sophisticated constitutional debate that puts our modern lawmakers to shame,[174] it was also capable of error. There is no good reason to prefer the constitutional gloss of the Judiciary Act of 1789 to the plain words of the Constitution. The touchstone must always be the Constitution, not what anyone in particular, including the First Congress, says about the Constitution.

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172. Recent originalist scholarship has concluded, from several different directions, that segregated public schools violate the Fourteenth Amendment. See, e.g., Michael W. McConnell, Originalism and the Desegregation Decision, 81 Va. L. Rev. 947, 1099 (1995) ("[T]he weight of the evidence supports the proposition that segregation was understood in the years prior to the end of Reconstruction to be unconstitutional . . . ."); Michael W. McConnell, The Originalist Justification for *Brown*: A Reply to Professor Klarman, 81 Va. L. Rev. 1937, 1954 (1995) (asserting that *Brown v. Board of Education* actually reflects original meaning of Fourteenth Amendment); Steven G. Calabresi & Michael Perl, A Formalist-Originalist Defense of *Brown v. Board of Education* 17–55 (May 3, 2004) (unpublished manuscript, on file with the *Columbia Law Review*) (using evidence from year in which Fourteenth Amendment was passed to argue that original intent of Fourteenth Amendment supports unconstitutionality of segregated public schools).

173. Actually, Professor Engdahl has seriously questioned this bit of conventional wisdom. If one does not begin with the incredibly (though not necessarily improperly) broad view of "arising under" jurisdiction reflected in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (finding Bank of the United States charter to arise under federal law), there are actually very few cases within Article III over which the Judiciary Act did not confer federal jurisdiction. See Engdahl, Intrinsic Limits, supra note 25, at 136–38. If Professor Engdahl is right about this, our case is even stronger.

174. For example, the debate in the First Congress concerning the presidential removal power was a constitutional tour de force. See Saikrishna Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1042–61 (2006) (describing and analyzing congressional enactment of Foreign Affairs Act).

Second, we think that the practice is actually more consistent with our analysis than it might seem at first glance. The so-called early "exceptions" to the Supreme Court's appellate jurisdiction were all *implied* exceptions from affirmative language that granted jurisdiction over some class of cases and *were taken by implication* to exclude jurisdiction over others.[175] This kind of argument by implication, we think, commits profound error. If we are right that the Exceptions Clause is not a grant of power, and that Congress's power over Supreme Court jurisdiction stems solely from its power under the Sweeping Clause to make necessary and proper laws for carrying into execution the Supreme Court's judicial power, then Congress *only* has the power to pass affirmative laws defining (to the extent of Congress's power) the scope of the Supreme Court's original and appellate jurisdiction or laws confirming or clarifying the Court's constitutionally granted jurisdiction. *Congress could not pass a negative law simply denying the Supreme Court jurisdiction, either original or appellate, over a class of cases within the Constitution's mandatory jurisdiction, and until fairly recently Congress did not try.* Thus a typical so-called exercise of Congress's Exceptions Clause power over the Supreme Court is Congress's failure in the Judiciary Act of 1789 to make federal criminal convictions reviewable by the Supreme Court.[176] But this is not an exercise of a putative congressional Exceptions Clause power. It is simply a failure on the part of Congress to execute fully the judicial power conferred by Article III. Theoretically, the Supreme Court could have exercised power over such cases even though the jurisdictional statutes did not provide for it by falling back on its constitutional grant of appellate jurisdiction in all the other cases before mentioned. It is true that the Court never to our knowledge assumed constitutional jurisdiction over such a case where the jurisdictional statutes did not provide for it, but that does not mean that the Court could not have done so. In fact, there is no practice of Congress overturning Supreme Court decisions by passing jurisdictional laws by a simple majority in this country. If it is practice that counts, surely it has not been our practice to uphold challenged jurisdiction stripping bills as being constitutional.

Our account of congressional power explains one of the puzzles raised by the traditional reading of the Exceptions Clause: Why are Congress's statutes governing the Supreme Court's appellate jurisdiction writ-

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175. See, e.g., Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313 (1810) ("[Congress] ha[s] described affirmatively its jurisdiction, and this affirmative jurisdiction has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."); United States v. More, 7 U.S. (3 Cranch) 159, 173–74 (1805) ("[T]he jurisdiction of the court . . . has been regulated by congress, and an affirmative description of its power must be understood as a regulation . . . prohibiting the exercise of other powers than those described.").

176. On the failure of Congress to provide for Supreme Court review of federal criminal convictions until 1889, see John Harrison, The Power of Congress over the Rules of Precedent, 50 Duke L.J. 503, 514 (2000); Ann Woolhandler, Demodeling Habeas, 45 Stan. L. Rev. 575, 587 (1993).

ten in the affirmative rather than as exercises of a congressional power to make exceptions? Our account of Article III can answer that question more fully than competing accounts. We think that the reason congressional statutes are written as affirmative grants of jurisdiction rather than as negative exceptions away from the constitutional grant of jurisdiction is because Congress enacts these statutes pursuant to its power to carry into execution the judicial power conferred by Article III. The statutes governing the Supreme Court's appellate jurisdiction are not exercises of some negative power conferred by the Exceptions Clause.

Once the Sweeping Clause is seen as the source of congressional power to regulate Supreme Court jurisdiction, no negative implication should be drawn from an affirmative statute confirming jurisdiction over some cases but not others, because when Congress passes laws "for carrying into Execution" the powers of other governmental actors, *it need not do so to the full extent of its constitutional powers*. If Congress passes a statute authorizing the President to conduct a certain form of intelligence gathering during wartime, that statute does not foreclose the President's use of whatever powers of intelligence gathering are directly granted by the Article II Vesting Clause. Congress can, to the extent of its constitutional power, supplement the President's inherent constitutional authority, but it cannot limit this authority, either directly or by implication. Similarly, Congress can help clarify or implement whatever power is directly granted to the Supreme Court by the Constitution, but it cannot limit this power, either directly or by implication. Statutes that affirmatively describe the Supreme Court's jurisdiction, but that do not describe it to its full extent, are wholly consistent with the constitutional framework as we understand it. The weight of historical practice, including the statutes enacted by the First Congress, is actually very well explained by our analysis.

CONCLUSION

Justice Scalia's (and the Bush Administration's) views on Article II, which emphasize that Congress cannot derogate from the constitutional grants of authority to the President, are in considerable tension with their views on Article III, which seem to contemplate a wide congressional power to derogate from the constitutional grants of authority to the Supreme Court. Justice Scalia's position on Article II is correct, and it applies as well to Article III. Congress can determine whether the Supreme Court will have original or appellate jurisdiction over federal cases, but it cannot determine whether the Supreme Court will have jurisdiction at all. The Constitution has already done that.