ARTICLES

ARTICLE III CASES,
STATE COURT DUTIES, AND
THE MADISONIAN COMPROMISE

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Traditional federal courts scholarship holds that state courts are empowered to hear, and that they have certain duties to hear, Article III cases and controversies. Support for this position is thought to be provided in part by the historical events culminating in the Madisonian Compromise—the decision at the Constitutional Convention to leave the creation of lower federal courts to Congress rather than to require them in the Constitution. Thus, if there had been no lower federal courts, most Article III business would have had to be heard in the state courts in the first instance if it was to be heard at all. In this Article, the author questions the historical accuracy of these fundamental assumptions about state court powers and duties, including the traditional interpretation of the Compromise. He shows that among those who framed, ratified, and implemented Article III, there was a pervasive belief that state courts were not, in fact, constitutionally able to hear all Article III business; further, the prevailing assumption was that they ordinarily had no obligation to assume unwanted jurisdiction, the Supremacy Clause notwithstanding. These widely shared founding-era beliefs, unconventional by modern standards and difficult to reconcile with the Compromise, even led some to conclude that federal courts were constitutionally required after all.

Following an historical reexamination of the events surrounding the framing of Article III, the author concludes that the force of the Madisonian Compromise was lost on the early Republic because the "compromise" was probably never viewed as the simple agreement that we now think it was. These reconceived original understandings about the role of state courts in the implementation of Article III cast new light on the Supreme Court's shifting approach to the problem of state court jurisdictional autonomy and on Congress's (and the Court's) ability to reshape state court jurisdictional agendas to accommodate the enforcement of federal law. More importantly, the revisionist approach to the Madisonian Compromise provided by the author suggests that a number of other fundamental tenets of federal courts law that are premised on the Compromise may need to be reexamined as well.

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INTRODUCTION

The Constitution has made the Judges of the several States the Judges of the Union; because they have taken an Oath to observe the Constitution.—This proves too much—Instance the State Legislatures.

The Oath is in Nature of an Oath of Allegiance, and not an Oath of Office—

It hardly seems controversial to point out that state courts are under an obligation to enforce the Constitution and federal law. After all, under the Supremacy Clause, federal law is the supreme law of the land. And, where state law comes into conflict with federal law, state courts must conform their decisionmaking to federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Of course, state courts may assess the constitutionality of federal statutory enactments, and, like other interpreters of the law, they contribute their understanding as to the content of the supreme law of the land. But their obligation in cases before them is to adhere to the Constitution and to federal law passed consistent with it. This aspect of the Supremacy Clause's command to the state courts to conform their decisionmaking to the substantive norms of federal law as part of their case-deciding function is relatively unproblematic. It is, however, only one part of a potentially more complex, and less certain duty imposed upon state courts by the Supremacy Clause.

The obligation to enforce federal law also arguably carries with it a duty that state courts entertain jurisdiction over civil and perhaps even criminal actions brought by parties seeking to enforce federal law. To the extent that the Supremacy Clause may be said to make federal law a part of state law, it is a duty that might arise with or without an express congressional command to hear such cases. The possibility of such a duty implicates a larger and growing debate about the extent to which states

2. U.S. CONST. art. VI, cl. 2.
   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.
   Id.
3. Id.
might be compelled to assume a bureaucratic role in the administration of federal law which the federal government might otherwise carry out with instrumentalities and officials of its own.\textsuperscript{4} But traditional federal courts scholarship holds that, while state courts are presumed competent to entertain claims for relief based on federal law, they are under no absolute obligation to do so. Rather, it is said that they are obligated only to hear federal claims that are "analogous" to those they would otherwise hear under state law, and that they may have a "valid excuse" to decline nonanalogous judicial business.\textsuperscript{5} The model presented is one of jurisdictional nondiscrimination. Yet, while the analogous-claims and valid-excuse rhetoric that persists in the opinions of the Supreme Court


has prompted sharp academic criticism, the Court has made little effort to justify these limitations.

An especially powerful argument in favor of an unqualified state court obligation to entertain federal claims, without regard to any analogous-claims limitation, comes from another and perhaps competing tenet of traditional federal courts scholarship: the view that the Constitution did not require the establishment of any lower federal courts. Arising out of what is sometimes referred to as the "Madisonian Compromise," Article III's language mandates the establishment of a Supreme Court, but leaves the creation of "inferior" federal tribunals to the discretion of Congress. The Compromise, struck at the Constitutional Convention, is said to have marked an accommodation between Federalist forces, consisting of those who wanted to see the creation of some lower federal courts mandated by the Constitution itself, and Anti-Federalists, who preferred that the only constitutionally required federal court be the Supreme Court and who would have left to the state courts the trial of Article III cases and controversies (except, perhaps, those in the Supreme Court's original jurisdiction). Had Congress indeed created no lower federal courts, there would arguably need to be some way to compel state courts to exercise jurisdiction over Article III cases and controversies, either through some affirmative obligation on their part or a congressional ability to coerce them. Otherwise, there would have been some Article III matters over which no court could take original jurisdiction. So read, the Compromise itself provides a basis for concluding that state courts can be compelled to take jurisdiction of cases without regard to whether those courts entertain similar or analogous claims. Nevertheless, the Court has


continued in most contexts to honor the analogous-claims limitation and has not been driven by the apparent logic of the Compromise.

In this Article, I seek to account for the Court's reluctance to embrace fully a Supremacy Clause argument that would compel state courts to provide a forum for the disposition of all federal judicial business and to assess the historical and theoretical justifications for that reluctance. This reluctance, I will argue, stems from once-entrenched, if now largely abandoned, understandings not only about limits on federal power but about limits on state power as well—understandings that run quite counter to most modern federal courts scholarship. Part I of this Article will therefore address what I believe was a considerable debate surrounding the competence of state courts to entertain all Article III judicial business, as revealed during the Constitution's framing and ratification, and by the early implementation of Article III by Congress and the courts. These sources show, first, that the state courts were thought to be able to entertain Article III business only because of powers granted to them under state law, rather than because of powers or duties expressly or impliedly conferred on them by federal law or the Constitution. They further reveal a corollary belief that state court competence extended no further than to claims that were similar to those that state courts already heard, consistent with state constitutions and state jurisdictional statutes. In addition, there was a long and even dominant tradition—difficult if not impossible to reconcile with the Madisonian Compromise—that as to some Article III matters, state courts were constitutionally disabled from acting. From this, some in the early Republic drew the conclusion that Congress might have an obligation to create at least some lower federal courts, a virtually unthinkable proposition today due to the entrenched understanding of the Madisonian Compromise. These understandings not only made their way into the Court's eventual approach to state court power to entertain claims arising under Article III, but they also affected the question whether states were obligated to hear federal judicial business under the command of the Supremacy Clause. Moreover, they influenced the determination of whether Congress could compel state courts to entertain such claims—an authority, interestingly, that was steadfastly denied until well into this century.

As a bridge between a discussion of the historical limits on state court power to assume federal judicial business and the ability of state courts to refuse it, Part II of this Article will address the surprisingly muted impact the Compromise seems to have had on the founding

DAME L. REV. 1145 (1984) (arguing, based on the Compromise, that state courts have affirmative duties to hear federal claims, above and beyond a duty of nondiscrimination).
generation and its early successors. For modern scholars, the Compromise is a fundamental and unshakable article of faith, because the historical record of the events leading up to it provides something close to smoking-gun evidence that lower federal courts would not be constitutionally required. From the premise of the Compromise, a host of other arguments about federal courts follow almost inexorably, respecting, for example, the ability of Congress to strip the lower courts of their jurisdiction or the Supreme Court of its appellate jurisdiction, the meaning of the habeas corpus Nonsuspension Clause, and, of course, the extent to which state courts can and must hear Article III business. As I will try to show, however, for those who drafted, ratified, and implemented the Constitution in the early Republic, the Compromise was clearly not the defining event that it is for us. Despite the Compromise and Article III’s permissive language respecting the creation of lower federal courts, one sees almost no reasoning from the Compromise, or from the possibility that Congress might create no lower federal courts, to conclusions about the powers and duties of state courts. Such arguments are largely modern constructs. Moreover, this older, more cavalier approach to the Compromise did not result, as some might argue, from the fact that its details were kept secret for so long. Instead, the Compromise’s insignificance as a tool for reasoning about state-federal court relations probably lies in ambiguities surrounding its meaning at the time of framing and ratification, including the fact that some may have viewed the debate (and the “compromise”) as concerning whether Congress would have to create a separate system of lower federal courts, or instead could make federal judges of sitting state judges, who would perform dual roles. The insignificance of the Compromise for the

9. See, e.g., Hart & Wechsler, supra note 7, at 10-11, 368, 382; Martin H. Redish & Gene R. Nichol, Federal Courts 107-09 (3d ed. 1994) (citing Redish & Woods, supra note 7, at 52-55); Paul M. Bator, Congressional Power over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030, 1037-41 (1982); see also James E. Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 577-97 (1994) (discussing impact of Compromise, as traditionally understood, on scope of Supreme Court’s original jurisdiction).


11. This latter possibility, although not its impact on the Compromise, is raised by Saikrishna Prakash in a recent contribution to the debate on the coercive power of the federal government to rely on states as enforcers. See Prakash, supra note 4, at 2007-10; see also Akhil R. Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1537-38 (1990).
early Republic made it easier to deny, on occasion, the apparent force of the permissive language regarding the creation of lower federal courts, even though, at the same time, there was an equally powerful rhetorical tradition that their jurisdiction was in the hands of Congress.

As discussed in Part III, the unwillingness to use the Compromise or the language of Article III as a way to resolve the issue of state court jurisdictional duties, when coupled with the shared understandings about the sources and limitations of state court power, made it easy for earlier generations to conclude that states did not have to accept unwanted federal civil and criminal judicial business, and that Congress could not compel them to do so. Those who sought to resolve the question of such jurisdictional duties in the early Republic were careful to distinguish between what they saw as two distinct possible commands of the Supremacy Clause as it affected state judges. One was in the nature of an oath of fidelity to the Constitution, which “coerced” state judges to apply federal substantive norms that happened to be implicated in the decision of cases which state law gave them the power to hear. The other command was in the nature of what William Paterson, a participant in the Convention, called an “oath of office,” and would have compelled state judges to adjudicate cases that states denied their courts the power to hear. It was, however, only the first of these duties that the Supremacy Clause was long thought to impose, and it was a duty that could ordinarily be policed on direct review. To be sure, the distinction drawn is a somewhat formal one, inasmuch as a state court’s refusal to hear a case may undercut the supremacy of federal law to the same degree as a failure to apply it or an erroneous interpretation of it. But the distinction, I will argue, animated the Court from the founding era and well into this one, until some state courts sought to avoid having to apply certain federal norms of which they disapproved by couching their substantive objections in jurisdictional terms. It was out of these later events that the language of jurisdictional nondiscrimination was invented in an effort to enforce the simpler of the two commands of the Supremacy Clause while still accommodating the tradition of state court jurisdictional autonomy. In addition, it was this Supremacy Clause distinction that the Court came close to losing sight of in Testa v. Katt—the modern starting point for discussions of state court jurisdictional duties—and in later cases amplifying Testa’s theme.

Finally, in Part IV, I examine the impact of these traditional understandings on the present-day problems of enlisting state courts in the enforcement of federal law, reshaping their jurisdictional agendas, and, potentially, restructuring their judicial machinery to accommodate federal

business. I do not mean to argue for returning to a bygone era. It is
difficult if not impossible to argue today that there are areas of Article III
jurisdiction within the Supreme Court’s appellate jurisdiction that could
not be heard in the first instance by the state courts if they were so
inclined and if Congress were agreeable. Nor is it my purpose here to
argue generally that there is a constitutional necessity to create lower
federal courts (although the interpretation of the Madisonian Compromise
suggested here may warrant reconsideration of the Compromise’s
authority as a foundation for various arguments about federal courts). But
much of the older tradition respecting state court jurisdictional autonomy
expressed constitutionally based values that may provide meaning for
state-federal judicial relations today, even if certain conclusions to which
the older tradition sometimes led have been discarded. I will therefore try
to identify the concerns for state judicial independence that might have
inspired the older tradition and will consider the possibility that there
might yet be constitutionally based limitations on the federal government’s
ability to compel state courts to enforce all Article III business. The
possibility of such constitutional limitations is brought into sharp relief by
the Supreme Court’s decision in New York v. United States,13 which
purports to establish curbs on the federal government’s ability to enlist
state governments in the enforcement of federal law and to
“commandeer” their governmental decisionmaking structures in so doing.
While the issues addressed in this Article present both theoretical and
historical difficulties, they are issues that command increasing political
attention as well, as Congress seeks ways to enlist (and reshape) state
courts in the enforcement of an ever-expanding body of civil and criminal
federal law.

I. COMPETENCE AND CONCURRENCE

A. Shared Jurisdictional Competence and the Traditional Understanding

State courts have long adjudicated lawsuits to which Article III
extends, including cases that implicate questions of federal law. Indeed,
until Reconstruction, there was no grant of general federal question
jurisdiction.14 Consequently, many claims for relief based on federal
law were litigated only in the state courts. Even with the arrival of such
jurisdiction, the Supreme Court quickly settled on a presumption that state
courts could exercise jurisdiction concurrent with the federal courts over

congressionally created claims for relief. What is more, various statutory and judge-made jurisdictional doctrines have continued to force the initial litigation of certain federal issues in state courts. Thus, despite the considerable expansion of federal jurisdiction following Reconstruction and continuing through this century, it was still possible, as late as 1953, for Henry Hart to declare in his famous "Dialogue" that state courts, not federal courts, were the "primary guarantors of constitutional rights." Federal input in cases tried in state court still tends to come after the fact, primarily by direct review in the Supreme Court, and sometimes by collateral attack in criminal cases.

This arrangement accords with the traditional understanding of Article III that state courts would ordinarily be able to entertain jurisdiction over the cases to which the federal judicial power extended, including claims for relief based on federal law. That conclusion flows easily from the text and structure of the Constitution which, scholars agree, did not require the establishment of lower federal courts. Thus, there was a possibility that state courts would be the exclusive adjudicators of federal questions and enforcers of federal rights in the first instance.

The traditional understanding draws additional support from the statements of Alexander Hamilton in The Federalist No. 82. Hamilton admitted that the Constitution's grant of federal judicial power to the Supreme and lower federal courts could be read as signifying that federal courts exclusively could decide all "causes of federal cognizance." But he rejected such a reading in favor of one that saw Article III as simply identifying the "organs of the national judiciary" which would be able to decide such matters and as generally leaving intact the power of the states to entertain such cases. As with other powers granted to the federal government in the Constitution, states retained their "pre-existing" or "pre-existing" or

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16. For example, federal defenses cannot ordinarily be anticipated in civil claims based on state law. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908); 28 U.S.C. § 1441(a)-(b) (1988) (engrafting well-pleaded complaint rule onto removal statute). Likewise, a host of interrelated doctrines ensure that state criminal proceedings will be carried out in state court, despite the presence of possible federal issues. See Hart & Wechsler, supra note 7, at 1383-438.
17. Hart, supra note 7, at 1401.
20. Id.
21. Id. at 554-55.
primitive authority, except where the power conferred on the federal government was made exclusive. Article III's conferral of judicial power was not to be read as exclusively federal, he said, lest such an interpretation "amount to an alienation of state power by implication." Thus, the traditional understanding of Article III is that while Congress might by statute expressly make a particular grant of judicial power exclusively federal, the default rule is jurisdictional concurrency. This sentiment concerning the impact of congressional silence is consistent with the understanding that the federal government is one of limited powers, whereas the state governments, whose powers did not find their source in the federal Constitution, generally are not.

Hamilton's statements respecting concurrency and state court power were designed in part to allay the fears of Anti-Federalists that the enactment of Article III would work a wholesale withdrawal of then-existing state court jurisdiction. Opponents of broad federal power could be expected to find comfort in both the prospect that the initial adjudication of Article III business might be left to the state courts and in the possibility that Congress's option to create inferior federal courts might either go unexercised or be implemented only partially. Because the states would presumably pick up the slack created by the failure to establish a system of lower federal courts, the result would have been to confer greater power on the state courts to affect the shape and enforcement of federal law, despite the possibility of eventual review in the Supreme Court. That state courts were understood to play a substantial role in the vindication of federal law is revealed not only by the failure of the first Congress to confer all of Article III's judicial

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22. See Letters from the Federal Farmer (III) (Oct. 10, 1787), COUNTRY J. (Poughkeepsie), Nov. 1787-Jan. 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 234, 243-45 (Herbert J. Storing ed., 1981) (noting that state courts would share jurisdiction with the federal courts with respect to those matters over which the state courts previously had jurisdiction). John Marshall agreed: "Are there any words in this Constitution which exclude the courts of the states from those cases which they now possess? . . . The state courts will not lose the jurisdiction of the causes they now decide." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553-54 (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott Co. 1836) [hereinafter ELLIOT'S DEBATES]; see also 4 id. at 162 (remarks of William Maclaine of North Carolina); cf. U.S. CONST. amend. X (powers neither delegated to the federal government nor prohibited to the states by the Constitution are reserved to the states).

23. Hamilton chose, as his example of concurrency, cases arising under federal statutes: "[I]n every case in which [the state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth." THE FEDERALIST No. 82, supra note 19, at 555.
business on the lower federal courts in the first instance, but also by the number of criminal and related statutes whose enforcement was entrusted by the early Congresses to the state courts.

Hamilton's preemption-based approach to the question of state court jurisdiction would later be enshrined in *Claflin v. Houseman.* Just a year after the Reconstruction Congress's enactment of the general federal question statute, the *Claflin* Court held that state courts had jurisdiction over Article III judicial business "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Claflin*’s underlying supposition was that no affirmative act by Congress was needed to confer state court jurisdiction over matters that came within the federal judicial power. In most cases, state courts already possessed such power through the jurisdiction bestowed on them by state law. If a suit were one over which the state courts would be able to exercise jurisdiction under their own constitutions and laws, it would take an affirmative act of Congress to withdraw their pre-existing authority. It was in this jurisdictional sense that the Court held the state courts were competent to hear matters arising under federal law.

**B. Intimations of Limitations on State Court Power**

1. **“LIKE” CASES AND STATE JURISDICTIONAL LIMITATIONS**

Nevertheless, the *Claflin* Court hinted at two possible qualifications to its presumption of concurrency, neither of which has received much attention. First, the Court seemed to limit its remarks respecting state court concurrency to "like" cases over which the state courts exercised jurisdiction under their own laws. "[R]ights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent

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26. 93 U.S. 130 (1876).

27. *Id.* at 136.

28. *See id.* at 139. "[I]t was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases." *Id.; see also* Note, *supra* note 5, at 1553 (referring to *Claflin* as an analogous-right case).
to decide rights of the like character and class . . . .”

Claflin’s presumption of concurrency therefore appeared to be based on an understanding that, at some level of generality, the federal claim should resemble claims that the state courts already entertained. This “like cases” qualification to concurrent jurisdiction echoes somewhat Hamilton’s own equation of concurrency with the state court’s “pre-existing” jurisdiction in The Federalist No. 82. The concept of pre-existing jurisdiction, therefore, may have not only identified the jurisdiction that the state courts would not part with under the Constitution; it may have also identified a potential outside limit to ideas of concurrency. If so, the notion of “like” cases reinforces the understanding that Congress need do nothing to enable state courts to exercise jurisdiction over federal cases that were like those over which the state courts already exercised jurisdiction. In Claflin, moreover, the lawsuits at issue were not federally created claims for relief at all, but were “common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity,” brought by a bankrupt’s assignee—the sorts of suits that the state courts clearly already entertained.

This like-cases limitation, if correct, gains fuller significance when it is recalled that when Claflin was decided, rights under federal law and the Constitution were litigated in a common-law universe. Parties seeking to vindicate such rights would ordinarily complain of a common-law harm that they had suffered and base their case on one of the familiar forms of action. Often in such cases, the Constitution or a federal law entered only incidentally, either to provide the applicable substantive norm, or perhaps

29. Claflin, 93 U.S. at 136-37. As discussed below, questions of “likeness” are easily manipulated and may ultimately offer no serious limitation if asked at a sufficiently high level of generality. But I am willing to entertain Claflin’s apparent suggestion that its reference to like cases was thought to be a meaningful one, and one implying limits.

30. Id. at 135. Interestingly, in Claflin itself, the Court was not presented with the problem of enforcing a federal norm within a state cause of action, or even a congressionally created action. The problem before the Court was simply whether a state court had power to hear a run-of-the-mill state law claim brought by a trustee in bankruptcy, appointed pursuant to a federal statute. Claflin also recognized that the level of generality at which one conducted the like-cases inquiry could decide the question of exclusivity. For example, some had argued that cases arising under federal statutes, treaties or the Constitution were not sufficiently like the cases that state courts had previously heard (and were therefore beyond their power to entertain), because “no such jurisdiction existed before the Constitution was adopted.” But the Claflin Court seemed to note that the only thing that might be different in such cases was the norm to be applied, and not the type of claim in which it would be vindicated. See id. at 141 (“[B]ut the same jurisdiction existed (at least to a certain extent) under the authority of the States.”).
to negate a defense of official authorization.31 Indeed, until this century, it might have been difficult to conceive of a claim for relief based on a violation of a federal statute or the Constitution as involving an especially federally created cause of action.32 The source of the remedial vehicle was often left unclear in these suits, even when the underlying right being vindicated was federally created.33 Consequently, to say that state courts could, as part of their primitive jurisdiction, hear claims that sought recovery for a violation of a standard set up by a federal law or by the Constitution was merely to acknowledge that the age-old actions familiar to the common law and equity were the usual grist of both state and federal courts. The only thing that might have differed in a federal question suit brought in state court was the substantive norm to be applied. And the federal norm itself was enforceable as part of the

31. Early victims of unconstitutional state action at the hands of state officials typically sued the officer in tort under one of the familiar common-law forms of action described in Claflin. See Michael G. Collins, "Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983, 77 Geo. L.J. 1493, 1510-29 (1989). Private violators of federal statutory law might be sued in this common-law fashion as well, with federal law supplying the relevant standard of care or other legal norm in a suit for relief based on common-law theories. See id. at 1525 & n.172. Thus, a suit to recover damages or injunctive relief for injuries associated with the enforcement of an unconstitutional statute might be pleaded as a trespass action, see Scott v. Donald, 165 U.S. 58 (1897) (trespass action for damages in federal court against non-diverse state official who had enforced unconstitutional statute); id. at 107 (companion equity action to enjoin same harm), while a suit to enforce a federally created right, such as a land title, might be litigated in an ordinary action to remove a cloud on the title. See, e.g., Hopkins v. Walker, 244 U.S. 486 (1917).

32. See, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (constitutional norm engrafted onto common-law cause of action); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507-08 (1900) (federal law created property right enforceable by ordinary common-law actions). Neither Smith nor Shoshone Mining involved a cause of action that would likely have been perceived as created by either state or federal law. See Collins, supra note 31, at 1523-27.

33. This is not to say that express, federally created causes of action were absent in the nineteenth century. But often the federal statutes that created them did little more than incorporate the general law forms of action by giving the litigant an action in law or equity to redress a particular injury. See, e.g., 42 U.S.C. § 1983 (1988). Even Ex parte Young, 209 U.S. 123 (1908), the case often identified as the first to allow an implied equitable action under the Constitution (as opposed to tort law), was itself not fully free of the older, common-law tort model. See Michael G. Collins, The Conspiracy Theory of the Eleventh Amendment, 88 Colum. L. Rev. 212, 239-42 (1988) (book review). As the Claflin Court stated with respect to suits by inventors claiming exclusive rights in their inventions (which suits existed prior to the Constitution): "The change of authority creating the right did not change the nature of the right itself." Claflin, 93 U.S. at 141. And that right was enforceable under the familiar vehicles known to the common law in either the state or federal courts.
supreme law of the land.\textsuperscript{34} Whatever the contours of the like-cases limitation, however, \textit{Claflin} seemed to suggest that state court jurisdictional limitations could pose a barrier to the adjudication of some Article III business.

2. HINTS AS TO CONSTITUTIONAL EXCLUSIVITY?

A second limitation hinted at in \textit{Claflin} is more problematic. Most discussions of exclusive federal court jurisdiction today focus on the question of exclusivity created by federal statutes, not the Constitution.\textsuperscript{35} \textit{Claflin} itself devoted considerable attention to the statutory point, noting that, as to cases arising under federal law, "whether [state courts] possessed [concurrent jurisdiction] or not, in a particular case, was a matter of construction of the acts relating thereto."\textsuperscript{36} But before it got to the question of statutory exclusivity, the Court opened its discussion by noting what it considered to be

the general principle . . . that, where jurisdiction may be conferred on the United States courts, it may be made exclusive \textit{where not so by the Constitution itself}, but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.\textsuperscript{37}

\textsuperscript{34} "Unlike" cases, as discussed below, might be those that were both statutorily created and unfamiliar to the common law, or perhaps those that gave unfamiliar remedies, or that otherwise could not be said to fit within the states' pre-existing jurisdiction. \textit{See}, \textit{e.g.}, Dudley v. Mayhew, 3 N.Y. 9, 18 (1849) (holding patent action—under jurisdictional statute more ambiguous about exclusive jurisdiction than current 28 U.S.C. § 1338 (1988)—to be within exclusive federal jurisdiction because the Act provides for remedies "peculiar" to the Act and not in "the same form" as the common law). Edmund Randolph also indicated that the creation of federal statutory remedies unknown to the common law might make for exclusively federal judicial business. \textit{See infra} note 78.


\textsuperscript{36} \textit{Claflin}, 93 U.S. at 140.

\textsuperscript{37} \textit{Id.} at 136 (emphasis supplied). The Court noted that the question of the exclusivity of federal court jurisdiction over cases arising under federal law had been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other,—but the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction [of state courts], where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.
The statement seems to recognize that, while Congress might be able to make certain heads of jurisdiction exclusive by statute, perhaps the Constitution itself made some federal jurisdiction exclusive.

I do not mean to overstate the point. *Claflin* itself did not pursue the idea beyond mentioning it. And the idea that state courts might be constitutionally disabled from exercising concurrent jurisdiction over a particular slice of Article III business poses clear problems for the Compromise and the traditional understanding of state court judicial competence. Accordingly, the phrase "where not [exclusive] by the Constitution itself" might fairly be read either as referring to some or all of the Supreme Court's original jurisdiction, or as referring to the (constitutional) preemption arising from implied (statutory) exclusivity—that is, where there is "incompatibility . . . arising from the nature of the particular case" between state court jurisdiction and a particular federal jurisdictional statute. Alternatively, it might be possible to read the statement, especially in light of the remainder of the opinion, not as acknowledging that any particular Article III business is in fact exclusive by operation of the Constitution, but as simply repeating a constitutional principle that takes such a "theoretical" position as its starting point.

Nevertheless, despite the inherent difficulties in supposing that the Court could have entertained the possibility that some heads of (nonoriginal-Supreme Court) Article III judicial business were exclusively federal by operation of the Constitution, I believe that the statement in *Claflin*—and more importantly, the legal milieu that enabled such a statement to be made—may have allowed for just such a possibility. As I will try to establish, there is strong evidence that the shared understanding of eighteenth- and nineteenth-century lawyers, judges, and writers was that some Article III judicial business was off-limits to the state courts, by force of the Constitution alone. In a more tentative vein, I will try to explain how such views could have been held in light of the Compromise and in light of the Constitution's permissive language respecting the establishment of federal courts other than the Supreme Court.

It is not my primary purpose here to show that these once-held sentiments about possible constitutional exclusivity were "right." If my reading of the old Court's perspective on constitutional exclusivity is correct, however, it bears directly on the more plausible claim—and the even stronger tradition—that state courts could not ordinarily be

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*Id.* This latter remark could, of course, be consistent with a view of implied statutory exclusivity; but the remark noted in the text clearly cannot.

38. *See infra* text accompanying notes 79-94.
compelled to take on unwanted jurisdiction. If one agrees that the Compromise meant that the federal government was not obligated to create any lower federal courts, then there might be some justification for compelling state courts to entertain particular Article III claims, lest there be no forum in which to try them. This is a particular concern for those who believe that Article III mandatorily vests some or all of its jurisdiction in a federal court, either originally or on appeal. To avoid any potential gap in Article III jurisdiction, one then faces a constitutional choice between, on the one hand, assuming that Congress would be required to create lower federal courts to hear that particular slice of Article III business, and, on the other hand, assuming that state courts would be compelled to hear it. Modern critics, as discussed below, have generally chosen the latter as the path of least constitutional resistance.

Nevertheless, for much of the nation's history, the path of least resistance was the first of these two. A theme sounding from the founding era and throughout the antebellum period (and which was at least given lip service in Claflin) was that certain Article III matters might be solely within the power of the federal judiciary to hear in the first instance—even in the absence of congressional legislation making that jurisdiction exclusive. Claflin noted that there had previously been much discussion of the question whether suits arising under federal law were within the exclusive jurisdiction of the federal courts. Insofar as federal question cases were concerned, the Court put a clear stop to such discussion. But there were other heads of Article III jurisdiction, unmentioned in Claflin, that the Court and the legal community of the time once understood as potential candidates for constitutional exclusivity. Interestingly, those who gave voice to this theme included those who favored, as well as those who opposed, a strong federal judiciary. But the theme was sounded most clearly by Justice Joseph Story in his opinion for the Court in Martin v. Hunter's Lessee.

39. See infra part III.
41. 14 U.S. (1 Wheat.) 304 (1816).
Martin upheld the constitutionality of § 25 of the 1789 Judiciary Act allowing for Supreme Court review of state court decisions on certain questions of federal law. In so doing, the Court rejected the somewhat extravagant claims of state sovereignty urged by the State of Virginia that would have enabled state courts to have an unreviewable final say as to the meaning of federal law in the cases they decided. In the course of his opinion for the Court, Justice Story advanced a wide-ranging and provocative treatment of the federal judicial power and the relationship between the state and federal courts. At one point in Martin, Story went so far as to suggest that the state courts would be disabled from hearing some Article III cases by operation of the Constitution itself.

[I]t is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.42

42. Id. at 336-37 (emphasis added). The point is mentioned as well when the Court referred to judicial “jurisdiction which, under the constitution, is exclusively vested in the United States.” Id. at 331. Elsewhere, Martin asks “[i]n what cases, if any, is this judicial power exclusive, or exclusive at the election of congress[?]” Id. at 333. The statement clearly presupposes that exclusivity can be constitutional, not just statutory.

The reference to “jurisdiction . . . previous to the Constitution,” as noted below, is evocative of The Federalist No. 82. Story seemed willing to place some cases arising under federal law into this last category.

In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them . . . .

Id. at 334-35. This is interesting, of course, since in Martin, the Court would uphold Supreme Court review over a case coming from state court because it arose under federal law, and yet there was no suggestion that the state courts lacked jurisdiction over it. Story later explained Martin as a case that arose under federal law of which the state court had “incidentally take[n] cognizance” insofar as the federal questions arose only by way of defense or reply to the state law criminal action. Elsewhere, Story less insistently intimated that cases affecting ambassadors and other public ministers “might well justify
While the necessity of these observations to the decision of the Court in Martin is doubtful, no one on the Court other than Justice Johnson, who concurred separately, offered any disagreement. And, as noted below, Johnson was in express agreement on the point of exclusivity. Story advanced the suggestion that some Article III business was off-limits to the state courts in connection with his other argument, which has since been rejected by the High Court and by most federal courts scholars, that Congress was constitutionally required to create some lower federal courts, at least to handle the Article III business that the state courts could not. Even Story perceived this latter point to be "a question of some difficulty," largely because of the non-mandatory wording of Article III on this point ("such inferior courts as Congress may, from time to time, ordain and establish"). Indeed, elsewhere in Martin, Story had placed great weight on the distinction between the permissive and mandatory language in Article III to support his idea that the vesting of the federal judicial power in some Article III court was obligatory ("shall be vested"), rather than within Congress's discretion. According to Story, Article III's "shall be vested" language required that all cases within the federal judicial power (or perhaps an important subset of them) must be heard, either originally or on appeal, in some federal court. So it was an uphill battle for him to argue in the same breath that the permissive "may" language respecting the creation of lower federal courts was itself mandatory.

For Story, the two arguments related to one another in the following way: if a case to which the federal judicial power extended was not in the a grant of exclusive jurisdiction along with certain admiralty and maritime matters. See id. at 347.

43. Id. at 330.

44. Scholars have suggested different readings of Martin's theory of mandatory vesting. While there seems to be agreement that Story thought that at least some Article III business had to vest, either originally or on appeal in some Article III court, there is disagreement over the question whether such mandatory vesting extended to all Article III heads of jurisdiction, or only to those that were "subject-matter" based (e.g., federal question cases), rather than "party"-based (e.g., diversity jurisdiction). Compare, e.g., Amar, supra note 40 (arguing that only subject-matter based grants of jurisdiction were subject to the mandatory vesting rules) with Clinton, supra note 40 (arguing that mandatory vesting may extend to all Article III judicial business, including party-based grants); cf. Daniel J. Meltzer, The History and Structure of Article III, 138 U. PA. L. REV. 1569 (1990) (viewing Story as perhaps more likely suggesting an all-inclusive version, including party-based heads of jurisdiction). A major dispute seems to be over the force of the "all cases" language in Article III, which precedes only some of the heads of federal judicial power—ones that Professor Amar has considered to be subject-matter rather than party-based. The dispute is whether this language limits the command that the federal judicial power "shall be vested," so as to require full mandatory vesting only in those cases. See also infra note 45.
Supreme Court’s original jurisdiction, and if, in addition, the state courts were somehow constitutionally disabled from hearing it—as he supposed they could be—there would be an absence of any trial forum whatsoever for such a case if Congress created no federal courts to hear it in the first instance. That, in turn, would obviously disable the Supreme Court from being able to hear the case on appeal, which would have been contrary to Story’s theory of mandatory vesting. “It would seem, therefore, to follow that congress are bound to create some inferior [federal courts], in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance.” For Story, it was less problematic to address the constitutional difficulty surrounding the homeless Article III case by insisting on the creation of lower federal courts, rather than by concluding that state courts would be jurisdictionally competent to hear such cases. Nor, as discussed in Part III, were these ideas of exclusivity perceived as merely a constitutional starting point from which Congress might legislatively depart by conferring (or compelling) state courts to hear such matters; that possibility would be denied as well. Interestingly, Story’s argument concerning mandatory vesting is one that has recently attracted influential support. But even among those who believe that

45. *Martin*, 14 U.S. (1 Wheat.) at 331. I do not read the language in *Martin* as insisting that Congress create lower federal courts and give them original jurisdiction up to the limits of Article III, despite the fact that some scholars so read *Martin*. See, e.g., GERALD GUNThER, CONSTITUTIONAL LAW 48-49 (12th ed. 1991); R. KENT NEwMYER, SUPREME COURT JUSTICE JOSEPH STORY 110 (1985); Clinton, *supra* note 8, at 1584; Herbert Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 WASH. & LEE L. REV. 1043, 1046 (1977). While the phrase is not free from ambiguity, I think that when Story refers to “that jurisdiction which . . . is [constitutionally] exclusive,” he is referring to the jurisdictional enclaves that he defined as being constitutionally off-limits to the state courts. And it was for those jurisdictional areas that he stated some lower federal courts needed to be established. I agree that Story at times argued the entire judicial power under Article III (or at least those subject-matter areas proceeded by “all” cases) had to be lodged in a federal forum either originally or on appeal, but that sort of “exclusivity” is fundamentally different from a notion of exclusivity that would require all Article III business to be vested as an original matter (i.e., in federal trial courts). The exclusivity to which Story refers in the text was clearly exclusivity of state court original jurisdiction. See Amar, *supra* note 11, at 1504 n.9. While Story indicates that “there is, certainly, vast weight in the argument” that all Article III jurisdiction must be vested in an original federal forum, *Martin*, 14 U.S. (1 Wheat.) at 336, it appears to me that he is acknowledging, not accepting or ultimately relying on, the argument. In fact, *Martin* arguably implicitly rejects the latter idea insofar as it concludes—contrary to the argument of counsel arguing for the unconstitutionality of Supreme Court review of state court decisions—that cases encompassed within Article III need not originate in a lower federal court before Congress can confer appellate jurisdiction in the Supreme Court.

46. See *supra* note 40.
Article III demands some sort of mandatory vesting (and certainly among those who do not), this "other" argument in Martin about constitutionally driven state court incapacity and the constitutional necessity of lower federal courts appears to command little adherence today. It is therefore easy to dismiss Story's argument because of our view of the Madisonian Compromise, and because the theme of lower court constitutional exclusivity (and the need for lower federal courts) was not necessary to Story's more general theory of mandatory vesting. Nonetheless, Story's views in this regard were probably much more mainstream than has previously been supposed.

1. THE CONCEPT OF CONSTITUTIONAL EXCLUSIVITY
   —ANTECEDENTS TO MARTIN

a. Framing, Ratification, and Early Congressional Implementation

Story's notion that state courts were forbidden from entertaining certain heads of Article III business did not come from out of the blue. As discussed below, constitutional exclusivity was not a sporadically raised topic; it was a major theme on and off the Court, both before and after Martin. There were, certainly, those at the time of the Convention and ratification who argued that the state courts could be trusted to handle just about anything, and, therefore, no constitutional provision for lower federal courts was necessary.47 These sentiments of state court

47. John Rutledge had successfully urged something similar at the Convention, thus precipitating the Compromise, when he argued "that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgment." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS]. William Paterson's New Jersey Plan had omitted any provision for lower federal courts and specifically allowed for the trial of federal crimes in state courts of common-law jurisdiction. Id. at 243. At the time of the vote on the language of the Compromise before the entire Convention, Luther Martin and Pierce Butler both objected to giving Congress a power to create inferior tribunals and that "State Tribunals might do the business." 2 id. at 45. There were those arguing against the Constitution's ratification, who thought that "[t]he courts of the respective states might . . . have been securely trusted" to decide in the first instance most of the Article III business that was not committed to the Supreme Court's original jurisdiction. Essays of Brutus (XIV), N.Y. J., Feb. 28, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 431, 435-37; see also JAMES MONROE, SOME OBSERVATIONS ON THE CONSTITUTION (1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 278, 279 (arguing against having lower federal courts); Essays by Candidus (I), (BOSTON) INDEP. CHRON., Dec. 6, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 125, 129 (discussing competency of state courts).
omnicompetence have been stressed in federal courts scholarship to show the level of opposition to lower federal courts and to their mention in the Constitution and to bolster the idea that Congress might give some or perhaps all of Article III's judicial business to the state courts in the first instance. Yet it is questionable how representative these views actually were.

(i) Shifting Notions of State Court Competence

Despite the gloss that the conventional wisdom has put on these statements, what is striking about them is that once the language of the Constitution was settled on, the understanding that state courts would thereafter be able to handle all of the judicial business eventually catalogued in Article III became a distinctly minority sentiment. That is, while state court competence to handle all the trial business that was proposed for Article III was a frequently voiced idea, its significance depended on the contexts in which it was raised. At the Philadelphia Convention, it tended to be voiced in opposition to any mention of lower federal courts in Article III, and, at ratification, it was raised in opposition to Article III as drafted. But the sentiments expressed in

48. A good example is provided in the Essays of Brutus. Like many Anti-Federalists, Brutus extolled the competence of state courts to handle, in the first instance, all of the business that Article III proposed to make part of the federal judicial power. See supra note 47. And he thought there was no need for Article III to mention lower federal courts. Yet he also believed that certain judicial business (apart from some matters in the Supreme Court's original jurisdiction) might have to go to lower federal courts under Article III as drafted. For example, in addition to conceding two areas within the Supreme Court's original jurisdiction as exclusively federal under Article III (namely, suits "which might arise between states, such as respect ambassadors, or other public ministers"), he added that "perhaps such as call in question the claim of lands under grants from different states." Essays of Brutus (XIV), supra note 47, at 436. Brutus also appeared to concede that state courts would not be able to pass on admiralty and maritime matters, "because none but the general government can or ought to pass laws on their subjects." Id. (XIII) (Feb. 21, 1788) at 428, 428-29. And he feared that as a consequence of ratification, "[o]ne inferior court must be established, I presume, in each state, at least." Id. (I) (Oct. 18, 1787) at 363, 366-67 (emphasis added).

Others displayed a similar double-vision. James Monroe had argued against any constitutional reference to lower federal courts (see supra note 47), but he saw various heads of Article III jurisdiction (not in the Supreme Court's original jurisdiction) as "absolutely appropriated" to the federal courts and referred to the "duty" of Congress to establish subordinate courts. MONROE, supra note 47, at 303. Luther Martin argued in the Convention against the language coming out of the Compromise, stating that state tribunals might do the business (2 FARRAND'S RECORDS, supra note 47, at 45-46), yet he was one of the most enthusiastic cheerleaders against Article III because of his fear that the state courts would be disabled from hearing a good portion of Article III business in the first instance. See infra note 51. "Cornelius," another Anti-Federalist, would have
these two contexts about what state courts could do if Article III had not been ratified, and what they could do once it was, were, as noted below, quite different. Failure to separate these sentiments has therefore led to the impression that the dominant mode of thought respecting Article III as finally ratified was that the state courts could still handle all of the judicial business mentioned in Article III. That impression is mistaken.

In fact, among those generally hostile to broad federal jurisdiction, it is remarkable how few of them expressed a belief that all aspects of Article III jurisdiction not slated for the High Court's original jurisdiction could, in fact, constitutionally be handled by the state courts in the first instance. The individuals who stressed state court omnicompetence (and the corresponding lack of any need for lower federal courts) were the very persons who doubted that such power had survived the Constitution, at least as to some categories of Article III jurisdiction.

preferred a single federal court, see Essay by Cornelius, HAMPShIRE CHRON., Dec. 11 & 18, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 139, 144, but he recognized that under Article III there would be some exclusive jurisdiction in lower federal courts, including, surprisingly, diversity actions which "must be brought" in a federal court. Id. The Letters of Centinel reveal a belief that Article III meant that "there will be one or more inferior courts immediately requisite in each state." Letters of Centinel (II), (PHILADELPHIA) FREEMAN'S J. (n.d.), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 143, 149. The latter comment, unlike the ones before, is less clear that the necessity of lower federal court jurisdiction arises from the Constitution itself.

49. I have been unable to discover any statements by Anti-Federalists that declare that the Constitution, when ratified, would allow state courts to hear all Article III subject matter that was within the High Court's appellate jurisdiction. A few, however, acknowledged that the creation of inferior federal courts was not mandatory (although, as I discuss elsewhere, a belief in nonmandatoriness of lower federal courts was not necessarily linked to a belief as to whether some jurisdiction was constitutionally exclusive—see infra text accompanying notes 261-77). For example, Richard Henry Lee, who opposed the Constitution's ratification as well as the 1789 Judiciary Act, noted that the creation of lower federal courts was "altogether in the pleasure of the new legislature." Letter from Richard Henry Lee to Gov. Edmund Randolph (Oct. 16, 1787), VA. GAZETTE, Dec. 22, 1787, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 112, 115; see also Letters from the Federal Farmer (XV) (Jan. 18, 1788), supra note 22, at 315, 317 ("The inferior federal courts are left by the constitution to be instituted and regulated altogether as the legislature shall judge best . . . ."). But Lee expressed his sentiment because of a fear that Congress would not create them, and that litigants would be carried to a distant Supreme Court on appeal from state courts with their Article III cases and controversies. Lee's statement, which seems so supportive of the orthodox view, is, however, unmistakably a minority sentiment among those that were publicly expressed by opponents to the Constitution. As discussed below, supporters of the Constitution also seldom made the suggestion that state courts could indeed hear all matters not within the Supreme Court's original jurisdiction. But there were a few who did. See infra text accompanying note 56.

50. See supra note 48.
Perhaps they might have been inclined to exaggerate the loss of state court power associated with the arrival of Article III. Some prominent Anti-Federalists, such as Luther Martin, did make rather grandiose claims that large portions of Article III judicial business (including, remarkably, federal question cases and suits against federal officers) would not be able to be heard in any court other than a federal trial court. Even at the time, few Anti-Federalists would have gone as far as he. But a level of consensus existed that the Constitution had created exclusive federal enclaves, even if there was disagreement over which heads of Article III subject matter jurisdiction were rendered exclusively federal. In

51. Luther Martin, who had been an active player at the Convention and ratification, believed that cases and controversies arising under federal law and involving the constitutionality of the acts of federal officials would be within the exclusive jurisdiction of the federal courts by force of Article III and accordingly concluded that there was a necessity for the creation of lower federal courts. See Luther Martin, Genuine Information, MD. GAZETTE & BALT. ADVERTISER, Dec. 28, 1787-Feb. 8, 1788, reprinted in 3 FARRAND'S RECORDS, supra note 47, at 172, 204, 206-07, 220-21. "The judiciaries of the respective States, not having power to decide upon the laws of the general government, but the determination of those laws being confined to the judiciaries appointed under the authority of Congress, in the first instance, as well as on appeal, there would be a [corresponding] necessity for judges or magistrates of the general government, . . . ." Id. at 206-07. George Mason, who was also a participant in the Convention and later at ratification and who supported the language of the Madisonian Compromise (see 2 FARRAND'S RECORDS, supra note 47, at 46), would have included suits involving ambassadors, consuls, and ministers, as well as admiralty cases and "governmental actions brought by the U.S." as within the exclusive jurisdiction of the federal courts by force of Article III. 3 ELLIOT'S DEBATES, supra note 22, at 523, 660-61 (remarks of George Mason to Virginia Ratifying Convention). Cases regarding "revenue and excise" and respecting "duties" of federal officers, he said, "may and must be brought . . . to the federal courts; in the first instance to the inferior federal court . . . ." Id. at 525. And he assumed that inferior federal courts "must . . . be fixed in the several respective states." 1 FARRAND'S RECORDS, supra note 47, at 111. He also seemed to view suits between co-citizens claiming land under grants from different states as exclusively federal. See 2 FARRAND'S RECORDS, supra note 47, at 432-33. A few others shared Luther Martin's expansive sentiments. "A Maryland Farmer," identified as having attended the Constitutional Convention, thought all Article III jurisdiction was exclusively federal "by necessary implication," and that the prospect of concurrency was a snare and a delusion. Essays by a [Maryland] Farmer (VI) (Mar. 24, 1788), MD. GAZETTE, Apr. 1, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 51, 54 (emphasis omitted); see also id. at 53 (denying that suits against federal officers could be maintained in state courts, even for damages). James Monroe agreed with Martin that federal question jurisdiction was exclusively federal. See MONROE, supra note 47, at 303.

52. In fact, the State of Maryland so feared that Article III required constitutional exclusivity and a corresponding constitutional need for lower federal courts that it proposed an amendment to the Constitution to prevent such a possibility. See 2 ELLIOT'S DEBATES, supra note 22, at 551 (proposed amendment stating that Congress was
addition, among the many who believed that some Article III business was constitutionally off-limits to the state courts, some expressed a belief in the necessity of lower federal courts; yet even those who stated that lower federal courts were not constitutionally required did not necessarily disagree with the notion of constitutional exclusivity.

(ii) The Federalist No. 82—Another Look

Among the Constitution's supporters, one occasionally finds similar sentiments in support of the concept of constitutional exclusivity, although their statements are more equivocal and their tone is much more subdued. Indeed, it is hard to say that as unified a position prevailed

“compelled . . . to establish inferior federal courts” under the Constitution in its “present form”).


The inferior federal courts, and the state courts will . . . have concurrent original jurisdiction in all the enumerated cases wherein an appeal lies to the supreme court, except only [those] created by or under the proposed constitution, in which, as they do not now exist, the inferior federal courts will have exclusive jurisdiction.

Id. The sentiment, far from being aberrational, is quite consistent with others' notions that state courts would not depart with original jurisdiction over those matters over which they held jurisdiction previous to the Constitution, and leaves the door open to the possibility that some jurisdiction under Article III was “new” and therefore constitutionally off-limits to state courts. See supra text accompanying notes 47-48 (Anti-Federalists); supra text accompanying notes 41-45 (Justice Story); infra text accompanying notes 58-67 (Hamilton). But see William R. Casto, The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction, 26 B.C. L. Rev. 1101, 1124-25 n. 163 (1985) (treating these statements of Hanson's as “strange and obscure musings”). For other statements respecting the Constitution's impact on the states' pre-existing jurisdiction, see 3 ELLIOT'S DEBATES, supra note 22, at 553, 554 (statement of John Marshall) (emphasizing, in discussion of concurrency, fact that state courts would retain jurisdiction only over “those cases which they now possess” and “causes they now decide”); 4 id. at 139 (statement of Richard Spaight) (“Congress has power of establishing inferior tribunals in each state . . . . As Congress have it in their power, will they not do it? Are we to elect men who will wantonly and unnecessarily betray us?”). In the North Carolina Ratifying Convention, William Maclaine referred to “a number of . . . instances, where, though jurisdiction is given to the federal court, it is not taken away from the state courts,” suggesting that there might be some instances where jurisdiction was taken away by the Constitution. Id. at 163. For the views of James Wilson and Oliver Ellsworth, see infra note 56. For similar post-ratification sentiments of framers of the Judiciary Act, see infra text at notes 68-74.
among the Constitution's supporters as among most Anti-Federalists on this issue. Perhaps the supporters of the Constitution were less likely to emphasize the possibility that some Article III business would be constitutionally off-limits to the state courts (or to suggest any necessity for lower federal courts) because of their wish to soft-pedal any preemptive effect of Article III on state court jurisdiction. Such political reluctance may explain why one of the Constitution's most notable supporters, Gouverneur Morris—who had expressly endorsed the Madisonian Compromise at the Philadelphia Convention—would later state that it was "the evident intention, if not the express words of the Constitution" that the creation of some lower federal courts was mandatory. But with one or two notable exceptions, Article III's

54. 2 FARRAND'S RECORDS, supra note 47, at 46 (noting "the necessity of such a provision").

55. 11 ANNALS OF CONO. 79 (1802). After quoting Article III and a giving a few preliminary statements, Morris stated:

This, therefore, amounts to a declaration, that the inferior courts shall exist. . . . In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution. The Convention in framing, the American people in adopting, that compact, did not, could not presume, that the Congress would omit to do what they were thus bound to do.

Id.

56. The main exception is a big one, however. Oliver Ellsworth, who played a (if not "the") major role in the framing of the 1789 Judiciary Act (see Casto, supra note 53, at 1105), observed during ratification: "[N]othing hinders but . . . that all the cases, except the few in which [the Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in the state courts and those trials be final except in cases of great magnitude . . . ." Oliver Ellsworth, Letters of a Landholder (VII), CONN. COURANT & AM. MERCURY, Dec. 10, 1787, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 161, 164-65 (Paul L. Ford ed., 1970) (hereinafter ESSAYS ON THE CONSTITUTION). This statement is significant not only for Ellsworth's possible ideas about whether some or all of Article III's judicial power must vest, either originally or on appeal, in a federal forum, it is also significant for his possible views about whether state courts could constitutionally handle all Article III business in the first instance. He clearly seemed to think they could. This statement, however, was qualified by Ellsworth's later expressed views, given at the time of the fashioning of the 1789 Judiciary Act. At that time, he stated that he did not believe that admiralty matters or "perhaps" criminal prosecutions were part of the pre-existing jurisdiction of the state courts ("jurisdiction which they had not before"), and that state courts, as state courts would be incapable of hearing such matters but apparently could only do so as federal courts. See Letter from Oliver Ellsworth to Judge Law (Apr. 30, 1789), in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 37 n.† (photo. reprint 1970) (1849); see also Clinton, supra note 8, at 1530 (noting that Ellsworth's views on mandatory vesting were not entirely in sync with his contemporaries). As to the peculiar possibility of state judges sitting as federal
champions seldom went on record during ratification to assert the flat-out opposite of what the Anti-Federalists were asserting, or to concede that state courts could hear in the first instance all (nonoriginal-Supreme Court) Article III business once the Constitution was ratified. Perhaps the most that would be conceded by supporters of the Constitution was spelled out by Alexander Hamilton in The Federalist No. 82.

As noted above, Hamilton had gone out of his way to allay the fears of states'-rights champions by developing a theory of jurisdictional concurrency and took special care to suggest that claims arising from judges, see infra part II.B.5.

James Wilson of Pennsylvania at one point seemed also to endorse the idea that state courts could hear all of the business in Article III, without mentioning any limitation on the state courts' pre-existing jurisdiction, or more remarkably, without excepting any matters within the original jurisdiction of the Supreme Court. See 2 Elliot's Debates, supra note 22, at 491 ("Permit me to observe here, with regard to this power [diversity jurisdiction], or any other of the foregoing powers given to the federal court, that they are not exclusively given.") (emphasis added). Perhaps Wilson is simply stating the obvious, that they are not expressly, exclusively given. Elsewhere, Wilson spoke as if the heads of jurisdiction under Article III were "beyond" the powers of any state to resolve, except perhaps for suits between co-citizens regarding land granted by different states. See id. at 481 ("I do not recollect any instance where a case can come before the judiciary of the United States, that could possibly be determined by a particular state, except one . . . .") Quite arguably Wilson was referring here only to the ability of states to be the final arbiters of a subject. Wilson's views of the nonexclusivity of any matters within the Supreme Court original jurisdiction do not seem to have been widely shared and were apparently contrary even to Ellsworth's (who perceived that the state courts might be disabled from hearing at least some such business).

Finally, some equivocal support for the idea of state court omnicompetence might be found in statements like those of Roger Sherman of Connecticut who remarked: "[T]he constitution does not make it necessary that any inferior tribunals should be instituted, but it may be done if found necessary . . . ." Roger Sherman, Letters of a Citizen of New Haven (III), NEW HAVEN GAZETTE, Dec. 25, 1788, reprinted in Essays On The Constitution, supra, at 237, 241; see also Examination by Noah Webster (1787), reprinted in Pamphlets On The Constitution, supra note 53, at 53-54 (noting that "the truth is, the creation of all inferior courts is in the power of Congress," just before stating that "[w]hen these [inferior] courts are erected . . . ."). As I discuss below, however, it was possible to hold views about the non-necessity of lower federal courts (a not infrequently—but not ubiquitously—voiced idea during ratification), and still believe that some Article III matters were barred from the state courts. See infra part II.C.

57. The not fully disclosive statement of Governor Samuel Johnston during the North Carolina Ratifying Convention was typical. Denying that federal courts would have exclusive jurisdiction over cases arising under the Constitution and laws, he said: "The opinion which I have always entertained is, that they will, in these cases, as well as in several others, have concurrent jurisdiction with the state courts. . . . [T]he Constitution takes no power from the state courts which they now have." 4 Elliot's Debates, supra note 22, at 141 (emphasis added). What is suggestive is Johnston's unwillingness to concede that concurrency with the federal courts extends to all business within Article III. For less equivocal statements, see supra note 53.
federal statutes would not, by operation of the Constitution, be within the exclusive jurisdiction of the federal courts. It might be supposed that Hamilton's discussion of concurrent jurisdiction in *The Federalist No. 82* had therefore rejected altogether the possibility that any Article III business was constitutionally off-limits to the state courts. But I believe the import of his argument is more ambiguous than that.

Hamilton began with a discussion of constitutional principles that led him to conclude that the vesting of federal judicial power in Article III tribunals did not work a withdrawal of "pre-existing" jurisdiction from the state courts. "The principles established in a former paper [No. 32] teach us, that the states will retain all pre-existing authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases ...." Hamilton then applied a three-tiered analysis to resolve the more general question whether the Constitution had lodged particular powers exclusively with the federal government. He believed that exclusivity could arise from language in the Constitution expressly conferring it, from express constitutional prohibitions on the states from exercising a similar power, and by implication where shared power between the states and the federal government would be "utterly incompatible."

Hamilton concluded that the Constitution itself worked no such withdrawal, arguably in any of the established modes. But Hamilton

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58. *The Federalist No. 82* did not speak merely to the question of statutory exclusivity; rather, its primary discussion respecting concurrency is about the Constitution and its impact on state court jurisdictional power. Only after Hamilton disposes of that question does he say anything about statutory exclusivity, and states that with respect to cases arising under *federal statutes* "in every case in which they were not expressly excluded by the future acts" of Congress, state courts would have a concurrent jurisdiction. *The Federalist No. 82*, supra note 19, at 555. He makes no such general statement about other areas of Article III jurisdiction.

59. Id. at 553.

60. Although Hamilton acknowledged that "these principles may not apply with the same force to the judiciary as to the legislative power," he concluded that he was nevertheless inclined to think that they are in the main just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

Id. at 554.

61. This conclusion, however, is not unproblematic. Hamilton's argument appears to concede that federal jurisdiction was not expressly made exclusive by the Constitution and that state court jurisdiction was not expressly prohibited by it either. It is less clear that he also concluded that no constitutional exclusivity had arisen in consequence of his "third" mode (i.e., "incompatibility"), for the simple reason that he does not appear to discuss the possibility, and because he only addressed the possibility
did not therefore conclude that all Article III business was within the concurrent jurisdiction of the state courts. Instead, he cautioned, "[T]his doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance."62 Thus, while concurrency would be the constitutional default rule, Hamilton indicated in this passage that there might be some cases as to which concurrent jurisdiction might ultimately be inapplicable, i.e., cases of which the state courts lacked "previous cognizance." Then, without affirming or denying that any such non-previous-cognizance cases might be constitutionally off-limits to the state courts, he suggested that Congress might make jurisdiction over such matters statutorily exclusive.63 But beyond that, Hamilton only provided a vague indication of what Article III business might not fall into the previous cognizance (or pre-existing jurisdiction) of the state courts. As he put it,

[This doctrine of concurrent jurisdiction] is not equally evident in relation to cases which may grow out of, and be peculiar to the constitution to be established: For not to allow the state courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority.64

that something in the language of Article III may have barred state court jurisdiction over Article III business, as a whole. Although my remarks in the text do not depend on it, I am inclined to believe, therefore, that Hamilton’s argument leaves open the possibility that individual heads of jurisdiction could be found constitutionally off-limits to the state courts by operation of this third mode.

62. THE FEDERALIST No. 82, supra note 19, at 544.

63. Constitutional exclusivity, I believe, was still in the cards, despite Hamilton’s earlier argument, in which he concludes only that the Constitution had worked no withdrawal of pre-existing jurisdiction and had not rendered any pre-existing jurisdiction exclusively federal by operation of the Constitution. The possibility that some of the non-pre-existing jurisdiction might be exclusive by operation of the Constitution (a view that many would later entertain, in partial reliance on Hamilton) simply went unaddressed.

64. THE FEDERALIST No. 82, supra note 19, at 554-55. Hamilton had said something similar in The Federalist No. 81, when he observed (like Governor Johnston of North Carolina—see supra note 57), that “many” cases of “federal [judicial] cognizance” will be within the concurrent jurisdiction of the state courts. See The Federalist No. 81, supra note 19, at 551 n.†. In Claflin v. Houseman, 93 U.S. 130 (1876), Justice Bradley dealt deftly with Hamilton’s vagueness in The Federalist No. 82. As noted above, his opinion includes mention of possible constitutional jurisdictional preemption that might arise by express grant to the federal government, express prohibition on the states and “lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States . . . .” Id. at 138. Bradley continued, “Hence, [Hamilton] infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes.” Id. His next sentence then reads: “But, as their previous jurisdiction could not by possibility extend to cases which might grow out of and be peculiar to the new constitution, he [Hamilton] considered that, as to such cases, Congress might give the Federal courts sole
Although Hamilton's vagueness is frustrating, it is also instructive as to what he perceived would and would not be within the states' pre-existing jurisdiction. He quickly made it clear that "civil cases" arising from federal statutes would not automatically be off-limits to the state courts, although Congress might statutorily prohibit them from hearing such cases. But beyond the caveat noted above, Hamilton offered no hint that the cases of nonconcurrency to which he referred were limited to some or all of the matters in the High Court's original jurisdiction. If Hamilton had wanted to say that the "peculiar" jurisdiction to which he referred was defined and limited by some part of the Court's original jurisdiction, it would have been an easy thing to do. In addition, it would have defused some of the more extravagant claims of constitutional exclusivity then being advanced by the Anti-Federalists. Hamilton chose instead to answer one of the easy charges leveled by the Anti-Federalists, respecting state court jurisdiction over cases arising under federal statutes. It is also odd, if he meant to say that state courts could constitutionally exercise jurisdiction over all matters (including cases over which they lacked "previous cognizance"), that he would single out any one particular area over which they could exercise jurisdiction. In a similar vein, Hamilton also offered no direct response to the challenge of opponents to the Constitution that lower federal courts would be required by the Constitution.

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65. *The Federalist* No. 82, supra note 19, at 555.
66. Hamilton supposed that "all the causes of the specified classes, shall ... receive their original or final determination in the courts of the union," *id.* at 556, thus suggesting that he believed there had to be some trial forum (state or federal) in which to hear Article III business that was outside the original jurisdiction of the Supreme Court. Apart, however, from twice misquoting Article III as referring to "such inferior courts as the congress shall [sic] from time to time ordain and establish," *id.* at 554, 557 (emphasis added), Hamilton only talks about Congress's power to create "as many subordinate courts as [it] should think proper to appoint" and its power to establish "a certain number of inferior ones." *Id.* at 554. He concedes that the "definition" of the appellate versus original jurisdiction of the lower federal courts is "left to the discretion of the legislature." *Id.* at 557. But beyond that, he offered the Constitution's opponents no reply respecting the necessity of some lower federal courts. Later, Hamilton would state that he did not feel that the "may" language of Article III respecting the establishment of lower federal courts was an argument stopper. *See The Examination No. 14, N.Y. Evening Post, Mar. 2, 1802, reprinted in 25 The Papers of Alexander*
The language he employed, therefore, seems to describe a more
general category of state court non-pre-existing jurisdiction that might
have included some or all of the High Court’s original jurisdiction, but
that was not necessarily limited to it. By defining, however imprecisely,
an area of jurisdiction as to which the rules of concurrency did not apply,
and by suggesting that Congress could make such areas exclusive by
statute, Hamilton ultimately left unanswered the important question
whether certain other areas, apart from claims arising under federal
statutes, were constitutionally off-limits to the state courts (even in the
absence of statutory exclusivity). Significantly, however, even though
Hamilton was equivocal on the point, early commentaries on *The
Federalist No. 82* apparently understood Hamilton’s argument as having
left open the door to constitutional exclusivity, even as to matters that
were not in the Supreme Court’s original jurisdiction.67

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67 For example, Chancellor James Kent, who would conclude that a number of
areas of Article III business (other than matters in the Supreme Court’s original
jurisdiction) were constitutionally committed to the jurisdiction of the federal courts in the
first instance, paraphrased Hamilton as follows:

In the 82d number of the *Federalist*, it is laid down as a rule, that the state
courts retained all pre-existing authorities, or the jurisdiction they had before
the adoption of the constitution, except where it was taken away either by an
exclusive authority granted in express terms to the union, or in a case where
a particular authority was granted to the union, and the exercise of a like
authority was prohibited to the states, or in the case where an authority was
granted to the union, with which a similar authority in the states would be
utterly incompatible. A concurrent jurisdiction in the state courts was
admitted in all except those enumerated cases; but this doctrine was only
applicable to those descriptions of causes of which the state courts had
previous cognizance . . . .

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1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 370-71 (New York, O. Halsted
1826); see also id. at 377 (federal jurisdiction not “necessarily exclusive . . . as to
pre-existing matters within the jurisdiction of the state courts”). Kent, therefore, seems
to have understood Hamilton as allowing for the possibility that there might be some
constitutional exclusivity arising under one of the enumerated modes, and that the
constitutional power of the states might not extend at all to non-pre-existing jurisdiction.
See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED
STATES § 1748, at 622 (Cambridge, Brown, Shattuck, & Co. 1833) (citing *The Federalist
No. 82*, for the proposition that “it is only in those cases where, previous to the
constitution, state tribunals possessed jurisdiction, independent of national authority, that
they can now constitutionally exercise a concurrent jurisdiction”). For views of other
Similar and far more explicit statements about the constitutional incapacity of state courts to entertain Article III business were voiced in the first Congresses. In addition, a number of those who believed in such constitutional exclusivity also believed that Congress was constitutionally required to create lower federal courts. While some of the statements made in the legislative debates about constitutional exclusivity and the necessity of lower federal courts arguably blurred the line between political and constitutional requirements, it is clear that many pitched their arguments with a constitutional spin.

For example, in the House debates over the first judiciary statute, a number of objections, clearly couched in constitutional terms, were made in response to a motion to eliminate provisions giving more than admiralty jurisdiction to the inferior federal courts. Some, like Egbert Benson, observed that it was "not left to the election of the Legislature . . . whether we adopt or not a [national] judicial system like the one before us; the words in the Constitution are plain and full, and

68. See Casto, supra note 53, at 1108-10. For a good example of the political use of the word "necessity," see Roger Sherman's statements discussed infra note 77. Some scholars take a similar view of comments such as those of William Paterson who often spoke of the "necessity" and "inevitability" of a system of federal courts "of subordinate jurisdiction" that Congress "must" establish and of "a Number of Articles, which the federal Courts must take up." Paterson's Notes, supra note 1, at 476-77. Because of the orthodox view, Article III scholars are understandably reluctant to read any such statements as suggesting that some Article III business could, as a constitutional matter, only be tried in lower federal courts. See Casto, supra note 53, at 1108 n.56. It is certainly possible, however, that views like Paterson's were actually consistent with those who more explicitly stated the matter was constitutionally driven. Looking at statements of Paterson's without the corrective lenses offered by the traditional approach, their most natural reading may be one that argues for a constitutionally driven notion of state court incapacity as to some Article III business. For example, Professor Casto—an articulate spokesperson for the orthodox view—sees Paterson's statements as "prudential" only. Id. at 1108, 1110. In response, Akhil Amar has convincingly argued that the "must take up" language of Paterson's should not be entirely denied the sense of constitutional imperative, and finds in it some "modest" support for his own two-tier, mandatory vesting theory. Amar, supra note 11, at 1554-56. But see Casto, supra note 53, at 1108 n.56; Meltzer, supra note 44, at 1602 n.120. But if Amar is correct that a natural reading of Paterson's words carried a constitutionally imperative sense, then these and the remainder of Paterson's remarks provide even more than modest support for the view that lower federal courts had to be created. After all, Paterson was responding to a motion to strip the lower federal courts of most of their jurisdiction, not to a motion to abolish appeals from the state courts to the Supreme Court if the motion were to pass.
must be carried into operation." Others, like William Smith—whose views of federal court exclusivity, like Luther Martin's, appear to have been unusually expansive—believed that the discretion given to Congress respecting the institution of lower federal courts related to "the number and quality . . . and not to the possibility of excluding them altogether . . . ." Still others referred to Congress's creation of lower federal courts as something that the "Constitution requires." Even the author of the Compromise, James Madison, voiced constitutional as well as political doubts during the framing of the 1789 Judiciary Act as to "how it could be made compatible with the Constitution, or safe to the Federal interests to make a transfer of the federal jurisdiction to the State courts" as proposed by those who sought to strike the provisions relating to the lower federal courts and their jurisdiction. Moreover, opponents to the Judiciary Act, such as Representative Elbridge Gerry, expressly noted that it was incumbent on Congress to create inferior

69. 1 ANNALS OF CONG. 804 (Joseph Gales ed., 1789). The statements of Representative Aedenus Burke were made in a similar vein. Hesitating over the creation of lower federal courts with considerable subject matter jurisdiction, he reluctantly noted "which ever way he turned, the Constitution still stared him in the face, and he confessed he saw no way to avoid the evil." Id. at 813.

70. Id. at 818 (remarks of Rep. Smith); see also id. at 818-19 ("But that Congress must establish some inferior courts is beyond a doubt . . . . [T]he Constitution, in the plainest and most unequivocal language, preclude[s] us from allotting any part of the Judicial authority of the Union to the State judicature . . . ."). At times, Smith seemed to suggest that all Article III business was, by the Constitution, exclusively federal. But even if Smith's views in that regard were somewhat (but not entirely) unusual, others shared the basic idea of constitutionally driven exclusivity even if their exclusive jurisdiction lists were shorter. Most commentators have concluded that Smith believed that "the entirety of the judicial power" and not just parts of it must be vested in the federal courts. See Casto, supra note 53, at 1110 n.70; Meltzer, supra note 44, at 1601; see also Clinton, supra note 8, at 1534-40. Perhaps all Smith meant, however, was that only federal courts could exercise the federal judicial power and that state courts, even when they heard matters within Article III, were not exercising Article III powers. See Amar, supra note 11, at 1550; see also infra text accompanying notes 335-37.

71. 1 ANNALS OF CONG., supra note 69, at 807 (remarks of Rep. Ames); see also id. (remarks of Rep. Ames) (referring to federal criminal jurisdiction as "de novo" and as forming no part of states' antecedent jurisdiction); infra note 72 (offering views of Rep. Sedgwick); infra note 74 (offering remarks of Sen. Maclay). Still others, when discussing the problem of federal crimes, indicated that state courts had been ousted, by force of the Constitution, from considering such cases. See infra text accompanying notes 116-20.

72. 1 ANNALS OF CONG., supra note 69, at 813 (remarks of Rep. Madison); see also id. at 805 (remarks of Rep. Sedgwick) (asking whether it "[w]ould . . . be prudent, even if it were in our power" to leave lower federal courts with only admiralty jurisdiction).
courts because state courts might refuse certain jurisdiction.\(^73\) Although there is no official record of the Senate’s debates on the First Judiciary Act, the surviving notes of participants indicate that there were those who stressed the constitutional exclusivity of certain Article III business and the incapacity of state courts to take jurisdiction in the first instance.\(^74\)

Modern scholarship has tended to slight these seemingly wrong-headed statements and to focus instead on other observations, congenial to our own understanding of Article III, which suggest that state courts could hear all of the leftover Article III business if federal courts were not created.\(^75\) Two prominent opponents of the 1789 Judiciary Act

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\(^73\) See id. at 827-29 (noting that state law sometimes specifically forbade jurisdiction over “foreign matters” and observing that “[w]e are to administer this Constitution, and therefore we are bound to establish these courts”). Gerry also argued that the disadvantages created by a duplicative set of courts and officers “result[s] from the Constitution itself, and therefore must be borne until the Constitution is altered, or until the several States shall modify their courts of judicature so as to comport with our system.” Id. at 828. A similar statement was made by Representative Theodore Sedgwick who noted that state courts “might refuse or neglect to attend to the national business.” Id. at 805.

\(^74\) For historical reconstructions, see Julius Goebel, Jr., The History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 457-503 (1971); Casto, supra note 53; Clinton, supra note 8, at 1522-33; Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). Senator William Maclay, an opponent of the 1789 Judiciary Act, and whose journal is a principal source for the Senate’s debates, seemed to believe that Article III required the creation of lower federal courts and that federal judicial business was off-limits to the state courts. See William Maclay, The Journal of William Maclay 85 (New York, D. Appleton & Co. 1890). In response to Senator Richard Henry Lee’s motion to eliminate all lower federal court jurisdiction other than admiralty and maritime matters, Maclay argued that it was not possible to “follow the Constitution” and have such a limit. Id. at 87. Lee apparently argued that since state judges would be sworn to uphold the Constitution, there was no problem in so limiting the jurisdiction of the lower federal courts as proposed. Maclay writes that he responded to Lee:

[T]he State judges, in virtue of their oaths, would abstain from every judicial act under the Federal laws, and would refer all such business to the Federal courts; that if any matter made cognizable in a Federal court should be agitated in a State court, a plea to the jurisdiction would immediately be put in and proceedings would be stayed. No reply was made; the question was soon taken and the motion was rejected.

Id.

\(^75\) Not all federal courts scholars have ignored the constitutional nature of the statements made during the debates. Robert N. Clinton and Akhil Amar have both rightly noted that the debate over the shape of the federal judicial system was couched in distinctly constitutional terms. See supra note 40. Their rich scholarship has taken account of these statements and has used them to support various theories of mandatory vesting of Article III business in the federal courts, which they have associated with Story’s opinion in Martin. I agree that these legislative statements may be supportive of such theories and that they can stand for the proposition that Congress may face important
drew a picture of Article III that emphasized state court omnicompetence, as well as congressional discretion in the allocation of Article III judicial business for purposes of trial; and perhaps the small contingent of House members who voted with them agreed with such ideas.6 But, as was true during framing and ratification, the surprising thing about the early constitutional limitations with respect to its ability to curtail the jurisdiction of Article III courts at both ends simultaneously (i.e., originally as well as appellate).

Nevertheless, I believe that a fair reading of these statements shows that they are even stronger and more direct support for the narrower proposition put forward here: namely, that it was understood that there was some constitutionally exclusive Article III business which only lower federal courts, not lower state courts, could hear. These scholars do not really address that possibility, because of their general willingness to accept the logic of the Compromise and the possibility that lower federal courts might not exist at all. But as I argue below, this logic from the Compromise was lost on the founding and immediately subsequent generations. In addition, there are good reasons for viewing the statements referred to in the text as more directly supporting the notion of constitutional exclusivity (and the possibility that some lower federal courts might be required). First, the statements quoted above were made in the context of a motion to eliminate most of the judicial business of the lower federal courts. Second, mandatory vesting, as argued for by these scholars, was not implicated by the removal of jurisdiction from the lower federal courts so long as review in the Supreme Court remained open from the state courts. Third, a number of the statements made expressly endorsed the constitutional necessity of lower federal courts.

76. Two ardent opponents of the 1789 Judiciary Act raised this precise point in reasoning quite familiar to modern ears. Representative James Jackson stated: "The Constitution . . . did not absolutely require inferior jurisdictions . . . . The word 'may' [ordain and establish] is not positive, and it remains with Congress to determine what inferior jurisdictions may be necessary, and what they will ordain and establish; for if they choose or think that no inferior jurisdictions are necessary, there is no obligation to establish them." 1 ANNALS OF CONG., supra note 69, at 802; see also id. at 830-31 (remarks of Rep. Jackson) (also noting that congressional power with respect to lower federal courts was discretionary in contrast to its power with respect to the Supreme Court). Jackson would reiterate the notion in debates over the repeal of the 1801 Judiciary Act. See 11 ANNALS OF CONG. 48-49 (1802) (arguing that Congress had power to abolish existing federal courts). Representative Michael Stone, who also opposed the 1789 Judiciary Act, struck a modern chord when he observed that while lower federal courts were not "commanded" by the Constitution (see 1 ANNALS OF CONG., supra note 69, at 810), there might be a political necessity for admiralty courts—not because "power of the State [is] inadequate to that object; but because those courts are not instituted in all of them." Id.; see also id. at 825. Stone, however, noted, "[i]f . . . the State courts have the power" to hear admiralty cases, having lower federal courts to hear them was "not necessary, unless they will not execute that power." Id. at 811; see also id. at 822-23 (remarks of Rep. Stone) (focusing on discretionary aspect of "may" but also recognizing that tenor of proponents of 1789 statute was to the contrary). Representative Samuel Livermore, who had moved in the House to limit the creation of lower federal courts with broad jurisdiction, seemed not to be sure that any lower federal courts were needed and that, in any event, they were not constitutionally required. Id. at 831. The views of those opposed to the 1789 Judiciary Act were defeated by a vote of 31-11. Id. at 834.
congressional debates is that the dominant discourse was couched in terms of constitutionally driven state court incapacity.\textsuperscript{77} Statements to the contrary, especially from those who supported the First Judiciary Act, were in comparatively short supply.\textsuperscript{78}

Roger Sherman of Connecticut appears to have been one of the few House supporters of the 1789 Act to state on the floor of Congress that federal courts were not constitutionally required. Sherman had previously indicated as much during ratification. See supra note 56. Sherman reiterated that idea in Congress when he indicated that the finding of "necessity" for the creation of lower federal courts was left to congressional will. "[A] Judiciary system was necessary even upon condition that the Legislature had a discretion in the business." 1 Annals of Congress, supra note 69, at 815-16. Nevertheless, as I discuss below, it was possible to maintain the idea that lower federal courts were not constitutionally required and still entertain the notion that some subjects (even apart from the High Court's original jurisdiction), were constitutionally off-limits to the state courts. See infra text accompanying notes 264-76. Oliver Ellsworth, who was the guiding light behind the bill in the Senate, is also quoted as having said during ratification that state courts could hear all of the Article III business not in the Supreme Court's original jurisdiction. See supra note 56.

Also important for establishing the consensus regarding constitutional exclusivity is the remarkable Report on the Judiciary System submitted by Attorney General Edmund Randolph to the House of Representatives in 1790 for purposes of revising the first Judiciary Act (passed only the year before). See American State Papers, Misc. No. 17, at 21-34 (Dec. 31, 1790) (1834) [hereinafter Randolph's Report]. Although no action was taken on the Report, it is considered to be "highly significant" for the light it sheds on early understandings of Article III. See Clinton, supra note 8, at 1552. The Report discussed a variety of subject matter areas to which Article III extended and with respect to which Randolph made various arguments why particular areas either should or should not be in the exclusive control of the federal courts. It is certainly possible to read the Report as addressing only the political desirability of exclusive lower federal court jurisdiction over certain matters, especially given Randolph's express awareness that the existence of lower federal courts was dependent upon, and must have "slept forever without the pleasure of Congress." Randolph's Report, supra, at 34 n.6. Yet the language and structure of the opening paragraphs of the document clearly show that Randolph framed his initial inquiry in light of what he perceived to be the command of the Constitution. After a few introductory comments, Randolph begins by observing with respect to the heads of jurisdiction mentioned by Article III, and in furtherance of his inquiry into the cases from which "the State courts may be rightfully excluded," (id. at 21):

It is not expressly forbidden to the states to assume the cognizance of any one or all of them. For the judicial power of the United States is only extended to the recited cases, and to extend the authority of one court to a description of persons or things, which would of course be embraced by another, had no such extension been made, cannot, of itself, deprive that other of its pre-existing rights.

The nature, however, of some of these subjects shuts out the jurisdiction of the State courts, as such, on the vital principles of the Union. Id. at 22.

The language is obviously a reference to Article III, because the 1789 statute did "expressly" forbid concurrent state court jurisdiction. It might be possible to remove the
b. The Treatise Tradition

If there was a prevailing sentiment that state courts were capable of constitutionally exercising jurisdiction over all Article III matters within the Supreme Court's appellate jurisdiction, someone forgot to tell the generation of writers who were responsible for the earliest treatises on the Constitution. The virtually unanimous support the leading legal commentators of the early Republic gave to Story's position, both before and after Martin, persuasively demonstrates the existence of a tradition of state court constitutional incapacity as to certain slices of Article III business. Chancellor James Kent, for example, in his powerfully influential antebellum treatise, Commentaries on American Law, adhered to the view that at least some of the judicial business captured in Article III was put exclusively in the hands of the federal courts by operation of the Constitution alone. Kent was clearer than Hamilton in stating that such exclusivity extended to matters outside the High Court's original jurisdiction, although Kent expressly relied on Hamilton's constitutional preemption analysis in arriving at those conclusions. Of a similar mind was St. George Tucker, the editor of the ubiquitous first American edition of Blackstone's Commentaries, which included Tucker's own substantial essay on the federal Constitution—"one of the most
widely read discussions of the . . . Constitution in the early nineteenth century." 81 Tucker, who was clearly familiar with The Federalist No. 82, wrote long before Story had arrived on the scene, and developed two jurisdictional lists out of Article III: a fairly substantial one for jurisdiction "exclusively vested in the tribunals of the federal government" and another in which "the judicial power of the state must be presumed to possess concurrent [jurisdiction]." 82 William Rawle, 83 another influential treatise writer and early constitutional scholar, also supported the concept, although his own list of such constitutionally exclusive categories was considerably shorter than Tucker's. 84 Predictably, perhaps, it was Story himself who capped off the unanimous treatise tradition in his own Commentaries on the Constitution by reiterating his views in Martin: "That there are some cases, in which [the federal judicial] power is exclusive cannot well be doubted . . . . [I]t is only in those cases, where, previous to the constitution, state tribunals

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82. 1 TUCKER'S BLACKSTONE, supra note 80, at 181-83. Tucker's text shows that he was talking about something more than not letting state courts have the final, unreviewable say in a case. In the exclusive category Tucker put certain Supreme Court original jurisdiction matters, such as ambassador cases, interstate controversies, and impeachment. But he also included admiralty and, more tentatively, United States-as-a-party and federal crimes cases (both of which he conceded that Congress might allow states to hear). In the concurrent category, he put diversity suits, state-citizen diversity suits, and co-citizen suits over land granted by different states. Id.

83. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 202-08 (photo. reprint 1970) (Philadelphia, Philip Nicklin, 2d ed. 1829) ("A jurisdiction exclusive of the state courts, is not expressly given by the Constitution to any of the courts of the United States, but it is in several instances clearly implied."). Rawle goes on to identify various heads of Article III jurisdiction as constitutionally exclusively federal, including some (but, interestingly, not all) of the jurisdiction identified as original in the Supreme Court. Rawle believed that admiralty and maritime jurisdiction, as well as jurisdiction of suits between states, "must, by necessary construction, exclusively appertain to the courts of the United States." Id. at 202. Elsewhere, Rawle referred to "what may be termed the national promise to provide impartial tribunals." Id. at 256.

84. Id. at 202-08; see also THOMAS SERGEANT, CONSTITUTIONAL LAW 268 (Philadelphia, Abraham Small 1822) ("How far the jurisdiction of the Federal Courts is rendered exclusive by the words of the third article of the Constitution, is not specifically stated, except . . . that it is exclusive as to all cases of admiralty and maritime jurisdiction.").
possessed jurisdiction, independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction."

**c. Early Implementation and the Courts**

Story was not alone on the bench in articulating the general principle that the Constitution itself had conferred some exclusive jurisdiction on the federal courts and in stating the sometimes corollary idea that Congress was obligated to create lower federal courts. In *Rhode Island v. Massachusetts*, Justice Baldwin’s opinion for the Court reinforced the two-decades old “dicta” in *Martin* by observing that Congress was “bound to ordain and establish” lower federal courts. Justice Johnson, hardly the nationalist Story was, disagreed with Story’s theories of mandatory vesting of federal jurisdiction but did agree in his separate opinion in *Martin* that some Article III categories were constitutionally off-limits to the state courts. According to Johnson, “the real doubt is, whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends,” despite the fact that Article III “contains no express cession of jurisdiction,” and even though Congress may not have acted to

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85. 3 STORY, supra note 67, § 1748, at 621-22 (discussing Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

That there are some cases, in which that power is exclusive, cannot well be doubted; that there are others, in which it may be made so by congress, admits of as little doubt; and that in other cases it is concurrent in the state courts, at least until congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied.

*Id.* at 621. Somewhat more equivocally, Story observes that “it seems to be admitted that the jurisdiction of the courts of the United States is, or at least may be, made exclusive” in a group of cases, including ambassador suits, admiralty and maritime, suits between states, state citizen diversity suits and federal question cases. *Id.* Arguably, these statements do not exclude the possibility that Congress might, under Article I, delegate, or insist, that state courts exercise the jurisdiction that is constitutionally off-limits to them. But neither Story nor anyone else suggested that such a feat was possible, and what evidence there is suggests that Congress was thought to lack such power. See infra part III.


87. The Court stated, in dicta:

It was necessarily left to the legislative power to organize the supreme court, to define its powers consistently with the constitution, as to its original jurisdiction, and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised.

*Id.* at 721. Baldwin’s statement has been written off as “fundamentally mistaken.” Meltzer, supra note 44, at 1629 n.228.
confer jurisdiction on the federal courts. And that was not the only time Johnson supported the concept of constitutional exclusivity most commonly associated with Story. Similarly, Justice McLean thought it was "too clear for argument" and "universally established" that some Article III matters could not be handled by the state courts, even when Congress was prepared to acquiesce in the sharing of jurisdiction. Chief Justice John Marshall, this time speaking for a unanimous court in Cohens v. Virginia, offered some equivocal support for the concept of constitutional exclusivity when he observed "state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article." Finally, beginning in the early nineteenth century, state courts began to speak with almost a single voice in declaring that they lacked power to hear certain heads of Article III's judicial business—and refusing to take jurisdiction even when Congress had purported to give it. Far from ever being

89. See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 278 (1827) (Johnson, J.) (apparently suggesting that the diversity jurisdiction was exclusively federal by force of Article III). Johnson's astonishing gloss on Article III has been noted by David Currie, who observes that there was a possibility that Johnson spoke for others and perhaps even for a majority on this "remarkable and unsupported" point. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 155-56 & n.260 (1985).
90. See Fox v. Ohio, 46 U.S. (5 How.) 410, 438 (1846) (McLean, J., dissenting); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259 (1835) (McLean, J., dissenting) ("[N]or can the judiciary of a State carry into effect the criminal laws of the Union.").
91. 19 U.S. (6 Wheat.) 264 (1821).
92. Id. at 396-97 (emphasis added). Marshall, of course, may have been referring either to all or part of the High Court's original jurisdiction. But there is nothing in the substance or context of his statements that would necessarily so limit them. Thomas Sergeant understood the reference in Cohens as going to the general point of constitutional exclusivity, as did Martin. See SERGEANT, supra note 84, at 268 n.h. Two other statements of Marshall's offer modest support for the correlative idea of the mandatoriness of lower federal courts: (1) his statements in Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), about the privilege of the writ of habeas corpus may suggest that a constitutional obligation rests upon Congress to create a forum with the requisite jurisdiction (see infra note 178); (2) in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Marshall suggests that a lower federal forum might have to be available for the mandamus action which was at issue. See Clinton, supra note 8, at 1573-74 (so reading Marbury).
93. See, e.g., Davison v. Champlin, 7 Conn. 244 (1828) (state court refusal to hear civil action to enforce federal penalty arguing that "Congress have the power. Let them occupy, with their courts, the whole judicial ground."); Eli v. Peck, 7 Conn. 239 (1828); Haney v. Sharp, 31 Ky. (1 Dana) 442 (1833) (suggesting that state courts might be able to hear penalty actions but only if state court jurisdiction specifically allowed for it); Mathison v. Missouri, 3 Mo. 421 (1834); United States v. Lathrop, 17 Johns. 4 (N.Y. 1900).
criticized by the Supreme Court, the practice was one that the Court occasionally acknowledged and accepted. By contrast, there is a relative dearth of evidence that state courts during this same time were understood to be able to hear any and all lower court Article III business so long as Congress had not made it statutorily exclusive.

Admittedly, some of the arguments advanced in favor of constitutionally exclusive lower federal court jurisdiction are less persuasive than others. Some are not persuasive at all. The point of their inclusion here, however, is to recover a lost and largely uninterrupted tradition about the sources and limits of state court power to entertain Article III judicial business that may account for the historical reluctance of the Supreme Court to impose absolute duties on state courts to hear federal claims. The enclaves of lower federal court exclusivity identified in Martin, moreover, were ones around which there was a rough sense of agreement.

2. ENCLAVES OF EXCLUSIVITY

a. State Courts and Admiralty

It is common today to trace the federal courts' exclusive jurisdiction over much of admiralty to the 1789 jurisdictional provision, and its descendants, which made such jurisdiction statutorily exclusive. And in The Moses Taylor, decided only a few years before Claflin, the Court avoided the question whether the Constitution itself mandated such exclusivity, noting that the jurisdictional statute enacted by Congress was

1819) (discussed infra text accompanying notes 150-53); State v. McBride, 24 S.C.L. (Rice) 400 (1839); Jackson v. Rose, 4 Va. (2 Va. Cas.) 34 (1815) (discussed infra text accompanying notes 147-49); Commonwealth v. Feely, 3 Va. (1 Va. Cas.) 321 (1813) (no jurisdiction for an indictment to punish stealing of mail packets); see also Ward v. Jenkins, 51 Mass. (10 Met.) 583, 587 (1846); Delasfield v Illinois, 2 Hill 159, 169 (N.Y. 1841); State v. Pike, 15 N.H. 83, 85 (1844); cf. People v. Lynch, 11 Johns. 549 (N.Y. 1814) (constitutional incapacity as alternate ground for not upholding state prosecution for treason against the United States). For an accounting and description of these precedents and others, see James D. Barnett, The Delegation of Federal Jurisdiction to State Courts by Congress, 43 AM. L. REV. 852 (1909). For the less frequent dissenting perspective, see Hartley v. United States, 6 Tenn. (3 Hayw.) 45 (1816) (allowing suit for penalty under revenue laws brought by United States); United States v. Smith, 4 N.J.L. 38, 40 (Sup. Ct. 1818); cf. id. at 41-45 (Southard, J., dissenting) (arguing that state courts lacked subject matter jurisdiction over suits by United States for penalties for violations of federal statutes, even when Congress has authorized it).


95. 71 U.S. (4 Wall.) 411 (1866).
“sufficient” answer to oust state courts of jurisdiction in civil actions arising under admiralty and maritime law. Nonetheless, the opinion that some or all of the admiralty jurisdiction was exclusively federal by operation of the Constitution was pervasive in the antebellum period, and it was not altogether put to rest by The Moses Taylor.

It is a familiar story that establishment of a separate system of national courts able to handle admiralty trials—courts that did not exist during the Confederation—was a concern even before the drafting of the Constitution. Admiralty is understood to have been an area as to which even those who believed that state courts were fully competent to handle most Article III business appreciated the desirability of federal courts as a matter of policy. But many of those who participated in the framing, ratification and early implementation of Article III were also clear about the constitutional, not just the political, necessity of federal court jurisdiction over admiralty.

Significantly, all but one of the plans proposed for the Constitution expressly mandated federal trial jurisdiction, in one form or another, over admiralty and maritime matters, in national courts that Congress had a duty to establish. The concern is understandable, because any

96. See The Moses Taylor, 71 U.S. (4 Wall.), at 430 (“It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes.”).

97. The unwillingness of the Court to resolve definitively the constitutional question allowed Grant Gilmore and Charles Black to conclude that the constitutional grant was itself responsible for the exclusivity of certain admiralty actions. See Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 9-27 (2d ed. 1975).

98. See David W. Robertson, Admiralty and Federalism 100-03 (1970) (noting nonexistence of a separate system of federal trial courts during the Confederation). Scholars have noted that, at least as a subconstitutional matter, there was something approaching a consensus on the federal exclusivity of most admiralty and maritime matters. See Felix Frankfurter & James M. Landis, The Business of the Supreme Court 7-8 (1927); Meltzer, supra note 44, at 1578 & n.30. “The experience of the Confederation convinced virtually every conscientious patriot of the 1780’s that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government . . . .” John P. Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 3, 9 (1948); see also The Federalist No. 80, supra note 19, at 538 ("[E]ven the most bigoted idolizers of state authority" were not disinclined to allow the federal judicial power to extend to admiralty.).

99. See, e.g., Frankfurter & Landis, supra note 98, at 7-9; Holt, supra note 24, at 1424-25, 1427-30; see also infra note 327 and accompanying text (noting views of Representative Stone, who, although stating that inferior federal courts were not required by the Constitution, thought that federal courts might be “necessary” if the state courts refused to exercise that jurisdiction); supra note 76 (same).

100. Under Edmund Randolph’s Virginia Plan, admiralty jurisdiction was to have been conferred on the lower federal courts whose creation would have been mandated in the Constitution. See 1 Farrand’s Records, supra note 47, at 21-22. The Plan
constitutional scheme that allowed only for the possibility of appellate jurisdiction over such matters would have largely replicated the problems associated with the era of the Confederation. Ratification did little to erode these sentiments. As noted above, many participants in ratification saw exclusive jurisdiction for some heads of jurisdiction as a necessary

associated with Charles Pinckney of South Carolina gave Congress an exclusive right to create admiralty courts and provided that Congress “shall have the Power & it shall be their duty to establish such Courts of Law Equity & Admiralty as shall be necessary . . . .” 3 id. at 600. Elsewhere Pinckney seems to have proposed that Congress “shall have the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges . . . of the same for all maritime Causes which may arise therein . . . .” 2 id. at 136 (outline of plan). George Mason of Virginia, who would ultimately refuse to sign the Constitution, in part because of his fears about the scope of the national judiciary, was prepared in his constitutional plan to allow for the creation of one lower federal court which “Congress shall establish” but only to hear admiralty cases that “may and must be brought . . . in the first instance to the inferior federal courts.” Id. at 432. Once the Compromise was reached, and the Supreme Court became the one expressly required federal court, Alexander Hamilton offered his own plan, suggesting at one point that capture cases should be lodged in the High Court’s original jurisdiction. See 1 id. at 292 (Madison’s notes of Hamilton’s speech). But see 3 id. at 626 (Hamilton’s unsubmitted plan, having no reference to admiralty). Another “Draft Resolution,” perhaps by John Blair, also indicated that Congress’s establishment of one admiralty court in each state would be obligatory. See SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244-45 (James H. Hutson ed., 1987) [hereinafter FARRAND SUPPLEMENT].

Of the major proposals at the Convention, only the New Jersey Plan offered by William Paterson seems to have rejected a federal trial forum for admiralty matters. Paterson did not distinguish superior and inferior courts, referring only to the federal judiciary, whose original jurisdiction was to be limited to impeachments of federal officers. Admiralty and related matters were to be heard in the state courts in the first instance and were to be appealable to the federal judiciary. See 1 FARRAND’S RECORDS, supra note 47, at 244.

Perhaps more eye-opening in this regard is the fact that a number of the proposals offered by the states during ratification for possible constitutional amendments would have limited Congress to establishing lower federal courts which could only hear cases involving admiralty and maritime matters. See 2 ELLIOT’S DEBATES, supra note 22, at 546 (Pennsylvania; limiting lower federal jurisdiction to “such [courts] as shall be necessary” for admiralty); 3 id. at 660 (Virginia; limiting lower federal court jurisdiction to “such courts of admiralty as Congress may from time to time ordain and establish”); 4 id. at 246 (North Carolina; same); 1 id. at 331 (New York; “Congress shall not constitute, ordain, or establish, any tribunals of inferior courts, with any other than appellate jurisdiction, except such as may be necessary for the trial of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas . . . .”); 2 id. at 551 (Maryland); see also FRANKFURTER & LANDIS, supra note 98, at 7-8 & n.14 (“The desirability of independent lower federal courts for [admiralty] . . . did not encounter vigorous opposition even from the Anti-Federalists.”).
consequence of Article III, and admiralty was often near the top of their lists.\textsuperscript{101}

The theory behind such constitutional exclusivity was disputed, however. Some seemed to base it on the fact that these were not matters within the state courts' pre-existing jurisdiction,\textsuperscript{102} even though modern scholars have pointed out that many states did exercise admiralty jurisdiction to one degree or another during the era of the Articles of Confederation.\textsuperscript{103} Others, by contrast, seemed to understand that the delegation of this particular item of judicial business was designed to divest the states of most of their pre-existing power in the area.\textsuperscript{104} In addition, many understood that the regulatory power over admiralty was exclusively national, as were powers over foreign affairs and international relations, with which the jurisdictional grant of admiralty was often

\textsuperscript{101} All of those who supposed that none of the cases identified by Article III could be heard originally by state courts would presumably fall into this camp. \textit{See supra} text accompanying notes 48, 51; \textit{see also}, \textit{e.g.}, 4 \textit{Elliot's Debates}, \textit{supra} note 22, at 159 (remarks of William Davie of North Carolina) (lumping admiralty with interstate controversies, state-citizen diversity suits, and co-citizen suits over land granted by different states); \textit{Essays of Brutus} (XIII), \textit{supra} note 47 (state courts cannot pass on admiralty cases); Martin, \textit{supra} note 51, at 220-21 (regarding Admiration Clause of Article III: "[i]t is in the courts of the general government [that] the suit must be instituted.").

\textsuperscript{102} For a suggestion that the admiralty jurisdiction was not part of the states' pre-existing jurisdiction, see \textit{Letter from Oliver Ellsworth to Judge Law}, \textit{supra} note 56, at 37 n.\textsuperscript{1}; \textit{see also} 1 \textit{Farrand's Records}, \textit{supra} note 47, at 124 (statement of James Wilson during debate on motions preceding Madisonian Compromise in Committee of the Whole) (admiralty jurisdiction "related to cases not within the jurisdiction of particular states"); \textit{cf.} 3 \textit{Story}, \textit{supra} note 67:

The reasonable interpretation of the Constitution would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature, and extent, and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so.

\textit{Id.} § 1666, at 534 n.3. In support of these statements is the fact that some of the admiralty jurisdiction heard by state courts, appointed by Congress during the Confederation to hear trials of piracy and high seas felonies, was itself arguably exclusively federal. \textit{See infra} text accompanying notes 228-37.

\textsuperscript{103} \textit{See Articles of Confederation} art. IX, § 1 (1777) (ceding to Congress power of "appointing" courts for trial of piracies and felonies committed on the high seas and allowing for the establishment of a federal appeals court in cases of capture from state courts); Holt, \textit{supra} note 24, at 1427-28. \textit{See generally} Henry J. Bourguignon, \textit{The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787}, at 39-134 (1977). Prior to the Revolution, there is said to have been little or no tradition of state (colonial) court exercise of admiralty jurisdiction which was secured to British courts instead. \textit{See Robertson, supra} not 98, at 65-97.

\textsuperscript{104} \textit{See infra} notes 109-12 and accompanying text.
By the time the first judiciary statute was enacted, when Congress made admiralty jurisdiction statutorily exclusive, even the last-ditch challenge to the creation of an independent system of federal courts with substantial original jurisdiction over Article III matters did not oppose the existence of lower federal courts for admiralty matters. And if these particular gestures are thought to have been politically rather than constitutionally driven, there were still those in the first Congress who spoke the language of constitutional imperative.

The reaction of the treatise writers on the issue of constitutional exclusivity was unanimous, even if they, too, did not always agree in their reasoning. For example, Kent's Commentaries followed Martin in stating that the delegation of admiralty and maritime jurisdiction to the federal judiciary was an example of a constitutional grant of exclusive federal power. Employing the terminology of The Federalist No. 82, Kent reasoned that "there was a direct repugnancy or incompatibility in the exercise of it by the states." Other writers joined the chorus.

Story's own Commentaries were actually the most conservative in the

105. See, e.g., Rawle, supra note 83, at 202; Sergeant, supra note 84, at 200; 3 Story, supra note 67, § 1662, at 529-30; id. § 1666, at 533 n.3; see also The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1875) (Bradley, J.) (exclusive regulatory authority over admiralty in federal government). While exclusive grants of regulatory power might not disable concurrent state adjudicatory jurisdiction over the same area, the exclusive regulatory power associated with admiralty was perhaps uniquely judge-made. 106. Judiciary Act of 1789, § 9, 1 Stat. 73 (current version at 28 U.S.C. § 1333(1) (1988)). Congress included a proviso, "saving to suitors" remedies they might have at common law where the common law was competent to give them. Id. The "saving to suitors" clause found in the admiralty statute might be seen as a reference to that part of the pre-existing jurisdiction of the states over admiralty matters that was not exclusively transferred to the federal government by the Constitution or at least by the statute. See Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522, 525-26 (1872); The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-31 (1866); Waring v. Clarke, 46 U.S. (5 How.) 441, 464 (1846).

107. See Casto, supra note 53, at 1107 & nn.50-53 (discussing motion to limit lower federal court jurisdiction to admiralty).

108. See 1 Annals of Cong., supra note 69, at 808 (remarks of Rep. Ames). Ames observed that state courts could not constitutionally decide admiralty cases—even if Congress authorized them to. See also id. at 800 (remarks of Rep. Smith) (doubting that states could now take jurisdiction of admiralty cases). Others, such as Representative William Smith and Senator William Maclay, who seemed to believe that all Article III business was exclusively federal by force of the Constitution, see supra notes 70, 74, would presumably have agreed on admiralty's constitutional exclusivity.

109. 1 Kent, supra note 67, at 366.

110. Id.

111. Rawle, supra note 83, at 202 (suggesting that power to regulate admiralty matters was exclusively federal); Sergeant, supra note 84, at 267 (employing similar implied constitutional exclusivity language for admiralty); 1 Tucker's Blackstone, supra note 80, at 181-83 (same as Rawle).
treatise tradition, suggesting that only matters involving foreign relations, such as cases of prize and capture, and cases arising from activity on the high seas were within the constitutionally exclusive jurisdiction of the federal courts, whereas other admiralty and maritime matters were not.\(^\text{112}\)

Supreme Court opinions reflect this common understanding as well. As noted above, Story's statement regarding constitutional exclusivity presented a view in which the entire Court in \textit{Martin} could acquiesce; Justice Johnson remarked that "[w]ith regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the states could resume it, if the United States should abolish the courts vested with that jurisdiction . . . ."\(^\text{113}\) Later, in \textit{The Moses Taylor}, when the Supreme Court was content to peg admiralty's exclusivity to the 1789 Judiciary Act, the Court nevertheless expressed its overall approval of \textit{Martin}'s broader suggestion that some parts of Article III's jurisdiction were exclusively federal as a constitutional matter—a conclusion that Story had reached quite apart from his arguments about mandatory jurisdiction and the "two-tier" distinction that he had raised:

Without, however, placing implicit reliance upon the [two-tier] distinction . . . the learned justice [Story] observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition.\(^\text{114}\)

\(^{112}\) 3 \textit{STORY}, supra note 67, § 1666, at 533 & n.3 (critiquing views of Rawle, Kent, and Tucker).

\(^{113}\) \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat.) 304, 373 (1816); \textit{see also Taylor v. Carryl}, 61 U.S. (20 How.) 583, 611-12 (1857) (Taney, C.J., dissenting) (observing that states could not have admiralty courts under the Constitution); \textit{Ogden v. Saunders}, 25 U.S. (12 Wheat.) 213, 278 (1827) (Johnson, J.) (arguing that whatever pre-existing admiralty jurisdiction the state courts had prior to ratification was given up in the Constitution).

\(^{114}\) \textit{The Moses Taylor}, 71 U.S. (4 Wall.) 411, 429 (1866). Justice Field first indicated the uncertainty of the constitutional-exclusivity question, not only by resting the case on statutory grounds, but in his framing of the question. By asking "\textit{How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point}," Field seemed to acknowledge the possibility of a realm of constitutional exclusivity. \textit{Id.} at 428 (emphasis added). He then entered into a discussion of \textit{Martin} and the two tiers of jurisdiction discussed by Story and concluded with the statement quoted in the text. The statement seems to eliminate the possibility that Field was referring only to the jurisdiction of the Supreme Court in his statements about exclusivity, even though it is noncommittal on the question of admiralty's exclusivity.
Thus, while admiralty's exclusivity may have been statutory, it is easy to see how *The Moses Taylor* contributed to continuing notions of constitutional exclusivity.\textsuperscript{115}

\textit{b. State Courts and Federal Crimes}

Like admiralty, the prosecution of federal crimes was one of the areas often perceived in the early Republic as constitutionally requiring federal court trial jurisdiction. Lower federal court criminal trials were clearly anticipated in the Constitution, both in Article III's provision for trials by jury in federal criminal cases and by its venue provision directing that federal criminal cases be held in the state in which the crime arose.\textsuperscript{116} There was, however, notably little discussion of federal subject matter jurisdiction over federal crimes at the time of the Philadelphia Convention or during ratification. Most participants seem to have accepted that it was at least politically desirable for federal courts to enforce criminal actions brought by federal officials to vindicate national interests, and a few expressed the idea that such a result was required by the Constitution.\textsuperscript{117} Moreover, those involved in the Constitution's framing and ratification did not suggest that federal courts would be unnecessary because state courts themselves might hear such prosecutions, although some suggestions along these lines were proposed as alternatives to Article III.\textsuperscript{118} When Hamilton discussed the

\textsuperscript{\textnormal{115}} Interestingly, Justice Field (and before him, Justice Johnson) accepted arguments about constitutional exclusivity while not endorsing Story's theories of mandatory vesting—the precise opposite position from that of some modern federal courts scholars.

\textsuperscript{\textnormal{116}} The old views were remarkably tenacious. \textit{See, e.g.}, Farrell v. Waterman S.S. Co., 291 F. 604, 612 (S.D. Ala. 1923) (concluding, after an elaborate analysis of *Martin* and intervening Supreme Court decisions, that with respect to admiralty, "exclusive jurisdiction is given by the Constitution").

\textsuperscript{\textnormal{117}} \textit{See} U.S. \textit{CONST.} art. III, § 2, cl. 3; \textit{see also} Holt, \textit{supra} note 24, at 1425.

\textsuperscript{\textnormal{118}} Here, as with admiralty, those who supposed that state courts were unable to take original jurisdiction of any of the cases identified in Article III must have concluded that this area (federal crimes) would be off-limits to the state courts as well. \textit{See supra} notes 48, 51. In addition, some opponents of the Constitution were explicit about their view that federal court power was not just proper, but was exclusive under Article III in this area. \textit{See}, \textit{e.g.}, *Martin*, \textit{supra} note 51, at 221 ("[E]very offence against, and breach of, the laws of Congress, are also confined to its courts . . . .").

\textsuperscript{\textnormal{118}} A number of such suggestions were made in connection with constitutional plans that provided for no lower federal courts, or lower courts for admiralty only. One proposal was for state courts to exercise federal criminal jurisdiction "in such manner as the Congress shall by law direct . . . ." 2 \textit{FARRAND'S RECORDS, supra} note 47, at 432 (plan attributed to George Mason). In Paterson's New Jersey Plan, which did not mention inferior federal courts, prosecution for federal crimes was expressly provided in the state
The Madisonian Compromise

presumption of state court power over Article III cases and controversies in *The Federalist No. 82*, he observed that a state court would “look[] beyond its own local or municipal laws.” Hamilton, however, limited his observation to civil cases. While the specific point did not receive extended discussion at the time of the enactment of the 1789 Judiciary Act, there were those in Congress who argued that the constitutional inability of state courts to hear federal crimes was based on the familiar theory that such matters were ones over which the state courts did not hold jurisdiction before the Constitution’s ratification.

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119. *The Federalist* No. 82, supra note 19, at 555.

120. At the time of the first Judiciary Act, the principle of exclusivity was defended on the ground that federal crimes were not something the state courts ever exercised jurisdiction over antecedent to the Constitution. *Cf.* id. at 553-54 (discussing pre-existing jurisdiction as limit on concurrency).

The State courts were not supposed to be deprived by the Constitution of the jurisdiction that they exercised before, over many causes that may be tried now in the national courts. The suitors would have their choice of courts. But who shall try a crime against a law of the United States or a new created action? Here jurisdiction is made *de novo*.

1 ANNALS OF CONG., supra note 69, at 807 (remarks of Rep. Ames); *see also* id. at 808 (state courts “never had” power to hear federal criminal cases). Both of these statements, although in support of the statutory grant of exclusivity, clearly have a constitutional ring to them. *See also* id. at 799-800 (remarks of Rep. Smith) (acknowledging “necessity” of jurisdiction over “offences committed on the high seas” because they were “offences . . . against the United States”). While Smith’s language might not be referring to constitutional necessity, it is likely given his beliefs that it did. *See supra* text
According to Justice Story (commenting on his own handiwork), the Court in *Martin* had “expressly held . . . that no part of the criminal jurisdiction of the United States” could “consistently with the constitution” be delegated to or exercised by the states; prosecution for federal crimes was therefore outside of state authority. Story reiterated the idea that the Constitution itself left no concurrent power in the states over such subject matter and that each government should be left to enforce its own penal laws in its own tribunals—a maxim he drew from then-settled views surrounding the customary “law of nations” and the conflict of laws. And although jurisdiction over federal crimes, like jurisdiction over admiralty, has traditionally been exclusively federal by statute, Story (and *Martin*) clearly meant to assert that such jurisdiction was exclusively federal as a constitutional matter. While Story’s ideas were shared by others when he wrote, the treatise tradition was in some measure divided, and scholars have disputed how far such ideas were embraced among those who were responsible for the earliest judiciary acts or those involved in the Constitution’s framing.

(i) Warren’s Report

In an influential article, Charles Warren long ago catalogued the early congressional legislation that seemed to give state courts jurisdiction to hear various federal enforcement actions brought by federal officials and others on behalf of the United States. In what may have been a concession to the Anti-Federalists (and a recognition that the lower federal

accompanying note 70.


122. *See* JOSEPH STORY, *Commentaries on the Conflict of Laws* § 620, at 516 (Boston, Hillard, Gray & Co. 1834) (“The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed.”); *see also* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.); *Houston*, 18 U.S. (5 Wheat.) at 69 (“[N]o nation is bound to enforce the penal laws of another . . . .”); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1792) (Iredell, J.) (criminal law enforcement belongs to jurisdiction or government that created the law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1988).

123. *Compare* 1 KENT, *supra* note 67, at 377 (indicating that federal jurisdiction over “all criminal cases” was “necessarily exclusive, but it was not so as to pre-existing matters within the jurisdiction of the state courts”) and 3 STORY, *supra* note 67, § 1750 with *supra* note 118 (views of Tucker, Rawle, and Sergeant) (role for state courts to hear at least some federal criminal matters).

124. Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925). Warren argued that state courts were competent to enforce federal penal laws, but they were not obligated to do so. *See also infra* part III.
courts established by the Judiciary Act of 1789 were not always the most readily accessible to litigants), the first Congresses gave state courts the power to entertain certain monetary claims brought by the United States and other aggrieved parties for fines, penalties and forfeitures arising under a number of federal laws. These included federal statutes relating to the mails, internal revenue, customs, various embargo statutes and trade with Native Americans. Warren argued that some statutes went even further, conferring state court jurisdiction over the actual prosecution of certain federal crimes involving more than monetary relief. State courts, he maintained, were at first receptive to maintaining these various enforcement actions; only later did they balk. The modern Court would rely heavily on Warren’s article and the story of early congressional practice in concluding that state court powers and duties to hear federal judicial business were understood by the founding generation to be quite broad.

It is open to question, however, how much federal criminal jurisdiction the states ever exercised, or how much Congress ever really conferred on them. First, as explained below in Part III, it was doubtful under then-prevailing notions that Congress was capable of conferring jurisdiction on state courts at all. Rather, in line with The Federalist No. 82, the governing theory was that state courts could hear cases that were otherwise within their jurisdiction; they needed no congressional

125. Id. at 550-55, 570-73.


127. See Warren, supra note 124, at 549-50; see also Barnett, supra note 93, at 856-57. What the reported cases show is that a few state courts were prepared to entertain civil actions for debt, or similar suits, prior to the onset of jurisdictional refusals. See, e.g., United States v. Dodge, 14 Johns. 95 (N.Y. 1817) (allowing suit by United States on a bond given by defendant to federal customs collector for payment of customs duties). The civil cases for penalties fit comfortably with the idea that state courts would have concurrent jurisdiction at least where such suits were part of the state’s pre-existing jurisdiction. The problem seems to have arisen with suits for federal statutory penalties. See also infra text accompanying notes 147-53.

128. The Court would later make reference to Warren’s article for such a proposition in Testa v. Katt, 330 U.S. 386, 390 (1947). The briefs in the case show that the United States had relied quite extensively on Warren’s article in shaping its argument. See infra text accompanying note 360; see also Palmore v. United States, 411 U.S. 389, 402 (1973).
permission. Thus, to the extent that the suits for fines, penalties and forfeitures were nominally civil, state courts could arguably hear them based on their antecedent power to hear actions for debt and similar suits, even when they were brought by federal officials. Second, to the extent that Congress in these statutes referred to actual criminal prosecutions either by way of indictment, presentment, or information, Congress made little effort to provide for such criminal prosecutions by federal officials in state courts. In both the civil and criminal contexts, however, the statutory authorization was needed because Congress had expressly given the federal courts exclusive jurisdiction over federal "crimes and offenses" in the 1789 Judiciary Act. Thus, if the state courts were to undertake prosecutions of federal crimes through their own officials, subsequent affirmative congressional grants of concurrent state court jurisdiction were needed, not so much as conferrals of jurisdiction to the state courts, but as carve-outs from this previously enacted exclusive federal jurisdiction.

In addition, the vast bulk of the statutes that Warren identified involved civil suits for monetary relief. Only a small handful of them, even by Warren’s own count, dealt with the possibility of actual state court prosecutions of federal crimes by state officials. Yet even in many of those cases, express concurrent criminal jurisdiction may have been provided, not so much to enable state prosecutorial officials to enforce federal criminal law as such. Rather it was to make clear that the states retained the power to prosecute, under their own criminal laws, the very

129. Sometimes the United States did proceed criminally in the state courts but had difficulty doing so. I have found no cases where a federal official attempted to proceed by indictment or presentment in a state court. (Indeed, it would have been odd for the United States to convene a state grand jury or to move from a federal grand jury to the state courts.) But in United States v. Campbell, Tappan’s Ohio Rep. 61 (1816), the federal government proceeded by information against a defendant to recover a penalty for breach of federal revenue laws in a state in which criminal proceedings by information were not allowed. The federal prosecutorial effort was rebuffed, however, on broader grounds concerning the inability of Congress to confer federal criminal jurisdiction on the state courts.

130. As Chancellor Kent put it:

The state courts could exercise no jurisdiction whatever over crimes and offences against the United States, unless where, in particular cases, other laws had otherwise provided; and whenever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn, and the concurrent jurisdiction of the state courts, eo instanti, restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

1 Kent, supra note 67, at 373-74. Such carve-outs would also guarantee that state courts could hear actions for penalties or fines, by or on behalf of the United States, even if they were considered "offenses" that had been made federally exclusive by the 1789 Act.
acts or behavior that also happened to be actionable under federal law, such as counterfeiting federal currency or robbing the mails. If so, that is a concept quite distinct from providing for state prosecutorial enforcement of federal criminal laws, which these early statutes are thought to support broadly.

(ii) State Court-Martial Jurisdiction

Nevertheless, the Supreme Court's early decision in Houston v. Moore is thought to have settled once and for all (and only a year after Martin) any possible dispute about state court jurisdiction to prosecute federal crimes. In Houston, the State of Pennsylvania successfully tried a member of the local militia who had failed to answer a call to federal military service made by the President through the Governor of the State. Federal statutes clearly made the failure to respond to the call-up a crime, although it was apparently a violation of Pennsylvania law as well. Houston is customarily cited for the proposition that state tribunals could and did prosecute actions for violations of federal criminal laws and has therefore been relied on by the Court and modern scholars as establishing an early tradition of broad state court powers to enforce federal law. But the case probably cannot support such a view.

The suit that the Supreme Court directly reviewed was not the court-martial itself. Rather, it dealt with a state court trespass action by the reluctant soldier, Houston, against a state official, Moore, who had seized Houston's property to pay the fine that the Pennsylvania court-martial had assessed against him for failing to respond to the call-up. Moore defended the trespass suit by raising the prior, state-convened court-martial judgment as justification for his act of enforcing the judgment. Houston replied that the court-martial was unconstitutional.

131. See infra text accompanying notes 144-46. Of course, if this is all the statutes did, a congressional carve-out was probably not needed, except to dispel any possible concern that two sovereigns could not regulate the same act.
133. Id. at 28. At a number of points in his opinion, Justice Washington seemed to say that the same action could never be subject to prosecution by the states and the federal government. See J.A.C. Grant, The Scope and Nature of Concurrent Power, 34 Colum. L. Rev. 995, 1012 (1934) (noting that this aspect of Washington's view of federalism in Houston was "doomed").
135. Moore offered two justifications to the Supreme Court for his action. He argued first that Pennsylvania could constitutionally enforce the federal criminal statute.
because a state had no power to prosecute him for failing to respond to the presidential call-up; therefore, Moore should be liable for his unauthorized trespass. The state courts had found no constitutional infirmity in the prosecution of Houston and, hence, no infirmity in Moore’s seizure of Houston’s property.\textsuperscript{136}

A splintered Supreme Court affirmed. Justice Bushrod Washington, who announced the Court’s judgment, concluded that federal criminal laws preempted state law on the subject of punishing those who failed to respond to a federal military call-up. In so doing, Washington seemed to say that Houston could not be convicted for a violation of state law. But Washington then upheld the state’s asserted power to convict Houston for a violation of federal criminal law and to impose the federally prescribed penalty.\textsuperscript{137} If, however, it was Washington’s view that federal criminal laws could be enforced, as such, in state judicial tribunals by state officials, it may not have been the view of a majority. Washington pointedly noted that the four (unidentified) members of the seven-member Court who joined with him in affirming the Pennsylvania courts did not necessarily agree with his reasoning that state courts could enforce federal criminal laws.\textsuperscript{138} Their reasoning is not known. One of those who joined in the judgment, Justice Johnson, concurred separately, sensibly arguing that Pennsylvania had prosecuted Houston, not on the basis of federal criminal law, but on the basis of state law. Johnson argued, contrary to Washington, that state law had not been preempted as a basis for prosecution, and that states had a concurrent power to assess a criminal sanction of their own against such conduct.\textsuperscript{139} Johnson declared, moreover, that “crimes against a government are only cognizable in its own Courts.”\textsuperscript{140} Reiterating Washington’s caution in its tribunals to vindicate federal interests, and second that in any event, the state could enforce a criminal sanction based on Houston’s violation of state law for failing to respond to the call-up. See \textit{Houston}, 18 U.S. (5 Wheat.) at 16.

\textsuperscript{136} \textit{Id.} at 3-4.
\textsuperscript{137} \textit{Id.} at 32.

Two of the judges are of opinion, that the law in question is unconstitutional, and that the judgment below ought to be reversed.

The other judges are of opinion that the judgment ought to be affirmed; but they do not concur, in all respects in the reasons which influence my opinion.

\textit{Houston}, 18 U.S. (5 Wheat.) at 32.

\textsuperscript{139} \textit{Id.} at 32-47 (Johnson, J.). Justice Johnson did not believe that federal law reached the acts of Houston. \textit{Id.} at 36.

\textsuperscript{140} \textit{Id.} at 35 (“or in those which derive their right of holding jurisdiction from the offended government’’).
about the Court's actual holding in the case, Johnson noted that the Court had decided nothing other than the absence of constitutional error in imposing the fine on Houston and, therefore, that Moore's allegedly trespassory actions were justified.\footnote{141}

Justice Story dissented for himself and one other. He agreed with Washington that federal law preempted state law on the subject of these militia call-ups, and that the offense grew "solely out of [a] breach of duties owed to the United States."\footnote{142} But he dissented because he believed that no state possessed the judicial power to prosecute federal criminal violations.\footnote{143} The dissenters' views were therefore in agreement with those of Justice Johnson (and perhaps others on the Court who joined in the judgment of affirmance), in concluding that states could not ordinarily enforce federal criminal statutes in their own tribunals. They disagreed with Johnson only to the extent they believed that the

\begin{footnotes}
\footnote{141. Justice Johnson concluded his opinion: In this case, it will be observed that there is no point whatever decided, except that the fine was constitutionally imposed upon [Houston]. The course of reasoning by which the judges have reached this conclusion are various, coinciding in but one thing, namely, that there is no error in the judgment of the state court of Pennsylvania. Id. at 47.}
\footnote{142. Id. at 56; see also CURRIE, supra note 89, at 109. The actual basis of Story's dissent was, however, his reading of the federal statute, which he found had made federal court jurisdiction exclusive. Justice Story was particularly concerned that, if the criminal violation being prosecuted in the state courts was truly a violation of federal law, the state's governor would not be able to pardon the offender. See Houston, 18 U.S. (5 Wheat.) at 72-73 (Story, J., dissenting); see also id. at 31 (Washington, J.) (noting that governor might not be able to pardon for a violation of federal criminal law prosecuted in the state courts). The other dissenter may well have been Chief Justice Marshall. See WHITE, supra note 138, at 537.}
\footnote{143. See Houston, 18 U.S. (5 Wheat.) at 66 (Story, J., dissenting). In the course of his opinion, Story repeated what he saw as the "general principle" that had never "been seriously doubted": some areas of federal jurisdiction under Article III were exclusive of state court power by operation of the Constitution alone. Id. at 50. For him, it did not follow from the possibility that Congress might fail to provide adequate judicial means to enforce federal laws "that a resulting trust is reposed in the state tribunals to enforce them." Id. at 68. Story did not consider the punishment for an interference with federal sovereign interests to be part of the states' pre-existing jurisdiction: If an offence be created of which no court of the United States has a vested cognizance, the state court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the States have retained any power to enforce fines and penalties created by the laws of the United States, in virtue of their general sovereignty, for that sovereignty did not originally attach on such objects. They sprung from the Union, and had no previous existence. Id. Of course, absent preemption by federal statute, states could punish the same act for its interference with state sovereign interests, based on the states' pre-existing jurisdiction.}
\end{footnotes}
federal criminal statute had displaced a state law criminal action for the same offense.

Although today Houston stands for the proposition that state courts can constitutionally prosecute federal crimes through their own officials, the decision engendered a mostly lukewarm reception among its contemporaries. Commentators and opinions in later cases sometimes went out of their way to view Houston as having allowed a state prosecution for the violation of state, not federal, law, despite the obvious thrust of Washington's opinion. Indeed, in Fox v. Ohio, one of the few cases under these early congressional statutes to reach the Supreme Court and to raise such issues in a non-court-martial context, the Court sustained a state prosecution for counterfeiting on the ground that the State of Ohio might independently punish such activity, rather than on the more adventurous ground argued by counsel, that the state could prosecute for a violation of federal law. Notwithstanding Houston, there were other instances in which members of the Court would question jurisdiction in Houston was exercised on the basis of state law and concluding that the Court in Houston "disclaimed the idea that congress could authoritatively bestow judicial powers on state courts and magistrates"; Sergeant, supra note 84, at 270 & n.n (assuming that state courts could exercise criminal jurisdiction to enforce lesser offenses under federal law, but apparently viewing proceedings in Houston as a prosecution under state law).

Even the Court in Claflin, while invoking Washington's opinion, had some trouble with Houston v. Moore. The Court noted that the laws Houston was charged initially with violating were the "laws of the United States which the State legislature had reenacted." Claflin v. Houseman, 93 U.S. 130, 141 (1876). That phrasing alone may suggest some ambiguity as to whether the state was enforcing authentic, rather than merely incorporated federal law. Cf. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986). Nevertheless, Claflin characterized the opinion by Justice Washington as "based upon the general principle that the State court had jurisdiction of the offence, irrespective of the authority, State or Federal, which created it." Claflin, 93 U.S. at 141. While that statement may be read as indicating that concurrent jurisdiction over criminal matters was as broad as jurisdiction over civil matters based on federal statutes, it might also suggest uncertainty as to the source of the law pursuant to which Houston was actually convicted. In any event, the Claflin Court also indicated the uncertain force of Houston when it observed that "perhaps, the court went further, in that case, than it would now." Id.

144. See 6 Nathan Dane, A General Abridgment & Digest of American Law § 18 (1823) (reading Houston as upholding punishment based on state law and noting that "the case was involved in serious difficulties" if punishment was based on federal law); 1 Kent, supra note 67, at 372-73, 374 (concluding that jurisdiction in Houston was exercised on the basis of state law and concluding that the Court in Houston "disclaimed the idea that congress could authoritatively bestow judicial powers on state courts and magistrates"); Sergeant, supra note 84, at 270 & n.n (assuming that state courts could exercise criminal jurisdiction to enforce lesser offenses under federal law, but apparently viewing proceedings in Houston as a prosecution under state law).

145. 46 U.S. (5 How.) 410 (1846). The statute in Fox somewhat ambiguously provided that "nothing in this act contained shall be construed to deprive the courts of the individual states, of jurisdiction, under the laws of the several states, over offences made punishable by this act." Act of Mar. 3, 1825, ch. 65, 4 Stat. 115, 122-23. The statute could arguably be read as allowing states to prosecute federal crimes or, alternatively, as indicating that state law was not preempted and thereby giving states the green light to prosecute state crimes.
whether criminal prosecutions for violations of federal law could be brought in state courts.\textsuperscript{146}

(iii) Denying State Court Jurisdiction over Federal Penal Actions

Around the time of Martin, and unimpeded by Houston, a series of spirited state court decisions began to surface, denying that states could judicially enforce the penal laws of the federal government, even when the power to do so had been expressly conferred on them by Congress. Although most forcefully articulated by a strong nationalist like Story, the idea of such state court incapacity had also become congenial to those

\textsuperscript{146} See, e.g., Stearns v. United States, 22 F. Cas. 1188, 1189 (C.C.D. Vt. 1840) (No. 13,341) (Thompson, Circuit Justice) (taking it as a given that “no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals”); see also, e.g., Fox, 46 U.S. (5 How.) at 437 (McLean, J., dissenting); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259 (1835) (McLean, J., dissenting).

Sometimes, the Court addressed the flip side of the proposition—whether federal courts could hear prosecutions for violations of state law as a strictly original matter. See, e.g., Gwin v. Bredlove, 43 U.S. (2 How.) 29, 36-37 (1844) (“[T]he courts of the United States hav[e] no power to execute the penal laws of the individual States”; only state could punish state-law offense.); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); see also Ann Woolhandler & Michael G. Collins, State Standing, 80 VA. L. REV. (forthcoming 1995) (discussing Supreme Court’s refusal to read its original jurisdiction over state-as-party cases as including criminal cases). As it had in Martin, the Supreme Court in Cohens rejected an extreme states’ rights view of judicial independence while embracing another, less radical view of their independence. Cohens was a state law criminal prosecution brought by Virginia officials in Virginia courts, in which a federal defense was raised. Virginia’s attack on the constitutionality of Supreme Court review argued that, if the case arose under federal law within the meaning of Article III, given the presence of the federal defense, it had to originate in a lower federal court (which Congress was obliged to create). See Cohens, 19 U.S. (6 Wheat.) at 316 (argument of counsel). The argument of the state in Cohens would have required Congress to set up lower federal courts to try Article III cases as a precondition to Supreme Court review. The argument was rejected, not because the Court concluded that lower federal courts were not required. Rather, the Court doubted whether federal courts could exercise strictly original jurisdiction under Article III over a suit involving a state’s enforcement of its own criminal laws. See id. at 399; Woolhandler & Collins, supra. But cf. Tennessee v. Davis, 100 U.S. 257 (1880) (discussed infra text accompanying notes 154-58); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (broadly defining constitutional scope of Article III’s jurisdiction for actions arising under federal law). When applied to the state-federal context, the maxim of international law that governments do not enforce each other’s penal laws reinforced rather than undermined then developing notions of dual federalism, and indirectly confirmed the course taken by state courts refusing to allow enforcement of federal criminal law. Thus, far from casting doubt on state court refusals to entertain federal criminal jurisdiction, Cohens, like Martin before it, implicitly endorsed such refusals.
who championed states’ rights and decentralization of governmental power. For example, prior to Martin, courts in the States of Virginia and Ohio had refused to entertain claims to enforce penalties based on violations of federal revenue statutes, despite express congressional authorization to do so. In fact, in Jackson v. Rose, the Virginia General Court held that the congressional effort to confer such jurisdiction was an unconstitutional imposition on its sovereignty and satisfied itself that federal criminal laws had emanated from an entirely foreign government so that the state neither could nor would enforce them. While not all state courts were as extreme in their views of state sovereignty as Virginia’s, they tended to reach similar results.

Most of the later decisions rested squarely on Martin and the notion of implied constitutional exclusivity of certain heads of Article III jurisdiction. By vindicating the notion of federal judicial review of state court decisions, the Court in Martin had unquestionably dealt a fatal blow to the asserted independence of state courts to have the final say in interpreting federal law and the Constitution. But Martin’s other language about constitutionally driven exclusivity was tapped as a source of support for state court jurisdictional freedom to refuse federal judicial business, even when “conferred” by Congress. As the New York high court explained in United States v. Lathrop in denying its tribunals the

147. For Virginia’s view, see Jackson v. Rose, 4 Va. (2 Va. Cas.) 34, 36 (1815) (arguing that, if it did, it would be exercising a slice of the federal judicial power and "introducing] a strange kind of Mosaik work into the Judiciary system"). Jackson involved an effort by a federal official, pursuant to congressional authorization, to recover, through state court proceedings, a penalty for defendant’s selling foreign goods without a license, in violation of federal law. For Ohio’s position, see United States v. Campbell, Tappan’s Ohio Rep. 61 (1816). The Ohio court observed in refusing to allow the United States to proceed by way of an information to recover a penalty under a federal statute:

It is true, that we have been sworn to support the constitution of the United States, and that constitution, and the laws made in pursuance of it, are of paramount obligation: thus, a law of the United States may furnish a rule for the decision of a state court, as it oftentimes does, in determining a controversy between citizens; those laws may give us a rule in many cases where we have jurisdiction, but they cannot give us jurisdiction in any matter

148. 4 Va. (2 Va. Cas.) 34 (1815).
149. See authorities cited supra note 93.
150. 17 Johns. 4 (N.Y. 1819).
power to hear a suit brought by the United States seeking “a penalty of 150 dollars” for violation of a federal licensing statute:

[In as much as there is no express negation of jurisdiction to the state courts, [in Article III], their jurisdiction is not taken away, except as to such of the cases as they did not before hold cognizance of, and such as, from the nature of the jurisdiction, they could not hold cognizance of, from the incompatibility between the powers granted to the courts of the United States, and a reservation of any portion of the same powers to the state courts.]

The structure of the argument was the familiar one respecting constitutional preemption and shows that implied constitutional exclusivity was thought to extend to certain lower federal court Article III business. Even the dissenting judge, while doubting the federal exclusivity of civil suits for penalties under the federal law at issue in Lathrop, conceded the general principle of constitutionally driven exclusivity of certain heads of federal jurisdiction and would have upheld the refusal of jurisdiction in a more clearly criminal proceeding. He, like some other judges of his time, sought to distance himself from the more extreme states’-rights rhetoric of Jackson v. Rose. Yet even his more moderate opinion (which the Court in Claflin would later praise for its “able” assessment of the role of state courts in the enforcement of federal law) shows the striking degree of consensus respecting constitutional exclusivity, when it notes that there were “important constitutional limits” on the “legislative discretion” given to Congress in Article III and that establishing some lower federal courts was as mandatory as creating the Supreme Court. Given such consensus within the spectrum of

151. Id. at 7 (emphasis added).
152. See Claflin v. Houseman, 93 U.S. 130, 140 (1876).
153. See Lathrop, 17 Johns. at 14 (Platt, J., dissenting):

[T]he primary duty of creating the judiciary department, is referred to Congress . . . .

The legislative discretion on that subject has, indeed, important constitutional limits. There must be a Supreme Court; there may, and I think there must be, at all times, courts of the United States inferior to the Supreme Court.

Id. (emphasis in original); see also id. at 22 (“[A] state court cannot act as an organ of judicial power representing the United States, because, in its appointment, tenure, and accountability, it is independent of the federal government.”); see also RAWLE, supra note 83, at 203 (state courts could hear “suits [by the United States] for the recovery of debts, or damages for the breach of contracts . . . . There is nothing in the Constitution to restrain them from so doing, nor to justify a refusal on the part of the state court to take
judicial opinions, the propriety of state court denials of power over such
cases went largely unquestioned through most of the nineteenth century
and for much of the twentieth.

(iv) Reconstruction and Reaction

The idea of one government's incapacity to enforce another's
criminal laws underwent substantial revision in one important respect after
Reconstruction, when it was deprived of its constitutional status in
Tennessee v. Davis. The Court in Davis upheld the constitutionality
of a federal officer removal statute that transferred to federal court a
federal official's criminal prosecution, originally brought by state officials
under state law in state court. There was nothing new about federal
officer removal statutes. In addition, the Civil War amendments had
worked fundamental changes in the relationship between the state and
federal governments, which provided support for the nationalist approach
in Davis and some of the other famous removal cases decided that same
day. But the ability of the federal courts to try state criminal
cognizance of them.

At least a couple of decisions were in line with the Lathrop
dissent, see United States v. Smith, 4 N.J.L. 38, 40 (Sup. Ct. 1818); Hartley v. United
States, 6 Tenn. (3 Hayw.) 45 (1816) (allowing suit for penalty brought by United States).
154. 100 U.S. 257 (1880); see Currie, supra note 89, at 110 n.129 (noting that
the principle was "den[ied] constitutional status" in Tennessee v. Davis).
155. Justices Clifford and Field, however, dissented in Davis and rehearsed the
familiar antebellum arguments for independent control of the enforcement of a sovereign's
criminal laws. For a chronicling of these statutes, see generally Frankfurter &
Landis, supra note 98, at 61 n.22. For their intersection with removal, see Michael G.
Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. 717, 721
n.21, 767 (1986). The impetus for these statutes was not any perceived infirmity in the
state courts to hear the suit against the officer but, because of various political crises, the
fear that the state courts would be hostile to federal officers engaged in the enforcement
of politically unpopular federal laws. See Frankfurter & Landis, supra note 98, at 61.
Indeed, at the time, federal removal statutes were understood to operate only if the state
courts had jurisdiction to begin with. See, e.g., Lambert Run Coal Co. v. Baltimore &
156. See Straudcr v. West Virginia, 100 U.S. 303, 312 (1880); Ex parte Virginia,
100 U.S. 339, 349 (1880). Those changes also manifested themselves in the unique and
short-lived effort of the Reconstruction Congress to provide for federal prosecutions not
only of federal crimes but of state law crimes in federal court, when the victim could
show that she would be denied or could not enforce federally guaranteed rights in state
court. For its fate in the Courts, see Blyew v. United States, 80 U.S. (13 Wall.) 581
(1872); Robert D. Goldstein, Blyew: Variations on a Jurisdictional Theme, 41 Stan. L.
Rev. 469 (1989). The statutes were expunged by a revision of federal laws undertaken
between 1872 and 1874, because allowing for prosecution of a state law crime in federal
court would work, it was said, a "complete revolution in the character and functions" of
the federal courts. See id. at 514-15 (quoting 1 Revision of the United States
The Madisonian Compromise

prosecutions where Congress had given them the green light did little to
detract from the still well-entrenched notion that state courts could not
constitutionally perform a similar trick with respect to federal criminal
prosecutions.

Even at the time, such removal jurisdiction was thought to be a
narrow exception to established understandings.\textsuperscript{157} In addition, the
Davis Court cautioned—relying on general principles, and without
mention of congressional statutes which had given federal courts the
exclusive right to hear federal criminal prosecutions—that “there can be
no criminal prosecution initiated in any State court for that which is
merely an offence against the general government.”\textsuperscript{158} Houston
apparently did not command a different result. In the thick of
Reconstruction, those charged with overhauling all existing federal
statutes recognized Martin’s authority on the constitutional exclusivity of
jurisdiction over federal criminal matters and acknowledged the refusals
of “almost every state” to accept such jurisdiction. They therefore
proposed elimination of many of the earlier provisions that purported to
confer such authority on the state courts.\textsuperscript{159}

By the turn of the century, the admonition against state court
enforcement of another sovereign’s criminal statutes became something
of a staple of Supreme Court opinions in the distinct context of interstate
full faith and credit.\textsuperscript{160} Here, too, the Court relied on the long-settled

\textsuperscript{157} See, e.g., Huntington v. Attrill, 146 U.S. 657, 672-73 (1892) (noting federal
officer removal was a singular exception to the usual practice). Of course, the removal
provisions that were attached to the first federal question statute also allowed for removal
of civil enforcement actions, sometimes for penalties, brought in state court and in which
a federal defense was raised. See Collins, supra note 155, at 730-34.

\textsuperscript{158} Davis, 100 U.S. at 262.

\textsuperscript{159} The coup de grace was delivered as follows:

\textquoteleft The power of Congress to extend such jurisdiction to any courts, except
those established by the United States, has been denied not only by those
[state] courts, but by the Supreme Court of the United States. The grant of
such jurisdiction is therefore nugatory. It may be suggested, in addition, that
the difficulty of reaching the courts of the United States which may be
supposed to have first induced Congress to make such provisions has ceased
to exist, and that the national government no longer has any reason to attempt
to borrow reluctant aid from state tribunals.

\textsuperscript{160} See, e.g., Robertson v. Baldwin, 165 U.S. 275, 278 (1897); Huntington, 146
U.S. at 672 (citing, inter alia, Jackson v. Rose, 4 Va. (2 Va. Cas.) 34 (1815), and United

\textsuperscript{1} REVISER’S REPORT, supra note 156, lit. XIII, ch. 12, § 177, at 117. A few of the older
provisions remained intact, however. See, e.g., REV. STAT. § 3833 (1874) (allowing state
courts “having competent jurisdiction by the laws thereof” to take criminal jurisdiction
over certain postal crimes).

\textsuperscript{2} See, e.g., Robertson v. Baldwin, 165 U.S. 275, 278 (1897); Huntington, 146
U.S. at 672 (citing, inter alia, Jackson v. Rose, 4 Va. (2 Va. Cas.) 34 (1815), and United
tradition of state court refusals of federal criminal jurisdiction (as well as the language of Martin) to support what it saw as the general principle of interjurisdictional nonenforcement of criminal laws. More to the point, the state courts continued after Reconstruction to refuse enforcement of federal penal statutes, specifically relying on the antebellum precedents, until the Supreme Court put a stop to the practice in Testa v. Katt. While Testa is better remembered for its conclusion respecting the duties of state courts to hear federal claims, it was also the first clear pronouncement from the Court that state courts were perfectly able to hear federal actions involving the enforcement of civil penalties—an issue that had occupied the courts from the earliest days of the Nation.

c. **State Judicial Control of Federal Officers**

A final category of constitutional exclusivity concerned suits against federal officers for injunctive and similar relief. Such suits were occasionally perceived by the Supreme Court to be constitutionally off-limits to the state courts, although only scattered (and not particularly persuasive) support for that particular view existed among those who framed and ratified the Constitution. Nevertheless, the Marshall

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162. I will not discuss here the possibility that some or all of the High Court’s original jurisdiction was within the exclusive jurisdiction of the federal courts (as opposed merely to being exclusive of lower federal courts and lodged wholly in the Supreme Court). If such categories of federal exclusivity existed as to any of the High Court’s original categories—that is, if such exclusivity meant that jurisdiction could only be shared (if at all) with other federal courts—it would be consistent with the idea that some Article III business was constitutionally off-limits to the state courts. But the existence of such categories would not necessarily implicate the question of the necessity of lower federal courts, except perhaps, if Congress were to make exceptions to the High Court’s original jurisdiction. See, e.g., Amar, supra note 11, at 1566-67; Akhil R. Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443 (1989); Clinton, supra note 8, at 1618.

163. The standard treatment is Arnold, supra note 134. There was some scattered support for federal exclusivity of suits against federal officers offered during ratification among certain Anti-Federalists. See, e.g., 3 Elliot’s Debates, supra note 22, at 525 (remarks of George Mason in the Virginia Ratifying Convention) (“Gentlemen will not,
Court gave the tradition its impetus when it concluded that an order of mandamus could not issue from a state court to compel a federal officer to perform his duties. Although the Court's holding was arguably a narrow one, the opinion strongly indicated that the state court's incapacity was constitutionally driven. Later, and despite a substantial (and perhaps salutary) tradition to the contrary in the state courts, the

I presume, deny that . . . all proceedings relative to the duties of the officers of government, from the highest to the lowest, may and must be brought by these means to the federal courts; in the first instance, to the inferior federal court . . . ."; Essays by a [Maryland] Farmer (VI), supra note 51 (remarking with respect to suits by a "citizen against a federal officer": "Is it not evident that the jurisdiction in the cases above-mentioned, is expressly given to the inferior federal courts, with an appeal, both as to law and fact, to the supreme federal court?"); Martin, supra note 51, at 204 (noting that jurisdiction over officers of the general government was "taken away from the courts of justice of the different States and confined to the courts of the general government"); cf. 3 ELLIOT'S DEBATES, supra note 22, at 554 (statements of John Marshall) (state courts would have jurisdiction over trespass action against federal officials).

164. McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821). The plaintiff requested that the defendant officer take action with respect to the plaintiff's claim to federal land. The Court reasoned from the fact that Congress had generally denied such jurisdiction to even the lower federal courts and concluded that, rather than using the "extraordinary and unprecedented mode" of proceeding by mandamus, the plaintiff should attempt a more "ordinary mode" of procedure. Id. at 605. Whatever the limits of the Court's holding, it quickly gained status as an all-encompassing rule against state court interference with federal executive officials through the use of mandamus. See Northern Pac. Ry. v. North Dakota, 250 U.S. 135 (1919); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); see also HART & WECHSLER, supra note 7, at 489; Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 CASE W. RES. L. REV. 396, 414-22, 446-53 (1987).

165. The Court seemed to hang its hat on the fact that less extraordinary remedies might have been available to the plaintiff, but there are at least two points in Justice Johnson's opinion which suggest that the issue for the Court was one of constitutional dimension. Without identifying the source of the argument, the opinion states that a federal officer's "conduct can only be controlled by the power that created him." McClung, 19 U.S. (6 Wheat.) at 605. Elsewhere, the opinion observed that "no one will seriously contend . . . that [the power of issuing a mandamus] is among the reserved powers of the States, because not communicated by law to the courts of the United States." Id. at 604.

166. See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149 & nn.192-93 (1980); Arnold, supra note 134, at 1386; see also in re Booth, 3 Wis. 144 (1854); 1 KENT, supra note 67, at 382-86; 3 STORY, supra note 67, § 1751, at 625 & n.7 (noting "considerable diversity of opinion" on question); 1 TUCKER'S BLACKSTONE, supra note 80, at 291-92 (stating that if federal prisoner is not held pursuant to judgment of conviction, state habeas should be available to challenge detention). For a spirited defense of the practice, see Akhil R. Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1509-10 (1987) [hereinafter Amar, Sovereignty]; see also Akhil R. Amar, Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983, 64 U. COLO. L. REV. 159, 165-67 (1993) [hereinafter Amar, Converse-1983].
Taney Court denied the power of the states to issue a writ of habeas corpus to a federal official who held a prisoner pursuant to a federal court judgment. Its decision in *Ableman v. Booth* appears to have been based, in part, on principles of federalism and of federal supremacy that were said to "grow[] necessarily" out of the structure of the Constitution. While the Court was less than forthcoming about the source of its absolute jurisdictional prohibition on state courts, *Abebnan* went some distance in lending a constitutional patina to the argument that there were discernible separate spheres of state and federal action and that state courts could not, as a constitutional matter, exercise the jurisdiction they wished.

Probably the best remembered of these early decisions denying state court power over federal officers was *Tarble's Case*. Decided only four years before *Claflin* 's decision that state courts were competent to hear civil actions arising under federal law, *Tarble* reversed a state court's issuance of a writ of habeas corpus to a federal military officer who had custody of the petitioner's underage child, in violation of federal enlistment laws. Invoking *Abebnan* 's striking rhetoric of independent

167. 62 U.S. (21 How.) 506 (1859). The prisoner had been found guilty in a federal court of violating the Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1862) by aiding in the escape of a fugitive slave. The prisoner challenged the statute as unconstitutional in a habeas proceeding in a Wisconsin state court. The state courts agreed with him on the constitutional question and granted the writ. The United States Supreme Court reversed:

> [T]he powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or any other State of the Union, for an offense against the laws of the State in which he was imprisoned.

*Id.* at 516. This passage was later quoted in full by Justice Field in *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), discussed below. Elsewhere, the *Abebnan* Court described the federal officer as being "within the jurisdiction of another and independent government." *Abebnan*, 62 U.S. (21 How.) at 515-16; cf. Pennoyer v. Neff, 95 U.S. 714 (1877) (Field, J.) (on the extraterritorial (non)reach of process).

168. *Abebnan*, 62 U.S. (21 How.) at 523; see Arnold, *supra* note 134, at 1389 ("One wonders where the Court found this absolute prohibition.").

169. 80 U.S. (13 Wall.) 397 (1872).

170. Like the prisoner in *Abebnan*, Tarble was held by federal officials, but unlike in *Abebnan*, Tarble was not held as a consequence of a federal court conviction. Arguably, there had been a greater federalism concern with a state court's effort to undo
spheres of sovereignty and reaffirming the Court's role in marking their outlines and mediating between them, Justice Field declared in absolute terms that "[n]either government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other." The Court also adverted to Article I's grants of power to raise and regulate an army as support for the exclusivity of federal control over the military, and it pointed to the Supremacy Clause to explain why the decisions of federal military officers must stand until the challenge to their authority "can be finally determined by the tribunals of the United States." For the Court, though, this regulatory exclusivity was not just nationalist hype; it was a two-way street that protected the states as well: "How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers . . . are matters subject to their own control . . . ." Tarble's denial of power to the state courts has been the subject of a wealth of uncharitable commentary. It is hard to argue with Richard S. Arnold's assessment, however, that Field was arguing that the Constitution, of its own force, forbade state court jurisdiction. But

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171. Tarble's Case, 80 U.S. (13 Wall.) at 406. The Court, through Justice Field, framed the issue as whether the state courts had jurisdiction to issue the writ, and he denied that they did for many of the very same reasons that the power to prosecute violations of federal criminal laws had customarily been denied to state courts. The Court concluded that if states could issue coercive decrees on behalf of those held in federal custody, it would disable the United States from prosecuting violations of federal laws in federal courts without the permission of the state courts. Id. at 406-07.

172. Id. at 407. According to the Court, allowing state court jurisdiction with federal input only on direct review "would afford no adequate remedy" for the interim harm to federal interests that the issuance of such writs could cause. Id. at 409.

173. Id. at 407-08. It has been argued that Tarble was an example of a "Nationalist" as opposed to "Anti-Federalist" jurisprudence because of the reluctance of the Court to allow states to control federal officers. See Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1202-07 (1988). But given the antebellum precedents to Tarble, not to mention the role of Justice Field in maintaining guard over a rigid separation of state and federal jurisdictional spheres, the decision also seems consistent with an Anti-Federalist jurisprudence in which each system maintained its distance from one another regarding certain supposedly exclusive business.

174. See, e.g., Hart & Wechsler, supra note 7, at 488-91; Amar, Sovereignty, supra note 166, at 1509; Arnold, supra note 134, at 1401-02.

175. See Arnold, supra note 134, at 1390-91 ("Field's language indicates that the Constitution forbids state jurisdiction ex proprio vigore."); see also Redish & Woods, supra note 7, at 86-88 (observing that Tarble expresses a constitutional decision on the part of the Court).
if that is true, then the decision runs headlong into the traditional understanding that Congress was under no obligation to create lower federal courts. If state courts were constitutionally disabled from hearing such cases, and if Congress might create no lower federal courts, there would be no habeas forum available to redress illegal detention at the hands of federal officers. Such a possibility would present problems from the perspective of Article III to the extent that such a case might elude the federal courts altogether, and it would raise due process concerns to the extent that a case of executive detention might elude any judicial forum whatsoever.176 As is typically pointed out, however, Congress had statutorily opened the federal courts to the very sort of habeas claim raised by the petitioners in Tarble; indeed, Chief Justice Marshall's own reading of the habeas corpus Nonsuspension Clause177 seems to have been that it bestowed an affirmative mandate upon Congress to keep some federal court open for just such purposes.178 Thus, it is possible to read

176. See Redish & Woods, supra note 7, at 93.
177. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
178. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807). Although Marshall recognized that federal habeas jurisdiction is a creature of Congress, see id., he opined that Congress might nevertheless be obligated to create courts with such original jurisdiction. Id. at 95. After describing the habeas corpus provisions of the 1789 Judiciary Act in which lower federal courts were given the power to issue habeas writs for those in federal custody, he wrote:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared “that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

Id. at 95. I believe that Marshall's statements can be read as implying that habeas jurisdiction might have to be lodged in the lower federal courts to vindicate the Nonsuspension Clause. The argument runs as follows. Marshall strongly suggests that a federal habeas forum is constitutionally required. Such matters could not necessarily be handled in the Supreme Court, because habeas does not readily fit under any of the limited categories assigned to the Court's original jurisdiction. Of course, there is an acknowledged role for the Court's "appellate" power to grant the writ "originally,"—i.e., as an original matter—at least when the issuance of the writ is in review of a lower court and involves questions that would otherwise be within the court's "appellate" jurisdiction. See Ann Woolhandler, Demodeling Habeas, 45 STAN. L. REV. 575, 595-96 (1993); see also Bollman, 8 U.S. (4 Cranch) at 100-01 (referring to Court's original habeas jurisdiction as appellate because it involved "the revision of a decision of an inferior
Tarble, like the cases before it, not as about constitutionally exclusive jurisdiction, but as merely expressing an implicit congressional preference for federal statutory exclusivity in federal officer habeas cases when Congress has provided such jurisdiction in the federal courts.\textsuperscript{179}

The presumption approach to Tarble certainly takes care of its most troublesome implications. But the effort to rationalize the outcome in Tarble should not obscure the fact that the jurisdictional incapacity of state courts in this area still represented, for the old Court, a kind of constitutional common-law generated by structural and supremacy concerns. In addition, these federal officer cases reinforced the prevailing notion of enclaves of jurisdictional exclusivity, and they reflected the constitutional mind-set of dual sovereignty which approached its zenith toward the end of the nineteenth century.\textsuperscript{180} Prominent in that mind-set was a deep-seated belief that, the Supremacy Clause notwithstanding, federal officials could not ordinarily command state officials to engage in what were called "affirmative" or positive acts, even if those acts were

court\textsuperscript{\textdagger}). It is unclear, however, that Marshall would have upheld the Supreme Court's "original" granting of the writ as part of its "appellate" power if the writ was being used to challenge executive detention directly, as opposed to detention arising out of, or in response to a judicial proceeding. Thus, Marshall's surmise in Bolblan may well have been that Congress would be obliged to create an inferior federal forum for those exercises of habeas jurisdiction against federal officials that would not be considered "appellate," and exercisable by the Supreme Court.

Many modern scholars, however, look at the Nonsuspension Clause through the lens of the Compromise. If federal courts did not have to be created, the clause cannot be read consistently with any such surmise. Therefore, the clause is usually read, not as a limitation on Congress's ability to restrict the habeas jurisdiction of the federal courts (or to fail to empower them), but as a limitation on Congress's ability to curtail the habeas jurisdiction of the state courts to issue writs to federal officials. See, e.g., DUKER, supra note 166, at 155. See generally Steiker, supra note 10, at 865-67 (noting current scholarly approaches to Nonsuspension Clause and their connection to theories regarding the necessity of lower federal courts). But as Jordan Steiker has ably argued, this modern view of the Nonsuspension Clause "was rejected emphatically by the Court" in Abelman and Tarble. See id. at 865 n.16. Consequently, the Compromise requires rejection of the results in cases such as Abelman and Tarble to the extent that they suggest there may be anything like a constitutional disability on the state courts to hear habeas cases against federal officials. The Compromise's logic and that of the old Court (including in Bolblan) clearly seem to be at odds with each other.

\textsuperscript{179} Lawrence Sager has noted that if the constitutional problem identified by Tarble is with state court control over federal officials through injunctive-type relief, then the objection might be waivable by express congressional enactment or be deemed waived if Congress jurisdictionally closes (or fails to create) lower federal courts. See Sager, supra note 40, at 84; see also Redish & Muench, supra note 5, at 329-30 (reading federal officer precedents as involving implied exclusivity arising from federal jurisdictional statutes).

\textsuperscript{180} See infra text accompanying note 347.
seemingly demanded by the Constitution.\textsuperscript{181} As will be developed below, it was that notion which also contributed to the idea that, quite apart from possible questions of jurisdictional incapacity, state courts could not be coerced into assuming unwanted jurisdiction.\textsuperscript{182}

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One might legitimately quarrel today with the suggestion that there are areas of constitutional exclusivity such as those outlined above. But there is no mistaking the fact that the belief that some such enclaves existed was well entrenched and widely shared, even if there was disagreement over what comprised them. To the extent such beliefs suggested that certain Article III business could only be heard in lower federal courts, some concluded that lower federal courts might be required. Others who accepted the concept of exclusivity were reluctant to draw that particular conclusion, but they nevertheless seem not to have questioned their views of constitutional exclusivity. Nor did they suppose, as discussed more fully in Part III, that state courts must have been able (much less obliged) to accept the business instead. The idea

\textsuperscript{181} See, e.g., Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861) (This Court “has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it . . . ”); see also infra text accompanying note 347. To the extent that the jurisdictional objection in cases such as McClung, Abelman, and Tarble was based on sovereign immunity concerns, it might be supposed that the barrier may have been of constitutional dimension but waivable by legislative action. Cf. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (jurisdictional limitation created by sovereign immunity is waivable); Fallon, supra note 173, at 1206 n.296 (noting that such views—waivability and constitutionality—would ordinarily be incompatible). If so, these cases would appear to be different than the categories of admiralty and federal crimes concerning which such legislative action was not thought possible.

\textsuperscript{182} Yet at the same time, neither judicial system had much of a problem adjudicating personal damages claims or criminal actions against the individual officers of the other. See Amar, Converse-1983, supra note 166, at 169-72; Arnold, supra note 134, at 1386, 1394-95; Fallon, supra note 173, at 1202 n.282; see also, e.g., Teal v. Felton, 53 U.S. (12 How.) 284 (1851) (state court action in trover for six cents for nondelivery of newspaper by local federal postmaster); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (quasi-criminal state court informer’s action prosecuted on Maryland’s behalf). And federal courts at least seem to have long permitted “negative” injunctions that commanded state and federal officials to cease their illegal behavior. See, e.g., Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1 (1817) (state court action for replevin of goods wrongfully seized by federal custom collectors); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In addition, state law criminal actions against federal officials were routinely sanctioned in the days when the federal officer removal statutes were relatively limited in their scope. See Colorado v. Symes, 286 U.S. 510, 517-18 (1932). The personal liability theory that underlay these permissible suits against governmental officials was apparently thought to implicate less immediately the interests of the sovereign whose duties the officers were carrying out.
that state court empowerment came from state law sources and was limited by those sources was conceded by all sides. All of this, moreover, showed a certain disregard not only for the permissive language of Article III respecting the creation of lower federal courts, but for the events leading up to and culminating in the Madisonian Compromise.

II. THE MUTED FORCE OF THE MADISONIAN COMPROMISE

By its terms, Article III purports to leave the establishment of lower federal courts to the political will of Congress. The evidence that at the Constitutional Convention on June 5, 1787, James Wilson and James Madison effected some kind of compromise between those who insisted on a constitutional mandate to create a separate system of inferior federal courts and those who opposed it, would seem to be close to irrefutable support for the proposition that lower federal courts were not constitutionally required. And if lower federal courts were not required (and they had gone uncreated), then state courts would have been the only place to which a litigant could turn with her Article III claim. Consequently, to talk about constitutional disabilities of the state courts to hear certain Article III cases and controversies is to ignore the logical inference to which the Compromise seems to point. Nevertheless, the persistent unwillingness of earlier generations to draw the inference that we draw today is no less a reality for the interpretation of Article III than the “plain meaning” of the Compromise is for us. The important question is whether anything can explain the apparent disharmony between the modern and the older perspectives, other than the simple retort that those like Story, Kent, Rawle, and Tucker were not very good originalists or legal historians.

A. The Compromise as an Interpretive Tool

In context, the Compromise may not have been the definitive event for the founding generation and its immediate successors that we perceive it to be. As constitutional scholars have shown, it is questionable whether the founding generation would have put much stock in the deliberations of the Convention as an aid in interpreting the Constitution.183 Their approach more likely would have focused on such things as the text and structure of the Constitution, the purposes for calling the Constitutional Convention, and statements made during ratification, as well as “early,

deliberate [and] continued practice under the Constitution."\(^{184}\) In fact, if there was a hierarchy of interpretive sources among the founding generation, these particular, non-public, deliberations of the Philadelphia Convention might have ranked quite low. This is not to suggest that these materials are irrelevant to a proper interpretation of Article III. It is only to indicate why the Convention's deliberations, including the evidence of the Compromise, might not have counted for much during the early Republic.

Of course, there is an even more obvious reason why the written record of such deliberations was not resorted to initially: it was simply not available until the Convention's Journal was first published three years after the bellwether decision in *Martin*, and until the notes of some of the participants were made available thereafter.\(^{185}\) Modern scholars might point to the unavailability of these materials at the time of *Martin* as evidence that Story was on historically shaky ground in insisting on the exclusivity of certain heads of Article III jurisdiction. But Story's position on this particular issue was unremarkably mainstream and was shared by those who came both before and after him. Indeed, many of the views about state court incapacity described above, including those in the treatise tradition, continued to be made well after the publication of the official Journal of the Convention, the ratification debates, and

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184. Letter from James Madison to M.L. Hurlbert (May 1830), in 4 The *Founders' Constitution* 362 (Philip B. Kurland & Ralph Lerner eds., 1987). Thus, even Madison might not have overly credited his Compromise. *See also* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 1 The *Founder's Constitution*, *supra*, at 74 ("As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. . . . [I]f a key is to be sought elsewhere, it must be . . . in the sense attached to it by the people in their respective State Conventions where it recd. all the authority which it posseses."); cf. 1 *STORY*, *supra* note 67, § 405, at 387 ("In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."). Elsewhere Story wrote:

"Is the sense of the constitution to be ascertained, not by its own text, but by the 'probable meaning' to be gathered by conjectures from scattered documents, from private papers, from the tabletalk of some statesmen, or the jealous exaggerations of others?" *Id.* § 407, at 391 n.1.

185. *See* Clinton, *supra* note 8, at 1592. *Martin* was decided in 1816, and the Convention's Journal, which had been kept secret, was first published in 1819. *See* 1 *Farrand's Records*, *supra* note 47, at xi-xiv. Robert Yates's notes were published in 1821, but James Madison's were not published until 1840. *Id.* at xiv-xv. The proceedings of the ratifying conventions were published by Jonathan Elliot in 1830. *See* 1 *Elliot's Debates*, *supra* note 22, at vi.
participants’ notes of the Convention’s deliberations. Story himself actually made frequent reference in his own constitutional treatise to the very sources he might be faulted for not having had access to at the time he wrote Martin. First published in 1833, the treatise shows Story’s awareness of the events that produced the Compromise, as described by the Journal and by certain other prominent notetakers, including a description of the positions and votes leading up to it. Not too surprisingly, Story’s assessment of Martin remained unaltered.

B. Multiplicity of Meanings and the Compromise

1. LOWER FEDERAL COURTS VERSUS FEDERAL “TRIALS”

Significantly, the Compromise was reached at a very preliminary stage of the Convention’s proceedings, making its immediate force somewhat ambiguous even to the participants. For example, current discussions of the Compromise suggest that it resolved whether the Constitution would require the existence of federal trial courts to handle the bulk of Article III’s judicial business. However, it is important to recall that whether there would be a federal forum of first resort to hear some or all of the cases that might end up within the federal judicial power did not necessarily depend on a constitutional mandate for, or even a congressional discretion to create, lower federal courts. When the Compromise was struck, neither the original jurisdiction of the Supreme

186. See supra note 185. Only Tucker’s edition of Blackstone’s Commentaries, which came out in 1803, preceded publication of the Journal. See supra note 80.

187. See 3 Story, supra note 67, § 1574. Story’s first edition of 1833 makes reference to the ratification debates compiled by Jonathan Elliot, various publications and speeches of the ratification period, and records from the Philadelphia Convention, including Robert Yates’s minutes and the Journal of the Convention. Only Madison’s notes were not published before Story’s treatise. Nevertheless, the evidence surrounding the Compromise is hardly unique to Madison’s notes. The events leading up to the earlier proposals, and the substance of the Compromise are all more or less confirmed by the other accounts. Compare 1 Farrand’s Records, supra note 47, at 124-25 (Madison) with id. at 118 (Journal) and id. at 127 (Yates). Rufus King and William Pierce, however, failed to note the Wilson-Madison motion that constituted the Compromise. See id. at 128, 129. And only Madison’s record includes the “explanation” of the Compromise “that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.” See id. at 125. The possible ambiguity surrounding even Madison’s understanding is treated below. See infra part III.B.4.

188. The Compromise was reached on June 5, 1787, only a few days after the Convention began its substantive work with its consideration of John Randolph’s Virginia Plan, introduced on May 29.
Court, nor the reach of the federal judicial power had been settled.\footnote{189} Given Article III's final wording, we think of the Supreme Court's original jurisdiction as encompassing an exotic handful of cases. But, as initially conceived, original jurisdiction also identified the one place where the Constitution might secure an independently staffed federal trial forum for certain Article III judicial business.\footnote{190} A broad original jurisdiction provision for the Supreme Court, coupled with itinerant duties, would have mooted some of the problems associated with the absence of lower federal courts. Absent any agreement on the scope of the Supreme Court's original jurisdiction at the time of the Compromise, the participants could not know how much federal judicial business would be able to be tried in some federal court, even without a provision for "inferior" federal courts. The possible combination of substantial appellate and original roles for the Supreme Court and its judges was certainly no more unthinkable than their combination in any lower federal courts that might be created.\footnote{191} Thus, providing for "federal court trials" and "inferior federal courts" were potentially distinct issues at the time of the Compromise. The full implications of the Compromise on this point did not emerge, therefore, until late in the Convention when the original jurisdiction of the Supreme Court took its eventual (and limited) shape.\footnote{192}

The failure to equate lower federal courts with federal court trials also managed to spill over into ratification, even after the final language of Article III was agreed to in the Convention. Many Anti-Federalists complained that the possibility of Supreme Court review of "law and fact" under its appellate jurisdiction would pose a threat to the integrity of state court jury verdicts by imposing a kind of second trial in the High Court in Article III cases.\footnote{193} The often voiced fear that the federal

\footnote{189. On June 13, 1787, a little over a week following the Compromise, the federal judicial power was given its first (and still vague) definition. \textit{See} I \textsc{Farrand}'s \textsc{Records, supra} note 47, at 223-24 (\textit{Journal}); \textit{id.} at 232 (Madison).

190. \textit{See} David E. Engdahl, \textit{What's in a Name? The Constitutionality of Multiple "Supreme" Courts}, 66 \textsc{Ind. L.J.} 457, 484-85 & n.137 (1991); \textit{see also id.} at 477 (noting preliminary quality of Article III at this stage).

191. \textit{See} Amar, \textit{supra} note 162, at 475-77 (discussing and critiquing early circuit court practice in which Supreme Court Justices sat with District Court Judges to try cases).


193. \textit{See}, e.g., \textit{Essay by a Georgian, supra} note 118, at 134 (observing that a "GRAND TRIBUNAL OF APPEAL" would annihilate trial by jury); \textit{Essay of a Democratic Federalist, Pa. Herald, Oct. 17, 1787, reprinted in 3 The Complete Anti-Federalist, supra} note 22, at 58, 60-61; Essays of Brutus (XIV), \textit{supra} note 47, at 433, 434-35; \textit{Letters from the Federal Farmer I)}, \textit{supra} note 22, at 223-24; \textit{id.} (III) at 244-45; \textit{id.} (XV)
judiciary would destroy the right to trial by jury had focused, not simply (or even primarily) on the absence of a jury guarantee for the lower federal courts, but on the possibility that the Supreme Court might undo state jury verdicts by aggressively exercising its appellate jurisdiction, which extended to questions of fact. The specter conjured up was that of a large, multi-member Supreme Court, broken up into smaller groups, riding over the countryside and reversing jury verdicts by conducting appellate trials de novo—but this time, without a jury. The danger was that, with such a system, much of the Court's appellate jurisdiction could take on a distinctly “original” flavor. These fears were fueled by the fact that some states had such two-tier trial systems already in place. It was this precise problem that part of the Seventh

at 319; cf. 3 ELLIOT’S DEBATES, supra note 22, at 540, 551 (remarks of Patrick Henry and George Mason) (noting Article III would destroy trial by jury because of review of law and fact); Address by Cato Ulensicis, VA. INDEP. CHRON., Oct. 17, 1787, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 119, 122-23 (complaining that there would be no jury on appeal to the Supreme Court which might review questions of fact); Essays by Cincinnatus (I), N.Y. J., Nov. 1, 1787, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 7, 9; id. (II) (Nov. 8, 1787) at 10, 11-12; Letter of Richard Henry Lee to Governor Edmund Randolph (Dec. 22, 1787), in 5 THE COMPLETE ANTI-FEDERALIST, supra note 22, at 114 (referring to “the necessity of submitting in multitudes of cases . . . to far distant tribunals . . . without a jury”); Martin, supra note 51, at 221-22. It was this possibility that led opponents to the Constitution to claim that the rights to trial by jury had not been sufficiently secured, as much as an absence of a provision for civil trials in the lower federal courts.

194. See WARREN, supra note 192, at 542-43; Gerhard Casper, The Judiciary Act of 1789 and Judicial Independence, in ORIGINS OF THE FEDERAL JUDICIARY 281, 288-92 (Maeva Marcus ed., 1992) [hereinafter ORIGINS]. These fears arose because Article III provided that the Supreme Court would have appellate jurisdiction over all Article III business that was not identified as part of its original jurisdiction, and that such appellate jurisdiction would be “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. Although most federal courts scholars reject the idea that Congress’s power to make exceptions to the Supreme Court’s appellate jurisdiction is limited to questions of fact, that rejection does not negate the existence of the very real worry about the possibility of Supreme Court review of facts on appeal of actions at common law, which was subject only to congressional control, and not (before the Seventh Amendment) subject to any constitutional limitation. Compare Clinton, supra note 8, at 1578-80 and Gunther, supra note 7, at 901 with Henry J. Merry, Scope of the Supreme Court’s Appellate Jurisdiction: Historical Basis, 47 MINN. L. REV. 53 (1962).

195. See, e.g., Letters from the Federal Farmer (XV), supra note 22, at 317 (referring to “three, five, fifty, or any other number of judges” as a possibility for the Supreme Court).

196. See, e.g., 4 ELLIOT’S DEBATES, supra note 22, at 151 (remarks of William Maclaine of North Carolina) (“This is well known to be the practice in some of the states. In our own state, indeed, when a cause is instituted in the county court, and afterwards there is an appeal upon it, a new trial is had in the superior court, as if no trial had been
Amendment would later address, directing that no fact found by a jury should be reviewed in any federal court except according to the common law (which would ordinarily limit review to questions of law, not fact). This part of the amendment was supposed to minimize, if not altogether eliminate, the possibility of new trials of fact on appeal from jury-tried actions. In hindsight, the fear of second-tier trials may seem extravagant; but for many it was a subject of "no small alarm." It, too, suggests that there was no easy equation between federal court trials and the establishment of lower federal courts.

2. AN ALTERNATIVE ORIGINAL FEDERAL FORUM FOR CONSTITUTIONAL CASES

At the time the Compromise was reached, the later-rejected "Council of Revision" and similar proposals remained ongoing propositions. The existence of such proposals has significance for the contemporary meaning of the Compromise and its impact. The Council would have put a hodge-podge of individuals from the judicial and executive branches in the position of overseeing the constitutionality of federal legislation before it went into operation—a kind of quasi-judicial, mandatory original federal jurisdiction on constitutional questions that would have significantly curtailed the need for inferior federal tribunals to hear them.

In a similar vein, the Committee of the Whole had, only days before it reached the Compromise, already agreed that the national legislature had before."; cf. 17 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 457-59 (Gaillard Hunt ed., 1910) ("Court of Appeals in Cases of Capture" existed for "trial" of appeals from state courts). Hamilton tried to convince his audience that the appellate power to which Article III spoke did not include the "New-England" practice of "appeal from one jury to another." See THE FEDERALIST No. 81, supra note 19, at 550.

197. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 149 (2d ed. 1985).

198. 3 STORY, supra note 67, § 1757, at 628.

199. As originally designed by Randolph, the Council would also have had a last say as to whether any proposed national legislative "negative" of state legislation would go into effect. See 1 FARRAND'S RECORDS, supra note 47, at 21; see also id. at 47, 54 (power of revision of state laws in national legislature). The proposal had been brought up only the day before the Compromise, debate on it had been postponed, and an executive veto of federal legislation had been approved. See id. at 93, 103-04. A motion by Madison and Wilson to add members of the judicial branch to the executive in its veto was similarly put on hold. See id. at 104. The day after the Compromise, Madison and Wilson moved to reconsider their earlier motion, but it was voted down; nevertheless, they would bring it up yet again. See id. at 139-40; see also Pfander, supra note 9, at 592-97 (noting that such proposals effectively would have guaranteed a federal forum for constitutional disputes).
would have a negative on unconstitutional state laws. The proposal's champions, including Madison and Wilson, held onto the possibility of such a legislative "veto" until well into the Convention when it was rejected as too direct an interference with the states' legislative processes. In response to the ultimate disfavor into which this veto fell, the nascent Supremacy Clause was introduced. Intended to ensure that the judges of the several states should be bound "in their decisions" by the supreme law of the land, the clause reflected recognition of the fact that the veto would be exercised only by the judiciary (and only if matters had gelled into a justiciable case or controversy). In this sense, federal interference would become primarily corrective rather than preventive. The full impact of the Compromise on whether the Constitution would require a federal forum for questions of unconstitutional legislation therefore only became clear well after the Compromise was reached, and only when the Council and related proposals were definitively rejected.

200. On May 31, 1787, the national legislature was given a negative on unconstitutional state laws. See id. at 47, 54; see also Warren, supra note 192, at 316.

201. See Warren, supra note 192, at 316-25, 548 (noting that the proposal for a legislative veto of state laws was not rejected until July 17, 1787).

202. See 2 Farrand's Records, supra note 47, at 29. As has been noted, the clause proposed by Luther Martin on July 17, 1787 (as a kind of quid pro quo for the elimination of the legislative negative) was "taken almost verbatim" from the Plan of William Paterson, previously offered on June 14, 1787. Warren, supra note 192, at 319; see also 1 Farrand's Records, supra note 47, at 245 (Paterson's Plan). Paterson's Plan presumably included such a provision because of a recognition that, without lower federal courts (as his scheme contemplated), state courts would be the forums of first resort in matters raising questions of federal law. Luther Martin eventually did not see much point in the Supremacy Clause because he later supposed—that after Article III's language was agreed upon—that it "rests only" with Article III judges to determine the constitutionality of a state's law. See Martin, supra note 51, at 220; see also Letters of Luther Martin (IV), The Md. J., Mar. 21, 1788, reprinted in Essays on the Constitution, supra note 56, at 360-62 (noting that Supremacy Clause ultimately lacked force it would have carried absent any provision for lower federal courts).

203. The Council of Revision was rejected for the last time on July 21, 1787. See 2 Farrand's Records, supra note 47, at 73-80; see also supra note 201. Madison, however, never let go of the idea of a legislative negative on state laws. See Warren, supra note 192, at 323. By the time all of the dust settled on the jurisdiction of the federal courts, the Supremacy Clause, and the legislative negative on state legislation, Madison recognized that judicial review was the only way the Constitution would keep states in check. See 2 Farrand's Records, supra note 47, at 589. But he continued to believed that judicial review of state legislation in the absence of a federal legislative negative "was insufficient." Id. For the possibility that the traditional view of the High Court's original jurisdiction is mistaken, see Pfander, supra note 9 (arguing, based on the Compromise and the elimination of proposals such as the legislative negative, that the Court's original jurisdiction would embrace constitutional challenges to state legislation).
3. OF "MAY" AND "SHALL" AND THE "NECESSITY" OF LOWER FEDERAL COURTS

While the Compromise has been regarded as irrefutable evidence of the nonmandatory nature of any lower federal courts, subsequent events, even at the Convention, hint that its understanding was still in flux. Much is made of the permissive "may" language in the final version of Article III regarding the establishment of lower federal courts, especially in contrast to what is often perceived as the mandatory language regarding the vesting of the judicial power. The language of the Compromise, however, avoided either "may" or "shall," merely saying that the national legislature was "empowered to appoint inferior Tribunals." Following the Compromise, and the Convention's unanimous approval of the language adopted, the draft of the Constitution went to a Committee of Detail, from which it later emerged worded as follows: "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States." This language from the Committee of Detail, when offered to the Convention, was also unanimously approved.

The Committee of Detail's version employs language quite different from that of the Compromise. If it is consistent with the Compromise—and there is nothing to suggest that anyone thought otherwise—then the Compromise might have been understood as compatible with an expectation that Congress would be required to create lower federal courts, at least in certain undefined cases of necessity. The words "as shall, when necessary" are loaded with ambiguity and quite arguably reflect no more than a notion of political expediency to be

204. 2 FARRAND'S RECORDS, supra note 47, at 38 (Journal) ("That the national Legislature be empowered to appoint inferior Tribunals[.]"); see also id. at 45 (Madison).

205. The language of the Compromise was approved by the entire Convention on July 18, 1787. See id. at 38-39 (Journal); id. at 46 (Madison); cf. infra text accompanying notes 220-22 (discussing vote).

206. 2 FARRAND'S RECORDS, supra note 47, at 186. In some respects, the Committee of Detail's language almost seems to incorporate statements of George Mason made before the entire Convention. Mason disputed with his brethren Anti-Federalists, Luther Martin and Pierce Butler, both of whom opposed even the language from the Committee of the Whole (i.e., the "Compromise"), and who stated they "could see no necessity for such tribunals. The State Tribunals might do the business." Id. at 45 (Madison). Mason endorsed the language from the Committee of the Whole, because, he said, he "thought many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary." Id. at 46 (Madison).

207. For approval of the Committee of Detail's version on August 17, 1787, see id. at 315.
ascertained by Congress. But it is at least plausible that such “necessity” both expressed something stronger and was perhaps linked to the possibility of state court incapacity (or unwillingness) to entertain certain federal judicial power, lest there be a lack of an original forum altogether.208

In any event, it was only after this “shall, when necessary” language of the Committee of Detail was later sent to the Committee of Style that it emerged in its present form—with the magic word “shall,” as well as the reference to “necessity” having disappeared.209 These changes, too, were something to which no one objected at the time. Given the sequence of events, it is possible that the earlier language, while establishing a mandate that Congress institute lower federal courts in certain situations, nevertheless too severely limited Congress’s ability to create lower federal courts by suggesting that Congress could do so only in narrow circumstances involving necessity. The eventual language (“such inferior tribunals as Congress may, from time to time, ordain and establish”) makes clear that Congress has the power to create lower federal courts in situations other than those involving strict necessity. But, viewed as an enlargement of the prior language giving congressional power to create such courts, it might also have been thought to include the idea that there might indeed be some situations of necessity where Congress “shall” act. Interestingly, and despite the eventual changes away from the “shall” language in the final version of the Constitution, the Supreme Court, on a startling number of high-profile occasions, still managed to misquote the relevant language in Article III by referring to inferior courts that Congress “shall . . . ordain and establish.”210 If nothing else, this not-

208. For further elaboration of this possibility, see infra part III.A.2.b.
209. See 2 FARRAND’S RECORDS, supra note 47, at 600.
210. Chief Justice Marshall was the chief misquoter of Article III in this respect. See American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) (quoting Article III as referring to “such inferior courts as congress shall from time to time ordain and establish”); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313 (1810) (Marshall, C.J.) (paraphrasing Article III as saying “[The judicial department] consists of one supreme court, and of such inferior courts as Congress shall, from time to time, order and establish”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803) (Marshall, C.J.) (misparaphrasing once (with “shall” at 173) and correctly paraphrasing once (with “may” at 175)); Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, Circuit Justice) (misquoting Article III). His brethren, including his two immediate successor Chief Justices did no better. See United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) (Chase, C.J.); Scott v. Sanford, 60 U.S. (19 How.) 393, 445 (1857) (Taney, C.J.) (quoting Article III as saying “The judicial power shall be vested ‘in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.’”); Jecker v. Montgomery, 54 U.S. (13 How.) 498, 515 (1851) (Taney, C.J.) (same); see also Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 515 (1898) (Harlan, J.) (correctly quoting Hamilton in The Federalist No. 82 (who
infrequent lapse suggests that the discretionary (as opposed, perhaps, to the simply temporal) quality of the language referring to the creation of inferior tribunals may not have been uppermost in the mind of the Court.

More significantly, during the ratification process, the Constitution's supporters failed to make any overt reference to the Compromise as a compromise, or as a way to enlist votes in favor of the Constitution, or to make Article III seem more palatable. Nor, with one notable exception, did they bother to make reference to the merely discretionary power given Congress to create lower federal courts as a way of suggesting that perhaps they would go uncreated. If the fact of the Compromise was as meaningful as we might suppose it to have been, it is more than odd that no overt reference was made to it as such once it left the Committee of the Whole. Most opponents of Article III assumed and feared the eventual existence of lower federal courts. Those who objected to such courts were worried not only about the possible breadth of jurisdiction but about their potentially limitless numbers (since their number was not fixed in the Constitution) and about the nationwide establishment of a permanent system of federal courts that would compete


The plan of the convention in the first place authorizes the national legislature "to constitute tribunals inferior to the supreme court." It declares in the next place that, "the JUDICIAL POWER of the United States shall be vested in one supreme court and in such inferior courts as congress shall ordain and establish ...."

THE FEDERALIST No. 82, supra note 19, at 556-57 (first emphasis in original); see also id. at 554 (similar misquotation). Hamilton would later remark of the may/shall language in Article III:

In the course of the debate in the Senate [concerning the repeal of the Judiciary Act of 1801 and the abolition of federal courts created by it], much verbal criticism has been indulged; many important inferences have been attempted to be drawn from distinctions between the words shall and may. This species of discussion will not be imitated, because it is seldom very instructive or satisfactory. These terms, in particular cases, are frequently synonymous, and are imperative or permissive, directing or enabling, according to the relations in which they stand to other words.

The Examination No. 14, supra note 66, at 546-47.

211. See supra note 56 (discussing Oliver Ellsworth's Letters of a Landholder (VI), supra note 56, at 164-65).
locally with, and draw business away from, the state courts.\textsuperscript{212} As noted above, a major part of the objections stemmed from the fear that federal courts would in effect destroy jury trial rights.\textsuperscript{213} And most prominent Anti-Federalists seem to have believed that some heads of Article III business would have to be heard in lower federal courts in the first instance. Although a few Anti-Federalists did observe that the language of Article III gave Congress only a discretionary power to create lower federal courts, they did so to make a different point altogether. They objected to the possibility that, because their establishment was not required, lower federal courts would not be created and litigants would therefore be forced to carry appeals of their state court cases involving Article III business to the geographically distant Supreme Court.\textsuperscript{214} For these Anti-Federalists, lower federal courts were favorably envisioned not only as possible trial courts in which a case would begin and end, but as potential appellate courts of state court decisions as well. Taken together, these Anti-Federalist arguments amounted to something of a damned-if-you-do, damned-if-you-don't set of objections to Article III.\textsuperscript{215} But what one does not see, even among those who might have preferred that the state courts handle the bulk of the business ultimately assigned to Article III, are arguments tying the supposed constitutional nonrequirement of lower federal courts to the jurisdictional competence

\textsuperscript{212} See, e.g., 2 Elliot's Debates, supra note 22, at 400 (remarks of Thomas Tredwell) (characterizing Article III as empowering Congress "to establish one supreme, and as many inferior, courts as they please"); id. at 521 (remarks of George Mason) (noting that the federal courts would be "as numerous as Congress may think proper"); Martin, supra note 51, at 206-07 (fearing for the "prodigious number of officers" contemplated by Article III and predicting that the federal courts would "absorb and swallow up" the state courts) (emphasis omitted). As noted above, a great number of Anti-Federalists stated that some Article III business could only be heard originally by lower federal courts. See supra text accompanying notes 48-52.

\textsuperscript{213} See supra text accompanying notes 193-98.

\textsuperscript{214} At the Virginia Ratifying Convention, John Marshall observed the ambivalence of the Anti-Federalist approach to Article III when he said, apparently in response to George Mason:

\begin{quote}
I had an apprehension that those gentlemen who placed no confidence in Congress would object that there might be no [lower federal] courts. I own that I thought those gentlemen would think there would be no inferior courts, as it depended on the will of Congress, but that we should be dragged to the centre of the Union.
\end{quote}

3 Elliot's Debates, supra note 22, at 552; cf. Letters from the Federal Farmer (III), supra note 22, at 243-44 (objecting to possible distance of lower federal courts, but noting discretion of Congress to make them convenient).

\textsuperscript{215} See Clinton, supra note 40, at 820 (noting that "[t]he antifederalist argument regarding the expense and inconvenience of a federal judiciary was really a two-edged sword," to the extent that they complained about inconvenience from too few and complained about expense and related matters from too many).
of state courts to handle any and all Article III business, much less arguments about state courts’ duty to hear it.

4. COMPROMISE FOR WHOM? COMPROMISE FOR WHAT?

Of course, there is no getting around the fact that Madison said there was a compromise. As he reported in his notes, he and Wilson stated, in proposing the language giving the national legislature the power to appoint inferior tribunals, that “there was distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish them or not establish them.” Other evidence of what occurred on the day of the Compromise is certainly consistent with such a theory. But it is interesting that, of the many accounts of the day’s events, only Madison’s put such a gloss on them. In fact, no other reference, either then or later in the Convention or during ratification, comes close to suggesting that what had resulted on June 5 was a compromise between the two described competing positions. The current editor of the Convention’s Records warned that as a note taker, Madison was at his least reliable when he put words into his own mouth, in part because of the difficulties of talking and accurately quoting oneself at the same time. But it is not necessary to doubt Madison’s recollection of what he had said to conclude that not all of those who participated on the Committee of the Whole or in the Convention necessarily saw things quite the same way.

First of all, the various proposals and votes do not clearly indicate for whom (much less for what) the language of the Compromise was a compromise. Prior to John Rutledge’s proposal deleting all reference to inferior federal courts, to which Madison’s language was offered as a compromise, Article III would have lodged the federal judicial power in one Supreme Court and in “inferior tribunals.” Rutledge’s proposal to eliminate inferior tribunals was approved by a vote of five states to four, with two states divided. As for Madison’s proposal, all four states that had initially voted against Rutledge’s proposal eliminating all reference to the inferior courts also voted for the new “compromise” language giving Congress the power to appoint them. Three of the

216. 1 FARRAND’S RECORDS, supra note 47, at 125 (Madison).
218. 1 FARRAND’S RECORDS, supra note 47, at 115-16 (Journal); id. at 119 (Madison).
219.  Id. at 118 (Journal).
220.  The States of Pennsylvania, Delaware, Maryland, and Virginia all voted against Rutledge’s inferior court scuttling motion, and later voted in favor of the
five that voted in favor of Rutledge's proposal continued in their opposition to any reference to lower federal courts and voted against Madison’s language as well.\textsuperscript{221} Apparently, the language was not compromise enough for them. For two states that voted in favor of the Rutledge proposal and for one that was divided, the new Madisonian language was preferable.\textsuperscript{222} For certain members of those swing-state delegations, the new language may have offered an acceptable compromise from their earlier position.

Perhaps they changed their minds for the reasons suggested by Madison’s statement about the upshot of his and Wilson’s language. But if one rereads the records of the day’s events, and momentarily puts aside Madison’s gloss, that is not the only possible thing that had changed by the time of this last vote. Earlier votes that same day had approved language that would have provided, similar to Randolph's original ninth “Resolve” that the “national judiciary be established to consist of one supreme tribunal and of inferior tribunals to be appointed by the national legislature.”\textsuperscript{223} This was the language that was supposed to have made lower federal courts mandatory. It seems fair to ask whether something may have intervened between that unanimous vote, and Rutledge’s momentarily successful motion to get rid of lower federal courts altogether.

What all accounts show is that there had been a separate intervening proposal, pushed by none other than Madison and Wilson, to eliminate...
the national legislature as the body responsible for appointing the inferior federal tribunals. Madison and Wilson each had different views about how the inferior courts should be chosen, but neither wanted to give the task to the national legislature. A vote was then taken that badly split the states between executive appointment, appointment by the Senate, and appointment by the national legislature. No consensus or majority formed, although there was a majority against any particular proposal. A subsequent vote then reached agreement to leave “blank” the political body that would choose the inferior courts. It was only then that Rutledge came forward and moved to eliminate reference to the lower courts. And it was only after Rutledge’s motion had succeeded five-to-four that Madison and Wilson joined forces again, this time to urge that “the national legislature” have the power to appoint inferior federal courts.

Those intervening events suggest a plausible alternative reason why, to the handful of swing votes, the new language may have been more palatable than Rutledge’s language: the proposal resecured the job of creating lower federal courts for the national legislature (and, notably, pursuant to a motion made by the same duo who first sought to eliminate any such reference). If certain delegations were swayed to vote in favor of reintroducing some mention of lower federal courts in Article III, Madison may have focused on only one of the trade-offs considered that day. In short, this possibility suggests that some may have voted for Rutledge’s initial proposal to eliminate federal courts because the version of Article III then on the table had become objectionable by leaving out the national legislature as the appointing body, and it became tolerable again by its reintroduction.

In response to this suggestion, the point can be made that the Compromise was ratified by the entire Convention a little over a month later when, after debate, it voted unanimously on the language that came out of the events of June 5. Nevertheless, the entire Convention did not vote to ratify any particular compromise, either Madison’s or anyone

224. Madison favored senatorial appointment, while Wilson favored executive appointment. See id. at 119-20 (Madison); id. at 126 (Yates). The notes of Rufus King appear to show the division among the states in how appointment was to take place. See id. at 128 (five states favoring executive appointment, six favoring legislative appointment, and one favoring appointment “by the people”).

225. Thus, before Rutledge proposed to eliminate any reference to inferior federal courts, the clause read: “That a national judiciary be established to consist of One supreme tribunal, and of inferior tribunals to be appointed by [blank].” Id. at 116 (Journal).

226. Id. at 118 (Journal); id. at 125 (Madison).

227. The vote before the entire Convention took place on July 18, 1787. See 2 id. at 46 (Madison); id. at 38-39 (Journal).
else's. Instead, it unanimously approved the language presented to it. As noted, no one suggested before the entire Convention that the proposed language had been the result of any compromise. While some proposed that Congress might make use of the state courts under this version of Article III, those suggestions, as I will try to show, may not have meant that Congress could forego the choice of creating inferior federal courts. Indeed, the language approved by the entire Convention may have represented something very different than Madison's earlier, but unrepeated, characterization might suggest.

5. A SEPARATE SYSTEM OF FEDERAL COURTS VERSUS STATE JUDGES AS FEDERAL JUDGES

The Compromise is traditionally spoken of as having been made between those who wanted to see no lower federal courts at all (and who did not want them mentioned in the Constitution) and those who wished to see the establishment of lower federal courts guaranteed by the Constitution in the same manner as was the Supreme Court. Yet the evidence above suggests that this line of division does not, in fact, fully capture all of the competing perspectives about inferior tribunals that were brought to the debates. Recent research suggests an additional and important perspective from which some members of the founding generation may have viewed the language of the Compromise. This perspective bears little relationship to our current understanding of it.

a. Framing and Ratification

The language of the Compromise referred to "authorizing" the national legislature "to appoint inferior tribunals." That language was virtually identical in significant part to language in the Articles of Confederation that gave Congress the power of "appointing courts for the trial of piracies and felonies committed on the high seas." If the Articles'
appointment provision was understood to give Congress a power to establish separate federal courts with such duties, it was never so employed during the era of Confederation. Instead, Congress made use of the clause to appoint state courts to hear such cases. Although this practice of denominating state courts to do federal business seems strange more than two centuries later, it did no damage to the language of the Articles, especially when contrasted with other language giving Congress the ability to "establish" an admiralty court of appeals. Congress did establish that court as a separate federal tribunal, and staffed it with federal officials, and it was, in fact, the only permanent federal court in existence during the Confederation. It therefore appears that differences in the Articles' language ("appoint" versus "establish") were understood as allowing for different practices.

The practice of appointing state courts as federal courts, common at the time of the Convention, may therefore have been understood by some delegates as the natural reference of the Compromise's language giving the national legislature authority to "appoint inferior tribunals." If so, the Compromise's language may have been attractive to them, not so much because it left the creation of inferior tribunals optional, but because it left open the possibility that inferior federal tribunals might be made out of the state courts at the hand of the national legislature. From such a perspective, the "discretion" that the language of the Compromise gave to Congress would have been whether or not to establish a new separate system of federal courts rather than whether or not to constitute or appoint inferior tribunals.

It is true, of course, that many statements at the Convention (and later) about making use of state courts as federal courts may simply have been roundabout references to the possibility that state courts might hear cases and controversies within Article III in the first instance. But

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..." Id. Others have noted the distinction, although not its significance, with respect to the Compromise itself. See GOEBEL, supra note 74, at 211-12; Prakash, supra note 4, at 2018-19.

230. See GOEBEL, supra note 74, at 173; HART & WECHSLER, supra note 7, at 4 n.18.

231. See BOURGIGNON, supra note 103, at 113-16.

232. See GOEBEL, supra note 74, at 212.

233. For example, Edward Carrington seems to have understood that state courts might be "adopt[ed]... into the federal system" and "adopted as the inferior Federal Courts" without having to be appointed by the federal government. See Letter from Edward Carrington to James Madison (Aug. 3, 1789), in 12 THE PAPERS OF JAMES MADISON 322, 322-33 (Charles F. Hobson et al. eds., 1981) [hereinafter MADISON'S PAPERS]. Carrington clearly understood that the state courts would be inferior federal courts simply by virtue of deciding federal judicial business. For a further discussion of Carrington's views on the obligation of state courts to hear such judicial business, see
there are indications that some in the founding generation held out the possibility that, in order to save money and to avoid having a separate army of lower federal court judges, state judges might actually be appointed as federal judges to do federal judicial business. In other words, state judges in some circumstances might actually be dual office holders by simultaneously acting as Article III judges, in addition to their day-jobs as state judges. This possibility has been ably defended by Saikrishna Prakash, who believes that it not only occupied the minds of the framers, but remained a viable option even after the Constitution was finally ratified. I do not mean to rehash his evidence here, but to focus on that evidence as it relates to the Compromise—a question that he does not discuss—and to develop additional leads.

Among the prominent constitutional players who seemed to share such a view at the time of the framing was Nathaniel Gorham of Connecticut, who presided over the meeting of the Committee of the Whole on the very day that the Compromise was reached. His curious remarks, made later at the Convention in support of the Compromise version of Article III, are incomprehensible absent some such understanding. To an objection to empowering Congress to appoint inferior courts, Gorham responded: “There are in the States already [federal] Courts with jurisdiction for trial of piracies &c. committed on the Seas. no [sic] complaints have been made by the States or the Courts of the States. Inferior tribunals are essential to render the authority of the National Legislature effectual.” The trial courts to which he referred were the state courts appointed by Congress to handle certain federal business under the Confederation. Gorham seemed to be satisfied that the Confederation-era practice of appointing state courts as federal courts was within the contemplation of the language of the Compromise. While Gorham himself may have favored a separate system of national courts, opponents of the establishment of a separate system of lower federal courts may have been attracted to the possibility of legislative “appointment” as a way to make use of the state courts as inferior federal courts, consistent with Confederation practice. Gorham’s comment

234. See Prakash, supra note 4, at 2027-28; see also Wythe Holt, “Federal Courts as the Asylum to Federal Interests”: Randolph’s Report, the Benson Amendment, and the “Original Understanding” of the Federal Judiciary, 36 BUFF. L. REV. 341, 357-58 & n.49 (1987) (noting that “probably a majority of those who considered the matter from 1787 to 1790 had thought that the state supreme courts . . . would serve as the lowest federal courts.”).

235. See 2 FARRAND’s RECORDS, supra note 47, at 46.

236. See GOEBEL, supra note 74, at 226 (noting that Roger Sherman, who had argued in favor of Rutledge’s motion eliminating reference to lower federal courts before
that lower federal courts "already" existed, made at a time when the language of the Compromise was first approved by the entire Philadelphia Convention, went unchallenged. As one member of Congress later put it, "[a]ll these were State institutions, and yet the court was a federal court."\(^{237}\)

During ratification of the Constitution, moreover, the appointment of state judges as federal judges seems to have been a hot topic, especially in Virginia. Edmund Pendleton indicated that he thought "it highly probable that [Congress's] first experiment will be, to appoint the state courts to have the inferior federal jurisdiction, because it would be best calculated to give general satisfaction, and answer economical purposes . . . ."\(^{238}\) Arguably, Pendleton was merely making reference to the possibility that inferior federal courts would not be needed and that Article III business might be brought to the state courts, as state courts, for trial. But that Pendleton might have understood that state judges could simultaneously operate as Article III judges appointed by Congress is suggested by his recognition that they would draw two salaries. The federal government would have to pay these hybrid judges, acknowledged Pendleton, but would only have to pay them a small salary for their federal role since they would still be drawing their regular state salary as state judges.\(^{239}\) This approach also makes sense of Pendleton's prediction elsewhere that "[w]e may expect that there will be an inferior court in each state; each state will insist on it; and each, for that reason, will agree to it."\(^{240}\) If he thought that the first experiment "would be to appoint state courts," he seems to have expected that those courts would also be the inferior federal courts.

\(^{237}\) 1 ANNALS OF CONG., supra note 69, at 801; see also id. at 797-803 (remarks of Rep. Smith).

\(^{238}\) 3 ELLIOT'S DEBATES, supra note 22, at 517; see also id. at 548 (remarks of Edmund Pendleton) ("For the sake of economy, the appointment of these courts might be in the state courts.").

\(^{239}\) Id. at 517. Perhaps Pendleton was just mixed up, thinking that any time state judges heard matters within Article III, they were, at that instant, converted into Article III judges. See also Letter of James Madison to Joseph C. Cabell (Oct. 5, 1831), in 12 MADISON'S PAPERS, supra note 233, at 278 (partial reprint) (regarding a letter from Edmund Pendleton to Madison written at the time of the deliberations on the 1789 Judiciary Act). But if Pendleton was just confused, others, as discussed in the text, believed that state judges might in fact serve as federal judges under Article III. Governor Johnston made a similar observation in the North Carolina Ratifying Convention. See 4 ELLIOT'S DEBATES, supra note 22, at 142.

\(^{240}\) 3 ELLIOT'S DEBATES, supra note 22, at 547.
Patrick Henry noted that "[i]t was observed that our state judges might be contented to be federal judges and state judges also."241 This, too, might be dismissed as a misunderstanding that state judges were somehow converted into de facto federal judges the minute they heard any Article III business. But that he was referring to something else—namely, the appointment of state judges as federal judges—is borne out by his persistent worries that if such double office holding came to pass, the state judges, if they were also federal judges, might "combine" against the states together with the general government, compromising their independence.242 Surely, that is an odd thing to fear of state judges who incidentally hear federal issues as state judges; but it is a reasonable thing to fear if local judges are paid by the federal government (for life) because they are also federal officers. Similarly, Grayson of Virginia remarked more than once during the ratifying convention "that the judges of the state courts might be federal judges" or "judges in the inferior federal tribunals."243

Finally, no less than James Madison—who was unlikely to have been operating under the mistaken belief that if state courts heard any Article III business they were, by that fact alone, converted into federal judges—acknowledged the existence of the argument that Congress might appoint state judges as federal judges. At one point in the Virginia ratification debates, Madison made a conscious reference to the Confederation’s provision of congressional power to appoint state courts to try piracy cases and felonies on the high seas, and then referred to the Confederation Congress’s action “invest[ing] the admiralty courts of each state with this jurisdiction.” He seemed to acknowledge a similar possibility in The Federalist No. 45.244 Madison’s awareness of this older practice of appointing state courts as federal courts is shown again during debates over the 1789 Judiciary Act which reveal, as discussed below, that he was doubtful of the practice’s legality under the new

241.    Id. at 539.
242.    Id.
243.    Id. at 563.
244.    See The Federalist No. 45, supra note 19, at 313 (James Madison) (state judicial authorities might be clothed with federal powers).
Constitution. But his awareness that such beliefs existed shows that they may have motivated others, Madison notwithstanding.

b. Orthodoxy and Heresy

The language of Article III underwent modification in Philadelphia, from the Confederation-like “appoint” in the Compromise presented to the entire Convention, to “constitute” in the Committee of Detail, to the arguably stronger “ordain and establish” of the final version from the Committee of Style. Julius Goebel has argued that this undebated shift in wording by the Committee of Style meant that Congress had lost any ability—which it might have had under the Compromise's version of Article III—to appoint state judges as federal judges, and that Congress was therefore required to create a separate system of federal courts.

245. See infra text accompanying notes 252-54. Alexander Hamilton seemed also to have been aware of the argument that state judges might serve as federal judges when he suggested that it might be “found highly expedient” to divide the country up “into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state.” The Federalist No. 81, supra note 19, at 547.

The judges of these courts, with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts... This plan appears to me at present the most eligible of any that could be adopted, and in order to [do] it, it is necessary that the power of constituting inferior courts should exist...

Id. at 547-48. The phrase “with the aid of state judges” is admittedly inconclusive, but it too may have been an overt acknowledgment of the possibility of “appointment” of state judges as federal judges, as a way to sell the Constitution. In a difficult passage elsewhere in The Federalist No. 81, a number of paragraphs are devoted to justifying the power given to Congress (as Hamilton emphasized it) to “institute or authorise in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.” Id. at 546. The pointed reference to “authorise” suggests the possibility of anointing state courts (or judges) as federal, as his “most eligible” plan seems to contemplate. Elsewhere in the same essay, however, Hamilton acknowledges the view that “[t]o confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much ‘to constitute tribunals,’ as to create new courts with the like power.” Id. at 547. But Hamilton seems ultimately to reject that particular view as not being sufficiently supported by the language of Article III. See id.

246. Interestingly, the language of Article I eschews the obvious word “establish” when it gives Congress the power to “constitute” lower federal courts. See U.S. Const. art. I, § 8, cl. 9. The latter is somewhat more reminiscent of earlier wording of Article III at the time of the Convention, even though Article III eventually opted for “establish,” and even though elsewhere in article I, § 8, the verb “establish” is used (e.g., to establish post-offices; to establish a uniform rule of naturalization). Cf. Lawson & Granger, supra note 4, at 267 n.3 (observing that the word “establish” might include notion of designation of existing facilities as federal).

247. See Goebel, supra note 74, at 247.
Federal courts scholars have rejected Goebel's conclusions as "uncharacteristically thinly supported and unpersuasive." But in so doing, the critics unfairly lump together his two conclusions, although only one of them can sustain the charge leveled against him. The first conclusion—that the stronger language of "ordain and establish" worked a loss of the power to appoint state courts as federal courts—seems not only carefully developed and supported by Goebel, but somewhat persuasive. Under the Confederation, Congress relied on the "establish" language to create a separate federal court of admiralty appeals, while implementing the "appoint" language by nominating state trial courts as federal courts. In addition, by the time Article III's language shifted from "appoint" to "establish," other changes had been made in the power of appointment of federal officials by the Executive that would have made congressional appointment of state judges as federal judges highly problematic. In addition, at the time of the Compromise and the approval of its language before the Convention, the Article III protections of judicial independence were applicable to the judges of the Supreme Court only. The eventual grant of Article III protections to the judges of inferior courts would therefore also have made such state court appointment a more difficult matter than at the time of the Compromise. In this light, it is certainly arguable that the discretion to create separate federal courts rather than appoint state courts—in the event Congress decided to create inferior tribunals—was lost by this change in Article III's language.

248. The remarks were made in the second edition of Hart & Wechsler. PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 13 n.46 (2d ed. 1973); see also Engdahl, supra note 190, at 474 n.88 (finding Goebel's conclusions here "unwarrantably strained").

249. The separate issues of appointment of courts and appointment of judges were arguably merged in the discussion at the time of the Compromise, which talked about the appointment of inferior courts. Later, on June 13, 1787, the Committee of the Whole began to address the appointment of the judges of the Supreme Court. See WARREN, supra note 192, at 213. But no real provision for the appointment of the judges of the inferior courts was made, until the decision with respect to other offices was added fairly late in the game by the Committee of Detail. See id. at 528; see also 2 FARRAND'S RECORDS, supra note 47, at 539-40, 627-28. Once that took place, it became problematic from the perspective of the Appointments Clause for the Congress to be able to appoint state courts as inferior federal courts. Madison said as much in the House during debate on the 1789 Judiciary Act. See infra text accompanying note 252. For an effort to surmount this hurdle, as a way of showing that such appointment was still possible even in the final version of the Constitution (contrary to Madison's surmise in the House), see Prakash, supra note 4, at 2032.

250. See 2 FARRAND'S RECORDS, supra note 47, at 38-39 (Article III protection to Supreme Court judges only, even while power to appoint inferior tribunals given to Congress).
Goebel's other apparent conclusion—that these later linguistic changes meant Congress was under an obligation to create a separate system—is, admittedly, undeveloped. The entire phrase on which his arguments are based, of course, is "such inferior courts as Congress may, from time to time, ordain and establish." That they had to be separate, if created, does not suggest also that they had to be created. In short, Goebel presents a more than plausible case that the move to the language of "ordain and establish" from the earlier "appoint" meant that Congress was no longer free to appoint state courts as federal courts, but was instead obligated to create a separate system of lower federal courts—when and if it created them. But his understanding of the "appoint" language directly supports the position that the Compromise's original language was viewed as allowing for the practice of making federal judges of state judges.

c. The "Appointers'" Last Stand? The Judiciary Act of 1789

Despite the final language of the Constitution, the possibility that state courts could serve as inferior federal courts seems still to have been in play even after ratification, as evidenced by those who continued to discuss whether state judges could in fact wear two hats. As had his equally unsuccessful senatorial counterparts, Representative Samuel Livermore had moved in the House of Representatives to eliminate the provision conferring lower federal court jurisdiction in what would eventually become the 1789 Judiciary Act.251 Madison objected to what he saw as the unavoidable consequence of such a motion, namely that Congress might be required to constitute state courts as federal courts for some slice of the remainder of the judicial business that the newly created federal courts did not get. Madison said it could not be done:

To make the State courts Federal courts, is liable to insuperable objections, not to repeat that the moment that is done, they will, from the highest down to the county courts, hold their tenures during good behaviour, by virtue of the Constitution. It may be remarked, that, in another point of view, it would violate the Constitution by usurping a

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251. See 1 ANNALS OF CONG., supra note 69, at 834. Previously, in the Senate, Richard Henry Lee had moved to eliminate jurisdiction of the lower federal courts except as to admiralty and maritime matters. For a discussion of the events in the Senate, see Casto, supra note 53, at 1103-09; Clinton, supra note 8, at 1527-33. Lee's motion was defeated; the Senate passed the Bill by a 14-6 vote. See 1 ANNALS OF CONG., supra note 69, at 50. Livermore's similar motion was defeated in the House by a vote of 31-11. See id. at 834.
The objection makes little sense (or else is highly disingenuous), if directed at state courts hearing, as state courts, the Article III cases and controversies in the first instance that federal courts would have been unable to hear had Livermore's motion passed. Indeed, it is hard to imagine that Madison had a problem with state courts, as state courts, hearing Article III business they otherwise were capable of hearing, since nothing would suggest that he doubted the possibility of concurrent jurisdiction, and the 1789 Judiciary Act which he supported clearly provided for it in many places. According to the accounts of the House debate, Madison "did not see how it could be made compatible with the Constitution, or safe to the Federal interests, to make a transfer of the Federal jurisdiction to the State courts, as contended for by th[ose] who oppose the clause in question."2

William Paterson seems to have had a similar objection in mind at the time of the First Judiciary Act when he confessed to the Senate his belief in the necessity and inevitability of a system of federal courts "detached from" the state courts. In opposition to a motion to eliminate lower federal courts with broad original jurisdiction, Paterson criticized the possibility of making state judges federal judges:

252. 1 ANNALS OF CONG., supra note 69, at 812-13 (remarks of Rep. Madison); cf. THE FEDERALIST No. 81, supra note 19, at 547 (considering whether using state courts in first instance would be exercising the power to ordain and establish federal courts, absent a "more direct and explicit provision . . . in favour of the state courts").

253. In light of Madison's apparent endorsement in the Virginia Ratifying Convention of the possibility of appointing state courts as federal courts as had been done under the Articles of Confederation (see supra text accompanying notes 244-45), perhaps he was being disingenuous at one time or the other. Cf. THE FEDERALIST No. 45, supra note 19, at 313 (James Madison) (suggesting that state judiciaries might be "eloathed with" federal authority). Representative Jackson, who was in favor of Livermore's motion to gut the judiciary bill, did, however, seem to think that Madison was describing nothing more than the consequence of state courts, as state courts, hearing Article III business in the first instance. See 1 ANNALS OF CONG., supra note 69, at 814-15.

254. 1 ANNALS OF CONG., supra note 69, at 813. The constitutional concern here seems clearly to be with the elimination of the lower federal courts and with them, some of their jurisdiction. That, of course, was what Lee's (in the Senate) and Livermore's (in the House) motions were aimed at. See supra text accompanying note 251.

255. Paterson's Notes, supra note 1, at 478. Paterson's objections were made in response to Lee's motion in the Senate.
Consider how appointed—some annually, &c. Their salary—how paid—They become your Judges—fixed upon you during good Behaviour—entitled to a permanent Salary—and therefore if the State refuses to elect them the year following, the Union will be saddled with the Expence of 3 or 4 Judges in a State instead of one . . . .”

Again, the objections make sense, but only if the possibility of state judges acting as federal judges (as opposed to state judges merely considering federal judicial business as state judges), was real. Others spoke up to protest that “[y]ou cannot make Federal courts of the State courts” in part because the Constitution barred it, but also because state law might prohibit it.257

A later failed effort to amend the Constitution in 1793 to allow Congress to “appoint” state courts to serve as federal courts suggests as well that this possibility did not survive Article III as ratified.258 Similar fates awaited other efforts to designate “existing State Court[s]” to take on federal duties “in addition to the duties assigned to them by the laws of the State.”259 The one-time existence of these odd possibilities, however, coupled with other post-ratification events, may shed new light on the meaning that the language of the Compromise originally carried when it conferred upon Congress the power to “appoint” tribunals inferior to the Supreme Court. The persistence of the idea of such “appointment” suggests that some of the delegates who voted for the Compromise’s language (either in the Committee of the Whole where the Compromise was struck, or later, in Convention when the Committee’s language was approved) may have understood it as giving Congress a power to appoint inferior federal tribunals—but a power that Congress could exercise without having to establish separately staffed lower federal courts. This possibility might mean, of course, that the Compromise provided even less support for the potential establishment of a separate system of federal courts than the usual understanding suggests. Yet it might also mean that there were those who were not focused on the mandatory versus

256. Id. at 476.
257. See 1 ANNALS OF CONG., supra note 69, at 828 (remarks of Rep. Gerry). Representative William Smith seemed to be aware of the suggestion, but he had problems with it as well. See id. at 800-01.
258. See 3 ANNALS OF CONG. 663 (1793) (“Article 3, section 1. After the words ‘ordain and establish,’ add, ‘or in such of the State courts as the Congress shall deem fit.’”). The proposal was tabled. See id.; see also FRANKFURTER & LANDIS, supra note 98, at 4 n.6; Warren, supra note 124, at 550 n.10. See also Egbert Benson’s stillborn proposal to federalize state courts, discussed in Holt, supra note 234, at 357-63.
259. See Warren, supra note 124, at 550 & nn.10-11.
nonmandatory creation of inferior federal tribunals at the time of the Compromise and the approval of its language. The persistent references to the possibility that state courts might get the nod when inferior federal tribunals were created strongly suggest that the issue raised by the language of the Compromise, for at least some of those who were present and voting, was whether the creation of inferior tribunals would mandate a separate system of lower federal courts.

The awareness that state judges might be appointed as federal judges is fully consistent with a view that there might be certain heads of Article III jurisdiction for which inferior federal tribunals were constitutionally required in the first instance. Those would include areas in which state judges, as state rather than federal judges, might be incapable of acting. Indeed, it is arguable that the view that state judges could serve as Article III judges may only be explainable by an understanding that some Article III business was off-limits to state courts as state courts. What other reason could there be for holding out the peculiar option of appointing state judges as federal judges, unless it was thought that state courts—as state courts only—might not be able to hear cases arising under certain heads of Article III in the first place? In addition, the proposal of a constitutional amendment to authorize Congress’s power to appoint state courts to exercise Article III power, after it became clear from the first judiciary statute that state courts would indeed have concurrent jurisdiction in many areas, can also only make sense if it was thought that State courts could not constitutionally exercise concurrent jurisdiction as state courts in all areas.

C. Conflicting Viewpoints? Congressional Discretion and Constitutional Exclusivity

Quite apart from the Compromise, however, is the language of Article III which speaks of inferior courts that Congress “may” ordain and establish. Consistent with this permissive language, early decisions of the Court have traditionally been read as demonstrating an awareness

260. See 1 ANNALS OF CONG., supra note 69, at 808 (remarks of Rep. Ames) (state judges could not constitutionally exercise admiralty jurisdiction unless they were “individually commissioned and salaried,” and “then they would not have it as the State judges”). Perhaps the idea that state judges could be appointed as federal judges was intended to ensure that state courts could be compelled to do federal judicial business should they balk. But this seems to conclude that, as state judges, they might balk, and it also begs the question. Why could state courts be compelled to serve as federal judges if they could not be compelled to take federal business as state judges?
that lower federal courts were creatures of Congress. Early opinions acknowledged that only the Supreme Court, not the inferior courts, had been ordained and established by the Constitution. From that, it followed that lower federal courts were dependent on Congress for their jurisdiction in a way that the Supreme Court was not. The early Court's expressions of belief in congressional control of lower federal court jurisdiction therefore arguably coexisted with the no less widely shared belief that important parts of Article III's jurisdiction were off-limits to the state courts and, as discussed below, that the state courts were under no obligation to assume unwanted Article III jurisdiction. How such apparently conflicting views could simultaneously be held is something of a puzzle.

Despite the apparent conflict, it may not have been logically impossible to hold such beliefs simultaneously. For example, viewing lower federal courts and their jurisdiction as creatures of Congress is not necessarily inconsistent with a view that some Article III business may be constitutionally off-limits to the state courts. Justice Johnson, for example, was a strong advocate of constitutional exclusivity of some Article III business and was also among those who believed that lower federal court subject matter jurisdiction was dependent on congressional action. Nor is the recognition of congressional control over lower federal court jurisdiction necessarily inconsistent with the idea that state courts are under no obligation to entertain jurisdiction over federal judicial business. As discussed below, some, like Justice Livingston, would conclude that state courts were under no obligation to undertake unwanted Article III jurisdiction, even when Congress had simultaneously closed the federal courthouse doors. Yet he too used the principle of congressional control over lower federal court jurisdiction as his starting point.


263. See infra part III.

264. See Hudson & Goodwin, 11 U.S. (7 Cranch) at 32. Edmund Randolph may have expressed similar sentiments in his Report to the House of Representatives by identifying a few constitutionally exclusive categories of Article III jurisdiction, while recognizing that the lower courts "must have slept forever" without Congress's intervention. See Randolph's Report, supra note 78, at 34.

265. See infra text accompanying note 301.
All that one had to do in order to embrace such beliefs simultaneously, as these individuals did, was to assume that some of the supposedly constitutionally exclusive Article III jurisdiction (or any Article III jurisdiction which was declined by the state courts) might go unexercised if lower federal courts were not created. For some in the early Republic, that prospect seems to have been tolerable.

The possibility that some Article III jurisdiction might not vest originally in any court at all became a constitutional problem when some in the legal community superimposed on Article III a larger theory of mandatory vesting. For those who believed that Article III jurisdiction (or some important pieces of it) had to vest, either originally or on appeal, in an Article III court, it was necessary to develop a theory of mandatory trial jurisdiction in either the state or federal courts to hear the judicial business in danger of being excluded. Those like Story concluded that federal courts would be obliged to assume the jurisdiction that the state courts either constitutionally could not or would not entertain, and that Congress would have to create federal courts to pick up the jurisdictional slack. For Story, a requirement that Congress create some lower federal courts was certainly consistent with (although not dependent upon) a theory of mandatory vesting. But it was only a theory of mandatory vesting, coupled with the pervasive understanding that the states were incapable of handling some Article III trial business, that pushed him to speculate on the requirement of lower federal courts. By contrast, while there is evidence that others shared Story's beliefs about mandatory vesting, there is little evidence, as discussed in Part III, that members of the Republic's first generations went off in the other direction to develop theories of state court jurisdictional duties to insure that such vesting would take place.

It is not my goal here to defend or take issue with the modern versions of mandatory vesting. See supra note 40. These arguments, like Story's, have great explanatory force. My goal is rather to understand how such potentially inconsistent views about congressional power might have coexisted with equally well-settled views about limits on state court power and jurisdictional duties. Suffice it to say that, while modern theories of mandatory vesting may provide a more convincing theory of Article III than other efforts, the versions that focus on concomitant state court jurisdictional duties (to enforce a regime of mandatory aggregate vesting) are hard to square with the widely held background assumptions about state court power and duties that existed at the time the first mandatory vesting theories were articulated. Ultimately, I do not think that there is anything in a theory of constitutionally driven federal court exclusivity (or even in the obligation that some lower federal courts be created) that is inconsistent with some version of aggregate mandatory vesting. It certainly wasn't for Justice Story.

As Robert N. Clinton has noted, a similar logic drives the argument that lower federal courts must be created as drives the argument that lower state courts may be under some kind of jurisdictional obligation. See Clinton, supra note 8, at 1585. Such
Still, the belief that the creation of lower federal courts might be required is in direct tension with the idea of plenary congressional control over lower federal court jurisdiction. Those who advanced arguments about the constitutional necessity of lower federal courts may have done so with some hesitancy, given the language of Article III. But the language did not prove insurmountable for them.\footnote{268} One might still believe in the general principle of congressional control of lower federal court jurisdiction while understanding that the principle might have constitutional limits. Nor would anything in the early history of the judiciary necessarily have swayed those who believed that lower federal courts might be required for some judicial business. The little jurisdiction that most observers would have considered constitutionally exclusive was conferred by the First Judiciary Act,\footnote{269} and the lower federal courts logic respecting trial courts may also have been driven by notions of the “coextensiveness” of federal power that would have suggested to the founding generation that the power of each branch ought to be commensurate with the power of every other branch. See G. Edward White, Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases, in \textit{Origins}, supra note 194, at 66.

\footnote{268} As shown above, some did not view the “may ordain and establish” language as wholly permissive at all, but instead viewed it as giving discretion with respect to matters of deployment and arrangement, not the discretion to create none. See \textit{supra} text accompanying notes 69-74. In \textit{The Federalist No. 82}, Hamilton refers to congressional discretion as giving Congress the power to create “as many subordinate courts as congress should think proper to appoint” and to create “a certain number of inferior ones” but never suggests in so many words that that number might be “none.” \textit{The Federalist} No. 82, \textit{supra} note 19, at 554; see also \textit{James Iredell, Answers to Mr. Mason’s Objections to the New Constitution, Recommended by the Late Convention} (1788), \textit{reprinted in Pamphlets on the Constitution}, supra note 53, at 343 (noting as “impracticable” the delineation of everything with respect to lower federal courts); \textit{3 Elliot’s Debates, supra note 22}, at 521 (remarks of George Mason in the Virginia Ratifying Convention) (“There is no limitation. . . . The inferior [federal] courts are to be as numerous as Congress may think proper.”); \textit{id.} at 517 (remarks of Edmund Pendleton in the Virginia Ratifying Convention) (focusing on the impropriety of fixing the number in the Constitution); \textit{2 id.} at 400 (remarks of Thomas Tredwell in the New York Ratifying Convention) (Congress is empowered “to establish one supreme, and as many inferior, courts as they please”); \textit{11 Annals of Cong.} 79, 86-87 (1802) (remarks of [Sen.] Gouverneur Morris) (Congress has discretion as to “number and kind” of inferior courts, but arguing that Article III amounts to “a declaration, that inferior courts shall exist”).

\footnote{269} I am referring to the constitutionally exclusive jurisdiction of the lower federal courts in areas such as admiralty and crimes. There were some gaps in the Supreme Court’s original jurisdiction. See \textit{Amar, supra} note 162, at 492 n.219 (noting there was no right of removal from inferior federal courts to Supreme Court in some cases in which jurisdiction was concurrent with Supreme Court); \textit{Meltzer, supra} note 44, at 1595-98 & nn.90, 96 (suits by domestics or domestic servants or by consuls or vice-consuls omitted from ambassador jurisdiction in 1789 Judiciary Act, as were suits by states against foreign governments).
were, of course, ordained and established. The occasional affirmances of congressional nonvesting of lower federal court jurisdiction involved areas that no one would have considered constitutionally exclusively federal even at the time. In addition, some of the Court’s supposedly clear expressions of congressional control over lower federal court jurisdiction often carried enough ambiguity that they might not have been seen as definitively answering the question of whether Congress might be able to forego creating lower federal courts altogether.

Finally, these members of the legal community may have simultaneously embraced notions of congressional control and the constitutional necessity of lower federal courts simply by concluding that the Court was powerless to compel the congressional action needed to create the lower federal courts that they believed Congress was constitutionally compelled to create. Justice Baldwin raised just such a possibility in the context of a discussion of congressional power to confer, on the Supreme and on the lower federal courts, less judicial power than what he perceived the Constitution required. He concluded that

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270. See 1 KENT, supra note 67, at 377 (“The judicial act of 1789 was the true exposition of the constitution with respect to the concurrent jurisdiction of the state courts, and the exclusive jurisdiction of those of the United States . . . .”); see also Taylor, 71 U.S. (4 Wall.) 411, 429 (1867); United States v. Lathrop, 17 Johns. 4, 9 (N.Y. 1819).

271. It is beyond the scope of this Article to go into all of the evidence here. But a couple of familiar landmarks (supporting the notion that lower federal courts derive their jurisdiction from Congress) deserve mention. In Turner v. Bank, 4 U.S. (4 Dall.) 9 (1799), for example, Justice Samuel Chase noted from the bench that “the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress.” Id. at 10 n.1. The few “specified” examples went unmentioned, and it is less than clear that Chase was referring to the High Court’s own jurisdiction, because he apparently believed that the High Court had jurisdiction only “ifl congress has given it . . . not otherwise.” Id. But cf. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1844) (defining such “enumerated instances” as “applicable exclusively to this court”). In any event, there is no statement in Turner that Congress might forego the creation of, or never have to create, lower federal courts. Similarly, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1849), states, as did Turner, that lower federal courts are creatures of Congress and that their jurisdiction is dependent on federal statutes. But it did not suggest outright that lower federal courts might never have to be created. Its statement that Congress can constitutionally withhold “from any court of its creation jurisdiction of any of the enumerated controversies” could logically include the notion of withholding “all” such jurisdiction, but the Court seemed disinclined to suggest such a possibility directly. In addition, in both Turner and Sill, the Court only had to deal with counsel’s extreme argument that Congress could not withhold any Article III jurisdiction, as an original matter, from the federal courts.

272. See Ex parte Crane, 30 U.S. (5 Pet.) 190, 202 (1831) (Baldwin, J., dissenting). Admittedly, Justice Baldwin was not talking about congressional power to create lower federal courts, but more generally about Congress’s constitutional obligation
although the Constitution might require certain jurisdiction to be given to the federal courts, the Court would be unable to supply a remedy to control Congress's refusal to comply. Such an understanding may explain the well-known concession of Justice Story on circuit in *White v. Fenner* to the effect that if Congress did not provide the lower federal courts with jurisdiction over particular Article III business, then it could not be heard in such courts, even though the Constitution might be thought to require Congress to supply the missing jurisdiction. *Fenner* shows that Story could simultaneously digest the concept of constitutionally driven exclusivity (and even an idea that some lower federal courts might be constitutionally required), while recognizing that, as a political matter, the decision to create lower federal courts with jurisdiction required legislative action that the courts could not command. It may also explain the views of Chief Justice Marshall who, in *Ex parte Bollman*, arguably spoke of an affirmative congressional obligation to give lower federal courts habeas jurisdiction lest the promise of the habeas corpus Nonsuspension Clause be lost, while simultaneously recognizing that federal courts could not exercise such jurisdiction unless and until Congress had conferred it by statute. In short, the belief that lower federal court jurisdiction is dependent upon Congress for its establishment could logically be held, not only with ideas of state court incapacity, but with more expansive ideas of mandatory vesting, including a belief in the constitutional necessity of lower federal courts.

* * *

Without the Compromise to direct their reasoning, the members of the early Republic's legal community were somewhat liberated in their approach to Article III. They were able to tolerate seeming jurisdictional tensions and to reach conclusions about state court power and congressional roles that might be hard to accept today. As discussed in Part III, neither the Court nor the legal community leapt from any hypothetical suggestion that Congress might actually create no lower

to vest, in the aggregate, the Article III judicial power in some form (either originally or on appeal) in federal courts. *See Clinton, supra* note 8, at 1588. But Baldwin did, in fact, believe that Congress "was bound to ordain and establish" lower federal courts. *See Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838); supra text accompanying notes 86-87.

273. *29 F. Cas. 1015 (C.C.D.R.I. 1818) (No. 17,547).* Story joined in the opinion.

274. *Id.* (remarking that a lower federal court has "no jurisdiction which is not given by some statute").

275. *8 U.S. (4 Cranch) 75 (1807).*

276. *See supra* text accompanying notes 177-78.
The Madisonian Compromise

federal courts to the conclusion that various jurisdictional duties might then fall on state courts. However appealing such reasoning from the Compromise might be, it is of comparatively recent vintage, despite its seeming antiquity and its imagined place in the consciousness and rhetoric of the early Republic.

III. State Court Duties and the Supremacy Clause

At a time when state court power to entertain matters within Article III was thought to trickle up from state law sources, and when the Compromise had little generative force, the idea that state courts could not be coerced into accepting jurisdiction that state courts denied themselves is not difficult to understand. Thus, while there may have been some uncertainty whether state courts could entertain all Article III judicial business, there was almost no suggestion before this century that they were under any obligation to do so, or that Congress could compel them. Indeed, the ability to refuse unwanted jurisdiction once came close to an absolute prerogative on the part of state courts. This was true even though, after ratification, some continued to maintain that state judges could also serve as federal judges. If anything, it was the Constitution's refusal to embrace that particular idea that may carry meaning today regarding the extent to which state courts might be coerced into reshaping their jurisdictional agendas at the instance of the federal government.

A. Jurisdictional Duties, Congressional Power, and the Early Republic

1. Framing and Ratification

Whether state courts would be under a jurisdictional duty to hear Article III business, and whether Congress could compel them to do so, was not expressly debated during the Convention and ratification. Instead, the debate was over the extent of the federal judiciary, and over what judicial business the states would stand to lose. The Supremacy Clause clearly imposed duties on state courts, but, as I will try to show,

277. Although the Court often suggested that Congress had considerable power in the determination of the business of the lower federal courts, until decisions such as Lockerty v. Phillips, 319 U.S. 182, 187 (1943), it never seems to have suggested in so many words that Congress might actually create no lower federal courts at all. But cf. HART & WECHSLER, supra note 7, at 382 (citing to and quoting from Palmore v. United States, 411 U.S. 389, 400-01 (1973), as if it were quoting from more ancient statement in Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1844), that Congress might forego the creation of all lower federal courts).
it was not thought to provide jurisdictional authority where the state
courts otherwise lacked it. The relative silence on the subject may be
explained by the competing positions of the supporters and opponents to
the Constitution. It would have been difficult for Anti-Federalists to
argue in favor of such jurisdictional duties, or in favor of a federal power
of jurisdictional coercion, given their usual rhetoric championing state and
local prerogative against centralized power. Indeed, most Anti-Federalists
had set out to paint a picture of state court hospitality toward most of the
judicial business that would end up in Article III, as a way to argue
against the Constitution's allowance of power in Congress to create lower
federal courts with potentially broad trial jurisdiction. Federalists, on
the other hand, floated the idea of having state judicial (and other)
officials participate in the enforcement of federal law to minimize the fear
that vast numbers of federal personnel might be needed to carry out the
business of the new national government. But they too were reluctant to
mention the coercion word in connection with their suggestions, lest
Anti-Federalist sensibilities be offended.

The references to the participation of state officials in the
enforcement of federal law are not easy to decipher. Some may reflect
no more than that state officials would be obligated to follow federal law
norms in the performance of their own duties. But other proposals,
chiefly in The Federalist, clearly show that state officials, including state
judicial officials, might be involved in the enforcement of federal law in
a more direct manner. That is the unmistakable upshot of statements by
Alexander Hamilton and James Madison that the federal government
"probab[ly] will make use of" state officials, or that federal tax
collection "will generally be made by [state] officers," or that Article
III business might be decided "with the aid of the state judges" who
would thus act as "auxiliar[ies]" in the enforcement of federal law.
Significantly, however, nothing in these proposals mentioned the prospect
of coercion or even referred to an obligation of state officials to carry out
such functions, and Hamilton made clear elsewhere his uncertainty about

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278. See supra text accompanying notes 47-52.
279. The Federalist No. 36, supra note 19, at 227 (Alexander Hamilton).
280. Id. (No. 45) at 312-13 (James Madison).
281. Id. (No. 81) at 547 (Alexander Hamilton).
282. Id. (No. 27) at 174-75 (Alexander Hamilton). Elsewhere, Madison noted his
expectation that "in the organisation of the judicial power, the officers of the States will
be clothed with the correspondent authority of the Union." Id. (No. 45) at 313 (James
Madison). The force of this statement is not clear. Perhaps it merely recognizes
concurrent jurisdiction. Perhaps it reflects the notion of appointment of state judges as
federal judges. But see supra text accompanying notes 251-52. But it contains no overt
or covert reference to state duties or federal coercion.
the ability of the federal government to insist on the agency of state officials in the administration of federal law. On their face at least, these Federalist suggestions, like the suggestions of their opponents, appear to have been for cooperation, not coercion. As discussed below, that is how they were understood when put into effect, and that is how early generations understood them. But that is not how they have been read lately.

In recent challenges to the view that state participation in the administration of federal law would be largely voluntary, some constitutional scholars have argued that these Federalist suggestions were, in fact, for obligatory participation on the part of state officials. Saikrishna Prakash has argued that, given the possibility that Congress might have the power to constitute state courts as federal courts, state court judges could be coerced into assuming jurisdiction at Congress's direction. His insight that some framers held out the possibility that state courts might actually wear two hats seems accurate as a historical matter, and that very insight helps illuminate the contemporary understanding of the Madisonian Compromise. But it is less clear that the possibility of appointing state courts to be federal courts actually survived the Constitution in its final version. Even assuming it did survive the Constitution, it remains problematic whether it tells us much about the issue of jurisdictional coercion as opposed to cooperation.

Prakash's argument rests heavily on an understanding that the older, Confederation-era practice of appointing state courts to hear certain admiralty trials entailed coercion; he asks us to infer that if a similar appointment practice survived the Constitution, such coercion is still possible. The inference might be a fair one if the premise were correct, but its historical support is spotty. First, it is not clear that state

283. Thus, even though Hamilton assumed that state courts would be capable of handling most cases that arose under federal law (see The Federalist No. 82, supra note 19, at 553-56), he had his doubts about "the right to employ the agency of the State Courts for executing the law of the Union," which he said was "liable to question, and has, in fact, been seriously questioned." See Alexander Hamilton, The Examination No. 6, N.Y. Evening Post, Jan. 2, 1802, reprinted in 25 Hamilton's Papers, supra note 66, at 484. The remarks were made in opposition to the effort to dissolve certain of the federal courts that had been created under the 1801 Judiciary Act. See Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 92 (repealed 1802). In his references in The Federalist No. 27 to possible state officials' participation in the enforcement of federal law, Hamilton was also careful to deny that such arrangements would tend to the destruction of state governments, thus arguably suggesting that the arrangements were voluntary, not obligatory. See The Federalist No. 27, supra note 19, at 175 n.*; see also Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 38 (1825) (Marshall, C.J.).

284. See Prakash, supra note 4, at 1961.

courts were under any duty under the Articles of Confederation to take congressionally assigned jurisdiction. The relevant provisions in the Articles pursuant to which Congress eventually acted said nothing about the possibility of coercing state courts to accept their appointments.\footnote{286} In addition, the statutes by which Congress appointed the state courts to hear these matters were equally silent, both with respect to the state courts' obligation to hear such cases and whether the national government might be able to order them to do so if they refused.\footnote{287} It is true that the Confederation Congress had the "sole and exclusive right and power" to appoint state courts for the trial of piracies and high seas felonies, and that under Article XIII, the states agreed to abide by determinations of Congress.\footnote{288} But this obligation, like everything else in the Articles, was ultimately one that could not be implemented by coercion.\footnote{289} It is, perhaps, theoretically possible that an unenforceable "constitutional" duty under the Confederation might nevertheless have existed, but the point is not free from doubt. Moreover, the existing historical evidence suggests

\footnote{286. See supra note 229 (quoting ARTICLES OF CONFEDERATION art. IX (1777)).}

\footnote{287. See 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 355 (Ordinance of April 5, 1781). The ordinance provides that "the justices of the supreme or superior courts of judicature, and judge of the Court of Admiralty of the several and respective states, or any two or more of them, are hereby constituted and appointed judges for hearing and trying [piracies and high seas felonies]." Id. It is hard to see what language in the statute provides a compulsory sense. See also BOURGUIGNON, supra note 103, at 128 (noting that congressional acts under Articles "gave authority" to the states); GOEBEL, supra note 74, at 173 (indicating that congressional statutes amounted to no more than a delegation of power to the state courts). Prakash offers a single reference for the proposition that the appointment was obligatory on the states. See Prakash, supra note 4, at 1968 (citing ERWIN C. SUREMENT, HISTORY OF THE FEDERAL COURTS 7 (1987)). It is unclear what it is in the single paragraph devoted to Confederation-era admiralty practice in Professor Surrency's book that would justify a conclusion that the states were obligated to take jurisdiction. The only suggestion is the statement that "this [1781] ordinance was amended [in 1783] to require the judge of the [state] Court of Admiralty to be a member of the [federal] court." SUREMENT, supra, at 7. This, of course, merely provided that in order to be a duly "constituted" court, one of the judges had to be a state admiralty judge; it does not say that the states were obligated, as opposed to authorized, to create such courts. Joseph Story, for one, perceived things differently. See 1 STORY, supra note 67, § 250, at 230 (pointing to refusal of state courts to permit appeals or honor appellate judgments as emblematic of Articles of Confederation's nonobligatory nature).

\footnote{288. ARTICLES OF CONFEDERATION arts. IX, XIII (1777).}

\footnote{289. Prakash noted this elsewhere in his article. See Prakash, supra note 4, at 1963 ("Even where the Articles appeared to bestow on the federal government a 'right' or an 'authority,' those rights and authorities were exercised at the sufferance of the states.").}
that the state courts perceived themselves to be under no such duty even during the Confederation.290

Apart from the issue of jurisdictional duties and coercion is the question whether Confederation-style appointment survived the Constitution. As previously discussed, there are substantial reasons to conclude that it did not, even though at the time of the First Judiciary Act some still considered the option viable. Supporting this conclusion is the Constitution's shift away from the Confederation in supplying the federal government with sufficient powers so that it might not have to depend on the states to carry out federal administrative tasks. That shift included the provision for establishing separate federal trial courts, a power that the national government apparently lacked during the Confederation. In short, the federal government was organized as it was so that the prior practice of having to rely on states would not be needed.291 True, not

290. First of all, the states did not all fall in line with the congressional appointment of state courts to hear these admiralty cases. Those that did create courts to handle the business assigned to them followed very uneven schedules in implementing these congressional appointments. See GOEBEL, supra note 74, at 173-74 n.129. South Carolina, for example, did not legislate to create such courts until after the Constitution was ratified (but before the 1789 Act). Id. More importantly, no one seems to have supposed that the states had violated their obligations under the Confederation or that anything could be done about their recalcitrance. In addition, given the vast reserved powers of the states that the Confederation tolerated, it is unlikely that federal coercion would have been consistent with the Articles. Even the one true federal court that existed—the Court of Appeals in Cases of Capture—lacked means of compulsion in enforcing its judgments. See id. at 175. This prompted an attitude of nonacquiescence in some state courts. Id. at 179.

Perhaps the best argument for the existence of an obligation on the part of the state courts to accept their appointments under the Articles is the surmise that, if state courts did not exercise the power invested in them, particular cases might receive no judicial forum at all, since there were no federal trial courts to hear them during the period of Confederation. See Prakash, supra note 4, at 1969-71. From that, Prakash argues that state courts could not abolish their existing "capture" courts, lest congressional power to establish an appellate court be rendered meaningless. Id. at 1969-70. The argument is not unpersuasive, but it is not fundamentally different from the argument from inference today regarding state duties that arise from the possibility that there might be no lower federal courts. The difficulty of the argument is its inability to muster any historical support for its articulation, when all of the evidence we have suggests the absence of an understanding that any such duty existed. Nor does the possibility of a "constitutional" jurisdictional duty in a context in which separate lower federal courts did not (and perhaps could not) exist necessarily have a controlling meaning in a constitutional scheme in which separate federal trial courts could exist. See also infra note 298 and accompanying text (discussing relevance of New Jersey Plan to state court jurisdictional duties).

291. See IREDELL, supra note 268, at 343 (noting the Constitution's "parting with coercive authority over states qua states"); 3 FARRAND'S RECORDS, supra note 47, at 248 (remarks of Charles Pinckney) (Constitution inaugurated regime that could operate directly on individuals rather than indirectly through the states); 2 id. at 9 (remarks of James
having to coerce state court jurisdiction might not necessarily be equivalent to the inability to coerce it. And the elimination of Confederation-style appointment (even assuming it was accompanied with an obligation) would not necessarily negate the possibility of jurisdictional coercion under the Constitution. In light of pre- and post-ratification events and statements regarding the difficulty of "appointment" of state courts as federal courts, however, an inference of jurisdictional coercion in the Constitution from the prior Confederation appointment practice is not easy to draw.

In addition to inferences from Confederation-era practice, Prakash presents an argument for state court jurisdictional obligations developed from statements made by the Constitution's supporters during ratification. In this regard, he is joined by Jefferson Powell in offering a different spin on a number of suggestions from *The Federalist*—suggestions that they argue illustrate an early understanding that Congress would have the ability to coerce various branches of state governments in the enforcement of federal law. To the extent those materials suggest that vast armies of federal officials, especially executive and judicial branch officials, might not be needed to enforce federal law, they provide a historically compelling argument that many in the early Republic contemplated an interesting blurring of lines of authority between the state and federal governments. But these scholars move too quickly from the prospect that the federal government was empowered to seek assistance from, and to rely on, state officials to enforce and administer federal law, to the conclusion that state officials would be compelled to accept such employment. It is certainly possible that a constitutional argument for such coercion can be made today and with greater or lesser ease depending on which branch of state government the federal government is seeking to enlist. But such a possibility was not the necessary or even the likely upshot of these foundation-era proposals.

Suggestions that the federal government might be able to rely on or make use of state officials from various branches, especially judicial officials, were likely put forward for perfectly good reasons having nothing to do with the possibility of coercion. With the arrival of the new Constitution, it might well have been thought that the federal government was disabled from entrusting the administration of federal law to state officials, or that state officials were disabled from carrying it out. It was important therefore to declare that neither the federal government

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Madison) ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands."); 1 id. at 255-56 (remarks of Edmund Randolph) (preferring direct federal legislation to coercion of states as mode of governing).

292. See Powell, supra note 4, at 663-64.
nor the states lacked such a right, and that they could share federal administrative duties. After all, things were going to be different from Confederation times, and the fact that the federal government could exercise certain powers on its own might mean that the states no longer had any role over the same subjects. It is for this very reason that Hamilton would undertake in *The Federalist No. 82* to explain why the state courts would be competent to handle most Article III business and that all their power to do so would not be given over exclusively to the federal government. His focus shows that the debate was over the feared loss of state power, not over their duties—other than that of “support[ing] the Constitution” and following federal norms in the judicial administration of state law. It also explains what Hamilton was getting at when he stated that the national government “must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.”293 The indications from this and other provisions of *The Federalist* that the new national government might be able to forgo hiring large numbers of its own officials and that state courts would be allowed to play an enforcement role would have been welcome news to the enemies of “consolidation.”294 But any argument from the fact that the federal government was “empowered to employ” state officials, to the conclusion that unwilling states or officials would be obligated to assume those administrative tasks (outside of the “coercion” associated with the anticipated possibility of direct review and reversal of state court decisions for legal error), would probably not have been terribly welcome news. As Akhil Amar has noted in a related context: “the authority to ‘raise’ armies no more naturally subsumed a power to conscript soldiers than the

293. *The Federalist* No. 16, *supra* note 19, at 102. Hamilton continued: “[The national government] must . . . possess all the means and have a right to resort to all the methods of executing the powers, with which it is entrusted, that are possessed and exercised by the governments of the particular States.” *Id.* at 103. While it may be possible to read this statement in conjunction with the one in the text as indicating that the federal government can command state officials the way states do, I think another reading is possible—namely, that the federal government ought to be able to hire officials by expending its resources, the same way that state governments do. And, under such a scheme, employment of state officials to do federal tasks might be one of those measures. The fact that it might be “in the power of the general government to employ state officers,” 3 *Elliott’s Debates*, *supra* note 22, at 306 (statement of James Madison at the Virginia Ratifying Convention), ultimately begs the question of whether the federal government may insist on it. See also infra note 295.

authority to 'lay and collect Taxes [and] Duties' and to 'constitute Tribunals inferior to the supreme Court' naturally subsumed power to draft tax collectors, customs officers, judges, and bailiffs.”

Indeed, given that the Anti-Federalists’ real and imagined fears for the loss of state autonomy were easily aroused, the absence of any outcry from them concerning the prospect of jurisdictional (or other) coercion, is itself strong evidence that such a prospect was not part of the perceived message of The Federalist. The foundation-era suggestions to which these scholars allude are therefore quite consistent with a view that the federal government had the right to ask and employ, and that state officials had the power to refuse.

What could suggest the possibility of coercion in these statements is the argument that, without a mechanism for insisting on state involvement, the benefits of fewer federal officials might not be realized, and the enforcement of federal law might not be accomplished without

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295. Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1168 (1991). It might even turn Marbury on its head to suppose that judicial commissions had to be accepted. Cf. U.S. CONST. amend. XIII; Pfander, supra note 9, at 596 & n.173 (“It seems unlikely . . . that the framers would have chosen to compel the state courts to entertain federal claims against their will . . . .”).

296. The generalized complaints about “absorption” of the state judiciaries seem to respect, not the problem of jurisdictional coercion (which was not an Anti-Federalist theme), but the fear that lower federal courts would draw all business away from the state courts. See, e.g., Martin, supra note 51, at 206. Luther Martin objected to the provision for the establishment of lower federal courts, noting that state courts would have been competent to handle most judicial business; he further objected that “to have inferior courts appointed under the authority of Congress in the different states, would eventually absorb and swallow up the State judiciaries . . . .” Id.

297. Prakash also points to The Federalist No. 15, which speaks of the “coercion of the magistracy,” as offering express support of the possibility of jurisdictional coercion of state courts. I believe this is a misreading of the passage. Hamilton was arguing in this essay that for federal law to have supreme force, a penalty must be available for noncompliance. The penalty could come from coercion by force of arms or by the force of the judiciary. “This penalty, whatever it may be, can only be inflicted in two ways; by the agency of the Courts and Ministers of Justice, or by military force; by the coercion of laws[,] coercion of arms.” THE FEDERALIST No. 15, supra note 19, at 95 (Alexander Hamilton). Surely Hamilton was not talking about “coercing the magistracy” any more than he was talking about “coercing arms” (whatever that may mean). Rather he was discussing the possibility that the judiciary could do the coercing, not that they could be coerced. The correct notion is visible in Hamilton’s constitutional plan where he contrasts “force of two kinds. Coercion of laws[,] Coercion of arms.” 1 FARRAND’S RECORDS, supra note 47, at 306 (emphasis in original). William Davie of North Carolina was on Hamilton’s wavelength and showed that the dichotomy was part of the Federalists’ rhetorical stock-in-trade when he said, “I know but two ways in which the laws can be executed by any government. . . . The first mode is coercion by military force, and the second is coercion through the judiciary.” 4 ELLIOT’S DEBATES, supra note 22, at 155 (emphasis added).
having to create federal instrumentalities. A plausible textual and structural argument can therefore be made from the Supremacy Clause and its framing supporting the notion of state court judicial duties in the administration of federal law. The clause binds all officials to support the Constitution and specifically enjoins state judges to conform their decisionmaking to federal law. In the absence of federal instrumentalities, especially judicial ones, supremacy might have been difficult to enforce if state courts could refuse to adjudicate federal judicial business. But as this Article has tried to show, that is precisely the line of inferential, Supremacy Clause reasoning that does not seem to have commended itself to the generation which struck these arrangements as much as it has occupied our own.

Such reasoning arguably might have surfaced if there had been no provision for inferior federal tribunals at all, as had been originally contemplated by the New Jersey Plan from which the Supremacy Clause was eventually borrowed. 298 Yet whatever its origin, the clause was

298. The clause was part of Paterson's New Jersey Plan, which had developed the idea of a single national judicial tribunal. See 1 FARRAND'S RECORDS, supra note 47, at 245. It was picked up in the Convention around the time that the legislative negative of state legislation was defeated. See 2 id. at 22. Prakash argues that Rutledge, who moved on the day of the Compromise to eliminate mention of lower federal courts, must have "implicitly pled[ged]" that the state courts would remain open if his proposal had succeeded. See Prakash, supra note 4, at 2018, 2020-21. On the whole, I find the supposition credible, although it takes some guesswork. Nevertheless, I believe that it leads to a different conclusion than the one Prakash has reached. Luther Martin, who rescued the Supremacy Clause from the defeated New Jersey Plan and who introduced it when the proposal for a national legislative negative on state laws was voted down, acknowledged that the Supremacy Clause meant something different prior to the allowance of lower federal courts. See Letters of Luther Martin (IV), supra note 202, at 360-62. This may well suggest that the Supremacy Clause might have had a more jurisdictionally coercive force as initially designed (i.e., in a constitutional scheme lacking inferior federal courts). Yet it also shows that Martin recognized that the presence of congressional power to create lower federal courts had changed the force of the clause. That fact, plus the fact that Rutledge's position (and Paterson's Plan) respecting inferior federal courts was eventually defeated, strongly suggests that any jurisdictionally coercive role for the Supremacy Clause was lost.

There are other suggestions that arguably support jurisdictional coercion. Roger Sherman, who, on the day of the Compromise, had voted in favor of Rutledge's motion to eliminate all reference to lower federal courts in the Constitution, later proposed (probably in aid of the New Jersey Plan—see 3 FARRAND'S RECORDS, supra note 47, at 615), that federal laws "ought . . . to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required." Id. at 616. But Sherman's proposal seems to have been made as part of a constitutional proposal that lacked even the possibility of lower federal courts. The best that can be said of such proposals is what Robert N. Clinton called them: "the views of the losers in the debate over the formation of the judicial article." Clinton, supra note 40, at 774 n.111.
introduced at a point when the Constitution had already made provision for inferior federal courts, even if it did not automatically require Congress to create them. Moreover, in nearly all of the relevant drafts, the language of the clause mentioned how it would supply the states with a controlling rule "in their decisions," but did not purport to speak to jurisdictional duties in the first instance. It is therefore extremely difficult to argue from the debatable assumption that state courts would be under an obligation to take all Article III judicial business in the first instance—as a quid pro quo for the Constitution's noninclusion of any reference to lower federal courts—to the conclusion that such a duty still existed when the second half of that bargain was decisively rejected (in the Madisonian Compromise, no less).

Finally, the Supremacy Clause itself was offered as a countermeasure to eventually rejected proposals that would have insisted on even more national government intervention and control of state officials, such as the congressional negative of state legislation, to police their conformity with federal law and the Constitution. The rejection of such proposals, together with the provision for establishing distinctly federal instrumentalities, suggests that the Constitution's eventual plan was less inclined to rely on coercing state judicial officials to get federal business done in the first place, than on other possible schemes either to have federal judicial officials do it themselves, or to enlist the cooperation of state officials when they were so inclined. State involvement in this area seems, therefore, to have generally been treated as a benefit inuring to the people of each state, and was left to them to accept or reject.299 More tellingly, if the possibility of jurisdictional coercion was so likely, it seems odd—as discussed below—that almost no trace of such sentiments remained, but only their opposite, among those who implemented the Constitution in its early years.

Edward Carrington also seems to have supposed that the Supremacy Clause would impose jurisdictional duties on state courts if Congress chose not to create courts for any other purpose than admiralty. See Letter from Edward Carrington to James Madison, supra note 233:

As to the amenability for the federal duties in the State Judges, if the constitution fixes on them these duties, they must of course be responsible to the same authority for a faithful discharge of them in such a way as the Govt. shall by Law direct. . . . If the duties vest as I suggest, no act of the State, which does not annihilate its judiciary establishment, can affect them.

Id. at 323.

2. EARLY JUDICIAL UNDERSTANDING

Early and consistent judicial practice undermines any suggestion that the Constitution was thought to impose jurisdictional duties on state courts. Although not a household name, Supreme Court Justice Smith Thompson struck a modern chord early on in the antebellum period when he wrote as a circuit justice that state courts could not treat federal law as if it emanated from a foreign sovereign, nor consider themselves bound by principles no stronger than comity when it came to the enforcement of federal law. But this particular message of the Supremacy Clause did not carry over to jurisdictional duties, even when Congress had endeavored to confer such jurisdiction on the state courts. The reason that such duties were lacking, Thompson said, was precisely because state courts were not federal courts.

[I]t seems to be pretty generally admitted that the state courts are not bound to exercise jurisdiction although given [by Congress], but it was optional with them to do it or not. . . . Congress cannot compel a state court to entertain jurisdiction in any case; they are not inferior courts in the sense of the constitution; they are not ordained by Congress. State courts are left to consult their own duty from their own state authority and organization. 300

These “pretty generally admitted” notions about compelling state courts to assume jurisdiction over particular cases typically led commentators and judges to ask instead whether the federal courts were open rather than concluding that the state courts must be. For example, Justice Brokholst Livingston, a Jeffersonian appointee to the High Court, declined on circuit to entertain a particular patent suit for injunctive relief because he concluded that, at that time, Congress had not given the federal courts jurisdiction over equitable actions involving patent infringement, much less made it exclusive. 301 In so doing, Livingston acknowledged that lower federal courts were indebted to Congress for their creation and had no subject matter jurisdiction unless Congress conferred it. Yet he also doubted that New York state courts would


301. See Livingston v. Van Ingen, 15 F. Cas. 697 (C.C.S.D.N.Y. 1811) (No. 8,420) (Livingston, Circuit Justice). The suit was a bill for quiet enjoyment of federal patents to exclusive navigation rights. As the Court explained it, the parties were not diverse, and federal jurisdiction extended only over patent infringement suits for damages but not over suits seeking equitable relief.
entertain the claim when there had been strong indications from the state's highest court that such cases could not be litigated in the state courts either. If they could not, Livingston observed that there might be a troublesome gap in jurisdiction over Article III matters. The problem, however, did not lead him to the conclusion that the state courts would have to be open; instead, he assumed that they might legitimately refuse to hear the case. The possibility that state courts might be closed merely bore on the statutory question of whether the federal courts should be construed as having been opened by Congress.

Writing for the Court in Osborn v. Bank of the United States, 302 Chief Justice Marshall provided a similar recognition of state court authority to refuse to entertain Article III business. In developing his argument why Congress could constitutionally vest federal trial jurisdiction over suits brought by the Bank, Marshall seemed to suggest at one point that the national government must be capable of investing the lower federal courts with original jurisdiction over any civil suit that could come within the High Court's appellate jurisdiction. Suits brought by the Bank of the United States, he said, could be heard in the Supreme Court on direct review in the proper case. But Congress could not be forced to rely on the state courts, concluded Marshall, because they were "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States." 303 Should they be closed, and if Congress could not vest lower federal courts with jurisdiction over such claims, the appellate power of the Supreme Court would be defeated. For Marshall, as for others, the constitutional difficulty associated with the possible absence of lower federal court jurisdiction to entertain a piece of Article III business led to a conclusion that lower federal courts ought to be construed as open, rather than to a conclusion that state courts had to be. 304 His views in Osborn were consistent with doubts that Marshall elsewhere expressed as Chief Justice about the ability of the federal government to

303. Id. at 821.
304. This was consistent with Marshall's earlier observation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that the federal government would not have to be dependent on the states.

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends."

Id. at 424 (emphasis added).
“compel” the agency of state officers even if it had the power to “permit” such use.\footnote{Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 39-40 (1825).}

A final, and perhaps extreme, example of the Court’s unwillingness to conclude that state judicial officials could be compelled to enforce federal law was provided in 

\textit{Prigg v. Pennsylvania}.\footnote{Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302 (repealed 1850).} In its 1793 Fugitive Slave Act,\footnote{See U.S. CONST. art. IV, § 2, cl. 3. The Fugitive Slave Clause provided: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.} Congress sought to enable state officials to dispose of claims of recapture at the behest of slave owners. In state court, Prigg had been tried and convicted under state law of abducting a runaway slave whom he claimed to own. The Supreme Court reversed, concluding that Pennsylvania’s statutes were unenforceable. An anti-slavery state, Pennsylvania had authorized its judges to hear claims for recapture, and it made self-help recapture a crime, all in conformity, it argued, with the federal statute and the Constitution.\footnote{Id. at 39-40. Marshall was talking here not of judicial, but rather executive officials.} While the opinion striking down Pennsylvania’s recapture and kidnapping laws was based on an amalgam of statutory and constitutional preemption grounds, the Court observed that state enforcement of recapture rights might be inadequate to the task at a more general level: “since every state is perfectly competent, and has the exclusive right, . . . to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance,”\footnote{Id. at 616. Chief Justice Taney disagreed with this point, arguing that state courts not only could, but that “it is enjoined upon them, as a duty” to give remedies to the owner} there was no guarantee that state judicial officials could be relied on to exercise any of the authority that Congress might properly choose to give them. Elsewhere the Court was more direct in its insistence that “the States cannot . . . be compelled to enforce”\footnote{Prigg, 41 U.S. (16 Pet.) at 619.} the

\textit{Id.} at 615. Justice Story observed:

On the contrary . . . the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.

\textit{Id.} at 616. Chief Justice Taney disagreed with this point, arguing that state courts not only could, but that “it is enjoined upon them, as a duty” to give remedies to the owner
provisions of the Fugitive Slave Clause by creating judicial structures for its enforcement.\footnote{311} It was precisely because of the federal government's inability to count on states to act as its agents in the enforcement of federal law that Congress felt obliged, after Prigg, to enact another version of the fugitive slave statute in which enforcement resided exclusively in the hands of federal officials.\footnote{312}

Prigg's author was Joseph Story, and it is perhaps predictable that his was the most powerful judicial voice on the question of state court jurisdictional duties. Previously, in Houston v. Moore,\footnote{313} Story had gone out of his way to observe that Congress could not compel the states to convene judicial proceedings to dispose of an infraction of federal laws relating to a call-up of the militia. He did so to buttress his argument in that case that federal courts alone would be able to hear such disputes. Story expressly dismissed the Article I argument that it could be "necessary and proper" to the enforcement of federal law for Congress to compel states to entertain such disputes, or even to delegate such power to them, noting that the nation could set up its own tribunals and that it "ha[d] no necessity to resort to other tribunals to enforce its rights."\footnote{314} Here too, when push came to shove, the necessity of creating lower federal tribunals (a point he had raised in Martin v. Hunter's Lessee) was a less constitutionally difficult path to travel than compelling states to hear unwanted Article III disputes.\footnote{315} If Story parted company with his

who seeks recapture. \textit{Id.} at 627. On another day Taney would deny that the Constitution's Extradition Clause, which he also read as imposing a duty on state governors to "deliver up" fugitives from justice, was judicially enforceable. \textit{See} Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

\footnote{311} "It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution." \textit{Prigg}, 41 U.S. (16 Pet.) at 541 (syllabus).

\footnote{312} \textit{See} Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 463-65 (repealed 1862).

\footnote{313} 18 U.S. (5 Wheat.) 1 (1820); \textit{see also supra} text accompanying notes 132-44.

\footnote{314} \textit{Houston}, 18 U.S. (5 Wheat.) at 67 (Story, J., dissenting).

\footnote{315} "Such an authority is nowhere confided to [Congress] by the constitution. Its power is limited to the few cases already specified, and these, most assuredly, do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers." \textit{Id.} at 67. Since the states did not have any power to enforce federal criminal law in the first place, Story concluded that such power could not be delegated to them. \textit{Id.} at 69. Of course, coming as it did on the heels of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Story's necessary-and-proper analysis in \textit{Houston} might be faulted as adhering rather too closely to the requirement—rejected in \textit{McCulloch}—that Congress make a showing of something close to absolute necessity to justify nonexpressly authorized means to achieve otherwise legitimate constitutional ends. Nevertheless, in \textit{McCulloch}, Chief Justice Marshall had suggested that the federal government would not have to rely on the "means" of state governments to achieve its legitimate ends, and could
brethren, it was only over the issue whether Congress was obligated to give federal courts jurisdiction of Article III business as an original matter where state courts refused it. Those like Justice Livingston seemed willing to concede that a jurisdictional gap might exist; Story was more troubled. But that state courts might refuse such jurisdiction, and that Congress could do nothing to compel them to take it, was a shared premise for both.316

Story provided his last and fullest discussion of the reasons for Congress’s inability to force the exercise of unwanted jurisdiction almost a quarter of a century after Martin (and long after all of the evidence on the Compromise was in). In it, he offered a more functional and less formal analysis as to why states were under no obligation to assume unwanted jurisdictional duties:

The states, in providing their own judicial tribunals have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure. They may refuse to allow suits to be brought there “arising under the laws of the United States” for many just reasons; first that congress are bound to provide such tribunals for themselves; secondly, that state courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice, to allow their courts to be crowded with suits arising under the laws of the United States. . . . A due regard of a state to its own rights, and its duties to its own citizens, might require [a state prohibiting its own courts from taking jurisdiction], in order to prevent oppressive delays, and obstructions in the actual administration of home justice, and, at all events, might justify it in preferring such claims to those, belonging appropriately to the national jurisdiction.317

rely on its means “alone.” Id. at 424. For a possible vindication of Story’s perspective on the clause, focusing on “proper” rather than “necessary,” see Lawson & Granger, supra note 4. And for the argument that Marshall may actually have joined Story’s Houston dissent, see WHITE, supra note 138, at 537.

316. Not surprisingly, Story took a similar approach in his constitutional treatise. See 3 STORY, supra note 67, § 1668, at 537 (observing that there was no “compulsory power over [state] courts to perform such functions”).

317. Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice). Story added a fourth reason based on the “novel” and “complicated” system of bankruptcy that was at issue in Mitchell. Id.
3. VIEWS OFF THE HIGH COURT

a. State Courts

State courts not only shared these sentiments, but when the issue arose, they were adamant that they could not be coerced into exercising unwanted judicial power. To the extent that a particular state court already believed that some part of Article III jurisdiction was off-limits to it (either as a matter of state law or because of the perceived preemptive force of the Constitution), the refusal to be coerced into hearing such matters followed *a fortiori*. The pre-Martin opinion of the Virginia court in *Jackson v. Rose*\(^3\) was typical. While admitting that the federal Constitution and laws passed pursuant to it would, under the Supremacy Clause, necessarily govern their decision in a given case over which they had jurisdiction, the Virginia judges recoiled at the idea "that Congress can compel or authorize, the State Courts" to entertain federal judicial business. The Virginia court thus recognized that the Supremacy Clause contained two potential components—one requiring adherence to federal norms in cases that were heard by the state courts, and the other requiring them to assume unwanted jurisdiction. While their objection to the latter possibility was grounded in some extreme states'-rights rhetoric, the Virginia judges also offered the more familiar objection that because state officials lacked the trappings of Article III judges, including life tenure, they could be under no obligation to carry out or exercise jurisdictional duties that were not theirs under state law, even if the Supremacy Clause imposed on them the requirement to conform to federal law in their decisionmaking. In short, they drew a distinction between oaths of allegiance, which the Supremacy Clause required, and oaths of office, which it did not. Although the Virginia judges were on a collision course with the Supreme Court regarding their claim to be independent and final interpreters of the federal laws they were obliged to consider in cases that they heard—a position that was dispatched by *Martin*—the claim to judicial jurisdictional autonomy never sparked much controversy on the Court.\(^3\)\(^1\)

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318. 4 Va. (2 Va. Cas.) 34 (1815); *see also supra* text accompanying notes 147-48.

319. Despite statements such as these, Jefferson Powell has argued that the theory of federalism developed by Story in *Martin* effectively destroyed the idea that state courts, or other organs of state government, could not be coercively enlisted in the enforcement of federal law and the Constitution. *See Powell, supra* note 4, at 679-80; *see also Powell*, *supra* note 81, at 309 (viewing *Martin* as one-sidedly nationalistic). Among the many things that *Martin* did was to reject the argument that state courts, as organs of "independent" sovereigns, could not be subject to the control of the federal courts through
b. Congress’s Understanding

As noted above, Congress had been responsible for enacting a number of measures that enabled state courts to entertain various enforcement actions brought by the United States, often relating to revenue collection. This practice is thought to demonstrate an understanding that the national government could enlist state and local

reversal of their decisions. In the process of upholding § 25 of the 1789 Judiciary Act, Justice Story acknowledged that as to a number of matters, the states had surrendered their sovereignty to the national government in the plan of the Convention. From that and similar observations, Powell fairly draws the conclusion that Martin was more than a case about judicial review, but was instead a broader vindication of federal control over state action.

Unquestionably, in holding that state court decisions on questions of federal law would not have the independence the State of Virginia contended for, Martin was a milestone in the forging of a nationalist jurisprudence. Martin vindicated in no uncertain terms the power of the federal government and the Supremacy Clause’s demand that states follow federal norms as an incident to deciding cases properly before them. But Martin also embraced fully and explicitly the suggestion of a constitutional incapacity of the state courts to hear large chunks of Article III business, and assumed the incapacity of Congress to coerce states in the exercise of this or any other Article III business. The fact that Martin rejected one extreme argument of state sovereignty hardly establishes that it rejected all related arguments, or that there was no room for constitutionally based structural autonomy arguments on behalf of the states. Indeed, Justice Story simultaneously accepted one consequence of the Supremacy Clause—that federal law could supply a rule that would bind state judiciaries—while implicitly rejecting another—that state courts could be given federal jurisdictional duties.

In addition, although Martin was a broadly nationalist decision, it was, in important ways, especially about judicial review, the relationship between appellate and lower courts, and more particularly, about the relationship between a state court and a (supreme) federal court. That, I think, is brought out by the majority’s decision not to command the Virginia state judges to enforce the judgment in Martin—a decision that had been precipitated by the Virginia High Court’s earlier refusal to abide by the Supreme Court’s initial mandate in the case. See GUNther, supra note 45, at 30-31. By entering judgment on its own this time, the Court avoided the direct coercion of Virginia’s High Court. While it is unclear whether Justice Story felt no other course was constitutionally available to him, Justice Johnson, in concurrence, seemed to assume that the Court was disabled from “issu[ing] compulsory process to the state courts.” See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 362, 366 (1816). Johnson, who was also distressed by the “truly alarming latitude of judicial power” for which Virginia had contended, id. at 364, observed that if the state high court did not voluntarily carry the Supreme Court’s decision into effect, the Supreme Court itself would then be obligated to execute the judgment, lest the Court “assert[] any compulsory control over the state tribunals.” Id. at 362. Although the particular concern of issuing compulsory process to a state court may now be less troubling, see Dean v. Hieckman, 358 U.S. 57 (1958); HART & WECHSLER, supra note 7, at 518-20, it reveals the difficulty of reading Martin as an unqualified manifesto for federal control over the instrumentalities of state government.

See supra text accompanying notes 124-28.
officials in the administration of federal judicial business. The members of Congress responsible for these statutes, however, also were careful to point out the distinction between the kinds of duties arguably imposed by the Supremacy Clause. While in their deliberations they regularly affirmed the duty of state courts to obey the substantive commands of federal law in disputes otherwise properly before them, they simultaneously denied the duty of state courts to hear federal claims.Expressions of doubt were often reinforced by statements that state courts would not be authorized to exercise a particular power even if Congress were to give it to them, unless the state courts were able to exercise such a power as a matter of state law. Capturing exactly the sense of federal supremacy that appeared to motivate Congress, Representative Fisher Ames remarked during the passage of the First Judiciary Act: “The law of the United States is a rule to them, but no authority for them. It controlled their decisions, but could not enlarge their powers.” This sense of supremacy is also reflected in the understanding of William Paterson—the father of the Supremacy

321. The statement of Representative Abraham Nott, made during the passage of the 1801 Judiciary Act, precisely captures the notion:

When . . . Congress passed a law that no instrument of writing for the payment of money should be received in any state court as evidence of such debt, unless the same was upon stamped paper, the Judges were bound to obey it; but if they [Congress] should pass a law giving power to any County court within the United States, to try persons guilty of treason against the United States, that law would not be obligatory upon them; nevertheless, it would be an act of Congress.

10 ANNALS OF CONG. 895 (1801). The comments were made in response to a provision of the bill to give the state courts jurisdiction over certain federal crimes and civil enforcement actions. Nott believed that the Constitution was imperative not only with respect to the establishment of the Supreme Court but with respect to inferior federal courts as well. Id. at 893. But see Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132 (“requir[ing]” local justices of the peace to resolve certain shipmaster-seamen disputes when there was no federal court available). The provision is discussed in David P. Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789-91, 61 U. CHI. L. REV. 775, 792 & n.93 (1994). Currie provides other examples of what he refers to as the First Congress’s “co-opting” of state officials to enforce federal law, but none of the other examples seems to bear much of a coercive, as opposed to permissive, flavor. See id. at 820, 824-25 & n.294.

322. See, e.g., 1 ANNALS OF CONG., supra note 69, at 808 (remarks of Rep. Ames) (doubting whether “Congress is authorized to require the servants of the States to serve us”).

323. Id.; see also 10 ANNALS OF CONG. 892 (1801) (remarks of Rep. Bird) (“Some . . . seemed to think that, as soon as Congress pass a particular law, there exists a right and a duty in the State courts to execute it. But our own practice destroys this idea.”)

324. 1 ANNALS OF CONG., supra note 69, at 808 (remarks of Rep. Ames).
The Madisonian Compromise

Clause—that the oath taken by state judges was one of “Allegiance[,] and not an Oath of Office,” and that the national government “[c]annot compel them to act—or to become our Officers.”

These sentiments were shared by opponents and proponents of federal court jurisdiction alike and they appeared to apply to civil as well as penal legislation. Those who opposed the creation of lower federal courts with broad subject matter jurisdiction and who considered state courts perfectly competent to handle the bulk of Article III’s jurisdiction, observed that the system of lower federal courts was not “necessary unless [the state courts] will not execute that power.” Such statements are doubly significant because they suggest both that state courts might refuse to entertain Article III business (even in cases when Congress had expressly “given” it to them), and that the consequences of refusal would be a “necessity” (political or otherwise) for Congress to supply lower federal courts with the needed jurisdiction. Those who argued for Congress’s vesting of jurisdiction in the state courts over lawsuits for federal statutory penalties typically explained that there ought to be little objection from the states since such suits would have made up part of the state courts’ pre-existing jurisdiction, at least to the extent that they were, at bottom, civil actions at common law. Similar sentiments were voiced during debates over the short-lived Judiciary Act of 1801. When it was proposed that Congress give the state courts

325. Paterson’s Notes, supra note 1, at 477. Given Paterson’s relationship to the clause, his views provide especially compelling evidence of contemporary understandings on the issue of state court duties.

326. But see Note, supra note 5, at 1554. Relying on Warren, supra note 74, at 70 & n.49, the Note’s author asserts: “the prevailing view was that there was no constitutional bar to the imposition upon the states of obligatory concurrent jurisdiction over all federal causes of action . . . .” Note, supra note 5, at 1552.

327. 1 ANNALS OF CONG., supra note 69, at 811 (remarks of Rep. Stone). Representative Stone believed that the state courts were capable of exercising admiralty jurisdiction, although he noted that many states lacked such courts. Stone further objected to Congress’s acting “on the principle that the State courts are not able or willing to do their duty.” Id. Given that Stone believed that federal courts would be necessary if the state courts did not execute their power to hear admiralty cases, the “duty” of which Stone speaks seems to be moral, at best. Yet Stone was one of the comparative few during the debates over the first judiciary statute who noted that the establishment of lower federal courts was “not commanded by the Constitution.” Id. at 810. The reference to “necessity” also echoes the Committee of Detail’s version that employed a concept of necessity in connection with the creation of lower federal courts. See supra text at notes 204-10.

328. See 10 ANNALS OF CONG. 896 (1801) (remarks of Rep. Bayard). Bayard argued in response to objections to a proposal giving the state courts jurisdiction over civil suits brought by the United States for debts arising under its contracts with individuals, that it was “known that their jurisdiction extended over all actions for debt.” Id.
concurrent jurisdiction over civil and criminal enforcement actions brought by the United States to recover taxes, it was objected that there was "no way of compelling" state courts to perform this duty. Those in favor of the proposal, despite their expansive views of state court power to hear such claims, agreed: "It is true that we cannot enforce on the State courts, as a matter of duty, a performance of the acts we confide to them," but, they said, there was "no cause to complain" about it "until they refuse to exercise [the jurisdiction]" that Congress had given them.

c. The Treatise Tradition

Chancellor Kent summed up the received wisdom of his generation with respect to these statutes: "We have seen a very clear intimation given by the Judges of the Supreme Court, that the state courts were not bound, in consequence of any act of Congress, to assume and exercise jurisdiction in such cases. It was merely permitted to them to do so, so far as was compatible with their state obligations." For him, as for others, the model was one of jurisdictional noncoercion, based in part on the limits of state power and in part on the fact that state courts were not ordained and established by the Constitution. He acknowledged that state courts "do voluntarily entertain jurisdiction" of Article III business and that they are subject to the appellate jurisdiction of the federal courts when they do. But the Supremacy Clause bound them only to this

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329. See id. at 891 (remarks of Rep. Dennis). Dennis also referred to the hardship in "obliging [local] courts and juries . . . to perform Federal duties." Id.

330. Id. at 892 (remarks of Rep. Harper) The repeal of the 1801 Judiciary Act just the next year occasioned a good deal of discussion about the power of Congress to disestablish certain lower federal courts that the 1801 statute had created, and to eliminate the Article III judges that went with them. See Act of Feb. 13, 1801, ch. 4, §11, 2 Stat. 92, repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. But in that discussion, see 11 ANNALS OF CONG. 27-41, 46-145 (1802), although replete with statements that federal courts were legislative creatures and subject to disestablishment, there was no discernible discussion about the possibility of compelling state courts to take federal jurisdiction.

331. 1 KENT, supra note 67, at 375.

332. Chancellor Kent stated:

The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case. It only permits state courts which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; and they do not become inferior courts in the sense of the constitution, because they are not ordained by congress. The state courts are left to consult their own duty from their own state authority and organization . . . .

Id. at 377.

333. Id.
extent. While Kent was perhaps the most eloquent within the genre, he only said what everyone else in the legal community was saying.334

d. A Loose Canon: The Impossibility of "Conferring" Jurisdiction

Related to the understanding that state courts could not be coerced to entertain suits arising out of federal law was the curious but ubiquitous suggestion that "Congress cannot confer jurisdiction" on the state courts over Article III subject matter.335 Even Justice Washington's opinion

334. See also SERGEANT, supra note 84, at 268-69 (noting that state courts "may" take cognizance of federal judicial business and that "Congress cannot confer jurisdiction upon any Courts but such as exist under the Constitution and laws of the United States"); 3 STORY, supra note 67, § 1749, at 623. William Rawle expressed the view that "[t]here [was] nothing in the Constitution to restrain" the state courts from hearing "debts, or damages" claims brought by the United States, "nor to justify a refusal on the part of the state court to take cognizance of them." RAWLE, supra note 83, at 203; see also id. ("[State courts] can no more withhold justice from the United States than from the meanest individual"). His understanding, however, is qualified by state court jurisdictional limitations and notions of jurisdictional choice.

The state tribunals are no part of the government of the United States. . . . But it is not inconsistent with this principle that the United States may, whenever it is found expedient, elect to make use of a state tribunal to the same extent as any foreign power may, if it thinks proper to institute suits in the courts of other countries, which is in civil cases only.

Id. at 200 (emphasis added). Rawle, therefore, seems to foreshadow the eventual understanding expressed by the Supreme Court that there may be limitations on the autonomy of state courts discriminatorily to refuse jurisdiction that is otherwise theirs to exercise. See infra part III.C.

335. See, e.g., Houston v. Moore, 18 U.S. (5 Wheat.) 1, 27 (1820) (Washington, J.); id. at 66-67 (Story, J., dissenting); Huber v. Reily, 53 Pa. 112, 118 (1866) ("[t]he Constitution to confer upon such a tribunal, which is exclusively of state creation, jurisdiction over offences against the United States."); State v. Tutt, 18 S.C.L. (2 Bail.) 44, 48 (1830) ("It is certainly true, that the General Government cannot confer a jurisdiction on the States where it was not possessed before."); Jackson v. Rose, 4 Va. (2 Va. Cas.) 34 (1815); see also 1 KENT, supra note 67, at 402; SERGEANT, supra note 84, at 268-69; 3 STORY, supra note 67, § 1749, at 622-23. Not all writers fell in line on this question, however. St. George Tucker seemed to think that of the various categories of constitutionally exclusive jurisdiction that he outlined, see supra note 82, cases in which the United States was a party, and federal criminal prosecutions—which he included as constitutionally exclusive (see id.)—could nevertheless be "vested" by Congress in the state courts. 1 TUCKER'S BLACKSTONE, supra note 80, at 181-82. In his treatise, Story criticized The Federalist No. 81 to the extent that it "seems faintly to contend, that congress might vest the jurisdiction in the state courts." See 3 STORY, supra note 67, § 1749, at 622 n.3; see also supra note 245.

When someone like Story stated that "[C]ongress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself," 3 STORY, supra note 67, § 1749, at 623, he was not suggesting that a case coming under one of the Article III heads could only be heard in a federal court. That indeed would be
in *Houston*, which would have allowed state courts to prosecute for violations of federal criminal law, denied that the particular power of the state courts came from congressional "conferral" of jurisdiction; conferral, he said, was something that Congress could not do.\(^3\)

Out of context, such statements might be read as suggesting that state courts were disabled from hearing any cases or controversies that were within the federal judicial power—a suggestion that would be clearly out of tune with the general understanding that Article III imposed no such all-encompassing barrier. But it is apparent that the statement carried a different meaning, and one that importantly affirmed state court power to hear most matters falling within Article III, while simultaneously rejecting any duty to do so. The statement meant simply that state court jurisdiction over Article III matters was exercised as a consequence of state grants of jurisdiction to their own courts, rather than as the result of federal enactment (or even the Constitution). The notion that state law, not federal law, conferred state court jurisdiction over Article III matters harked back to the sentiments of *The Federalist* that a state court’s jurisdiction could attach to congressionally created claims for relief without any jurisdictional say-so from Congress because of its "pre-existing" power. Indeed, it was widely assumed that when the state courts heard cases and controversies included in Article III, they were not exercising Article III judicial power at all, but only the power that had been granted to them as a matter of state law. The notion also parallels the intriguing suggestion of Chief Justice Marshall that congressionally created non-Article III tribunals could hear certain cases that fell within Article III; but because such legislative courts were "incapable of inconsistent with his own views that concurrent jurisdiction is the norm, and is available in many areas. Rather, he was articulating what the late Paul Bator, in a slightly different context, referred to as the "theological" perspective of Article III—namely that non-Article III tribunals are incapable of receiving the federal judicial power, and therefore do not exercise it, even when they hear matters that come within Article III. See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 240-43 (1990). Thus, simply allowing state courts to exercise concurrent jurisdiction was not thought to entail vesting the state courts with federal judicial power. Rather, it was understood that when state courts act on matters within a particular head of Article III, the state courts are exercising their own jurisdiction, and no one else’s. Cf. Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) (arguing, consistent with the older tradition, that Congress cannot confer jurisdiction on the state courts).

\(^{336}\) *Houston*, 18 U.S. (5 Wheat.) at 27 (Washington, J.) In such a case, said Washington, "the concurrent jurisdiction of the state courts was . . . not by way of grant from the national government . . . ." Id. at 28.
receiving" the federal judicial power, they (like state courts) did not exercise such power even when they heard such cases.337

B. Reconstruction, Change, and Continuity

By the end of the antebellum era, the story of state court refusals of unwanted jurisdiction had become a familiar one. The story, however, was easily harmonized with the many early congressional expressions of state-federal cooperation and their initial voluntary implementation. The Court conceded that there might have once been a Golden Age of cooperation when state and federal lines of authority were blurred and when state courts were rather more willing to do what they later refused to do.338 But if there had been a shift in thinking during the early antebellum period that led state courts to rethink their roles in the administration of federal law, it was not a shift concerning what duties might be imposed on them by the federal government. Instead, it was a shift in thinking about the limits of state court judicial power and about the desirability of continuing to exercise the jurisdiction they had once exercised without complaint.

337. See American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828); see also supra note 335 (discussing Paul Bator's characterization of Canter's perspective as "theological").

338. As the Court put it:

It is true that in the early days of the government, congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the general government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws . . . . And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them as State courts; and in other States, doubts appear to have arisen as to the power of the [state] courts . . . . to inflict these penalties and forfeitures for offenses against the general government, unless especially authorized to do so by the State.

Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108-09 (1861); cf. United States v. Jones, 109 U.S. 513, 519 (1883) ("[F]rom the time of its establishment [the United States] has been in the habit of using, with the consent of the States, their officers, tribunals and institutions as its agents.")
1. CLAFLIN AND STATE COURT DUTIES

These well-entrenched sentiments of state court independence continued to be reaffirmed after Reconstruction, even as the relationship between the state and federal governments was undergoing fundamental change. In *Claflin v. Houseman*, where the Court made its broad declaration of state court power to entertain claims arising under federal law, the Court indicated explicitly that state court power to entertain such claims was limited by state law. The Court noted that under the Supremacy Clause the state courts ordinarily had a duty to comply with the substance of federal law, and that neither federal law nor the federal judiciary could be considered "foreign" in an international, or conflict-of-laws sense. This view was not especially new (although, before the Civil War and even thereafter, state courts sometimes acted otherwise). But on nearly a half-dozen occasions, the *Claflin* Court took pains to note that the concurrent jurisdiction of which it spoke only existed "whenever, by their own constitution, [the state courts] are competent to take it." Similar contemporaneous statements from the Supreme Court respecting the "competence" of state courts, as well as their "obligation to guard, enforce, and protect every right granted or secured by the Constitution," were also qualified by the equally

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339. 93 U.S. 130 (1876).
340. Id. at 137.
341. Id. at 136. For example, the *Claflin* Court noted that the fact that the state and federal "sovereignties are distinct" "is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied." Id. at 137. Elsewhere the Court remarked, "Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction." Id. at 136. The Court also referred to concurrent jurisdiction as existing in state courts "competent to decide rights of the like character and class," id. at 137, and it observed that "[state] courts might exercise jurisdiction on cases authorized by the laws of the State . . . ." Id. at 141. Finally, referring to the assignee in bankruptcy before it, the Court concluded that the assignee "had authority to bring a suit in the State courts, whenever those courts were invested with appropriate jurisdiction, suited to the nature of the case." Id. at 143. Nothing in *Claflin*, at least, appears to foreshadow the modern argument that if the state court is one of general jurisdiction, then any refusal to hear Article III business is tantamount to discrimination.
342. Robb v. Connolly, 111 U.S. 624, 637 (1884). In *Robb*, the Court stated that "[u]pon the State courts, equally with the [federal courts], rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . ." Id. *Robb* was a state court habeas case in which a question of federal law had arisen—an issue the Supreme Court found the state court was "competent" to hear. *Robb* is the obligatory citation for the proposition that not only are state courts jurisdictionally competent to handle questions of federal law, but that there exists a kind of "parity" between state and
powerful message that the duty spoken of did not impose a requirement that state courts supply a forum or particular jurisdiction. Indeed, despite the decision's strong affirmance of state court power over federal claims, *Claflin* repeated the old maxim that Congress could not "confer jurisdiction upon the State courts." That *Claflin* did not perceive itself as rocking the boat too violently is also suggested by its invocation of the customary landmarks in the area, including the separate-sovereignty rhetoric of *Abelman v. Booth*, as well as Kent's and Story's discussions of state court jurisdictional powers. More tellingly, the Supreme Court's own reading of *Claflin* confirmed an understanding that the case did not speak directly to the question of state court jurisdictional duties. In *Huntington v. Attrill*, the Court expressly endorsed Justice Story's intimations of constitutional limitations on state court power in *Martin*, and even saluted the consistent line of antebellum state court decisions refusing to exercise jurisdiction over federal penal matters. And it announced what it perceived to be the uncontroversial principle that state

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What we decide—and the present case requires nothing more—is, that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the State of California, or for any of her judges—having power, under her laws, to issue writs of *habeas corpus*, to determine, upon writ of *habeas corpus*, whether the warrant of arrest . . . [was] in conformity with [federal law].

*Robb*, 111 U.S. at 638-39. As noted previously, *Claflin* also seemed to hold open, or was at least repeating older maxims that left open, the possibility of enclaves of constitutionally exclusive federal jurisdiction not limited to the Supreme Court's original jurisdiction. But that was not particularly surprising insofar as *Claflin*'s jurisdictional framework borrowed self-consciously from Hamilton's own analysis in *The Federalist* No. 82, in which he had also arguably held out a similar possibility. See supra text accompanying notes 53-67.

343. *Claflin*, 93 U.S. at 141. Quoting *Houston*, the *Claflin* Court stated: "Not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts." *Id.* The Court also observed with respect to the decision in *Houston* that "perhaps, the court went further, in that ease, than it would now." *Id.*

344. See *id.* at 137 (discussing *Abelman*); *id.* at 142 (mentioning the works of Kent and Story). The fact that Justice Field, author of *Tarble's Case* and *The Moses Taylor*, and dissenter in *Davis*, could join the unanimous Court in *Claflin* further attests to its noncontroversial nature.

345. 146 U.S. 657 (1892).
courts would not be compelled to hear such cases even if they were “like” ones the state courts already heard.

2. SUPREMACY, COERCION, AND “DUAL” FEDERALISM

The notion that state courts could not be coerced into taking unwanted Article III business also fit comfortably with the many contemporaneous post-Reconstruction expressions of the Court regarding the mutual immunity of state and federal officials from the coercive commands of one another. No one in the mid to late nineteenth-

346. Id. at 672 (dicta) ("[T]he courts of a State cannot be compelled to take jurisdiction of a suit to recover a . . . penalty for a violation of a law of the United States.") Even though Huntington was dealing with the decidedly different context of interstate relations and full faith and credit, the Court’s fundamental insight was that long-settled limitations on state court obligations in the federal-state context might reinforce the idea of limits on state court jurisdictional obligations in another, such as full faith and credit. The plaintiff in Huntington had apparently contended that the “duty” language of Claflin meant that state courts would be obligated, not merely permitted, to enforce such federal claims for relief. The Court expressly disagreed, however, denying that Claflin had anything to do with what the Court perceived to be the analytically distinct issue of state court jurisdictional duties. See id. To buttress its point about Claflin, the Huntington Court referred to a contemporaneous opinion of Justice Bradley (Claflin’s author), in which Huntington concluded that Bradley had denied that a state court would be able punish for an offense that was only proscribed by the laws of the federal government. See id. at 672 (citing Ex parte Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1,862)). Bradley, however, seems only to have focused on statutory exclusivity and merely noted the “incongruity” of any contrary arrangement.

347. These intergovernmental immunity doctrines achieved their classical formulation in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), when the Supreme Court refused to issue a coercive decree directing the Governor of Ohio to return a fugitive, despite the clear command of Article IV of the Constitution and the enabling statute enacted in 1793 that made it “the duty” of the governor to do so when properly requested. See id. at 108-10. The federal government, said the Court, “has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.” Id. at 107. The decision’s rigid separation of state and federal spheres of authority was representative of the period and kept much of its force even after the ratification of the Civil War Amendments. Even in the framing of the Civil Rights Act of 1871, the precursor to 42 U.S.C. § 1983, concerns such as those raised in Dennison were at the forefront of deliberations on whether Congress could impose affirmative duties on state or local officials that were not required as a matter of state law. See Monell v. Department of Social Servs., 436 U.S. 658, 677-82 (1978). As described by Justices Clifford and Field, “It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the government of the confederation . . . .” Ex Parte Clarke, 100 U.S. 399, 413 (1880) (Field, J., dissenting). When the federal government wished to enlist the services of state officials, they said, “it must accept the agency with the conditions” that the states put upon their own officials. Id. at 412. To get around those limitations when it “desires to
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century judicial mainstream purported to deny the supremacy of federal law. But its vindication was often an exercise in indirection, requiring litigants to proceed in familiar common-law actions in which the challenged governmental action might be raised and judicially reviewed incident to resolving a common-law dispute. Of course, these older sentiments about the nonimposition of affirmative duties may seem like so much water under the bridge today, given the pervasiveness of affirmative judicial relief to compel officials to conform their behavior to the Constitution or federal law. But they reflect what was, at the time, a largely unquestioned (if occasionally exaggerated and increasingly formalized) set of assumptions about state court powers and duties. The impact the Reconstruction amendments— with their potential for greater federal control of state actors, including state courts—had on existing jurisdictional arrangements was muffled, to say the least. And while much about the vision of federalism that once characterized this period has since been abandoned, debate did not end over the extent to which state officials could be coercively enlisted in the performance of federal bureaucratic tasks, or whether limitations on their powers under state law could be ignored when carrying out court-ordered relief for past constitutional illegality.

Thus, despite the nationalist thrust of Reconstruction and Claflin, it was not until well into this century that the Court began to suggest that state courts might be under some kind of obligation to entertain federal judicial business, their own jurisdictional rules and wishes to the contrary notwithstanding. And prior to the decision in Testa v. Katt, those suggestions instructed states to do little more than enforce federal substantive law in cases over which their courts otherwise had jurisdiction as a matter of state law. Following a brief treatment of those intervening developments, I will try to address the impact of this jurisdictional history on contemporary approaches to state court roles in the administration of federal law.

C. The Emergence of a Jurisdictional Non-Discrimination Model

Modern arguments that state courts are under at least a qualified duty to entertain federal claims are customarily traced back to a series of cases decided soon after the enactment of the Federal Employer’s Liability Act early in this century. The statute was Congress’s effort to provide for uniform standards of care governing workers engaged in interstate

compel by coercive measures and punitive sanctions the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted.” Id. at 413.
commerce. Yet some state courts balked at the idea of enforcing the negligence standards outlined in the FELA because of its elimination of the common law’s fellow servant rule—a time-honored defense to a worker’s recovery from her employer for injuries resulting from a co-worker’s negligence. In the face of state court resistance, the Court in The Second Employers’ Liability Cases (“Mondou”) held that the states were under a qualified duty to entertain such claims. The Court observed in those cases that state court jurisdiction encompassed the task of hearing such suits, and that state courts could not refuse such claims because of “policy differences” with the liability rules under the federal act. Mondou was therefore one of the first times the Court indicated that state courts had an obligation to hear federal claims that are analogous to those that the state courts already hear. But it was also a source of stronger language hinting at an even more absolute duty.

The stronger suggestion derived from the Court’s statement that, because federal legislation “is as much the policy of [a state]” as is state legislation, state courts must hear federally created claims for relief. Mondou itself, however, was careful to note that no suggestion had been made that the state courts did not already entertain jurisdiction over the sort of suits that would be presented in FELA cases, or that its decision “enlarge[d] or regulate[d] the jurisdiction of state courts.” It discussed the existence of a duty on the part of the state courts only insofar as they were otherwise empowered under their own jurisdictional laws to hear such suits, which were, in essence, negligence actions. What Mondou effectively did was to turn the like-cases limit on state court power to entertain federal judicial business into a limit on state court duties (at least in the absence of more overt congressional insistence).
If *Mondou* left any doubt on this issue, a string of later cases from the Court made clear that it had only spoken to "the duty resting upon [the states], when it was within the scope of their authority," to adjudicate claims for relief based on federal law. It upheld as a "valid excuse" for refusing to entertain jurisdiction, state jurisdictional rules that would have applied to similar state law claims. These later cases further suggested that constitutional problems would surround any insistence that the state courts hear cases other than those they ordinarily heard. *Mondou* was therefore clearly a transitional case insofar as it indicated that state courts had to hear federal claims on a nondiscriminatory basis with analogous state law claims. Yet in some ways the decision did not advance matters greatly when one recalls the common-law universe in which federal rights were then litigated. As the Solicitor General argued, the FELA merely created federal norms relating to right and duty, which could be enforced in common-law actions for negligence in courts of competent jurisdiction, including state courts. The only thing "unlike" what had gone on in state courts before, said the Court, was "the rule[] of law to be applied." The problem in *Mondou* was that the State of Connecticut acknowledged that it ordinarily entertained negligence cases, and indeed, negligence cases in which another state’s law would supply the relevant rights and duties. Because the state courts had rejected jurisdiction over the FELA negligence claim...
but not over other negligence claims, later decisions sought to frame the problem in *Mondou* as one of "discrimination" against a federal right.\(^{357}\)

In an important sense, therefore, *Mondou* fits easily within the long tradition of cases in which purported state law grounds for denying a federal right were rejected because they were simply a cover for the state court's dislike of the underlying federal substantive norm.\(^{358}\) That is why the decision seems much more akin to traditional Supremacy Clause cases in which the Court insisted that states adhere to substantive federal law in the causes of action that they entertained, and consistent with older assertions that federal law could supply state courts with a rule, but not with judicial authority. The state, of course, chose to express its unwillingness to comply with federal norms in the negligence cases by denying its authority. But the result was not materially different than if the state court had accepted jurisdiction and refused to consider the paramount federal standard with which it disagreed, thereby creating a substantive clash with federal law to which the Supremacy Clause would clearly have spoken. Decisions following *Mondou* had done little except to reinforce this nondiscrimination model, until the Court revisited the problem in the aftermath of the second World War in *Testa v. Katt*.\(^{359}\)

\(^{357}\) See also *McKnett*, 292 U.S. at 234 (viewing *Mondou* as a case of "discrimination against rights arising under federal laws," and concluding that state court could not refuse to hear FELA suit against out-of-state corporation, even when cause of action arose out of state, when no such limit applied to other suits); see also *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945) ("The freedom of the state courts to construe its [sic] jurisdiction and venue rules is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one.").

\(^{358}\) Including, of course, the litigation leading up to *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); see also, e.g., *McKnett*, 292 U.S. at 233-34 (stating the principle of *Mondou* as prohibiting states from "refusing to [exercise jurisdiction] solely because the suit is brought under a federal law"); *Herb*, 324 U.S. at 123 (expressing jurisdictional concern in terms of nondiscrimination); see also Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986) (discussing adequate state ground doctrine); infra text accompanying notes 384-89.

\(^{359}\) 330 U.S. 386 (1947). Despite the rhetoric of jurisdictional nondiscrimination in *Mondou*, scholars have identified what may be a counter-model to it in the nearly contemporaneous decision of *General Oil Co. v. Crain*, 209 U.S. 211 (1908). The opinion could be read as supporting an unqualified duty of state courts to entertain federal constitutional claims, without regard to their possible similarity to claims under state law. *Crain*, however, will probably not bear such an interpretation. The Supreme Court in *Crain* took review of a suit to enjoin a state official from enforcing an allegedly unconstitutional tax—a suit that the state court had refused to hear. The state courts' refusal was arguably jurisdictional, insofar as the state court concluded that it was barred from entertaining such suits as a matter of state sovereign immunity law, and the Supreme Court proceeded to enter judgment on the merits (against the plaintiff). The Court's conclusion, however, was that the suit in question was not, in fact, an impermissible suit against the sovereign. *Id.* at 220-28. The Court's frame of mind is understandable, since
it decided the same day in *Ex parte Young*, 209 U.S. 123 (1908), that such officer suits for injunctive relief brought in federal court did not implicate the state sovereign immunity barrier associated with the Eleventh Amendment. But if the Court was saying that the Eleventh Amendment did not bar the suit in state court, it is at least curious insofar as the Court has maintained that the Eleventh Amendment's strictures are not applicable to state courts. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); *cf* Coehens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). And if the Court was deciding a question of state sovereign immunity or jurisdictional law, things become even more curious, since the Court has abjured revising state courts on the interpretation of their own law. *See* Murdock v. Memphis, 87 U.S. 590 (1874); *see also* Crain, 209 U.S. at 232-34 (Harlan, J., concurring in judgment); *cf* Georgia R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949) (dismissing on adequate state grounds a case similar to *Crain* where state had not consented to suit under state law and federal courts were open).

But the Court may have tipped its hand when it indicated that the plaintiff had a “right... to be protected against a law which violates a constitutional right,” which the state’s jurisdictional rules apparently frustrated. *Crain*, 209 U.S. at 228. “If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a state to its courts, ... it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution ...” *Id.* at 226. *But cf*. Beers v. Arkansas, 61 U.S. (20 How.) 527 (1858) (state not required to let itself be sued in state court for violation of Contracts Clause). Of course, *Young* had made sure that the federal courthouse doors would be open for injunctive claims like the very one in *Crain*. Yet it is significant that, despite the Court’s counterfactual supposition, the possibility that a federal forum might be available was not a reason for it to uphold the state courts’ refusal to entertain the request for an injunction. *Cf* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 294 n.97 (1984) (noting that “if prospective relief is a necessary concomitant of a federal right, availability of such relief in federal courts may not free the states from an obligation to provide it as well”).

One might conclude from all of this that *Crain* created an obligation in state courts to take federal causes of action to enforce the Constitution, their own wishes and jurisdictional limitations to the contrary notwithstanding. *See* Gordon & Gross, *supra* note 8, at 1171-75. But it is open to serious question whether the Court, at that time, would have perceived the plaintiff’s cause of action in *Crain* (or *Young*) as especially federal, as opposed to a claim that found its source in state law or in the common law. *See* Collins, *supra* note 33, at 239-42. Accordingly, a plausible if narrow reading of the decision is that the Court considered the plaintiff’s action to be a nonfederal claim over which state courts would otherwise have had jurisdiction, except for the particular jurisdictional carve-out of all suits against state officers that the state had enacted on the heels of ratification of the Fourteenth Amendment. The Court provided just such a reading when it later observed that the decision had merely “foreshadowed the rule that ‘a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such case to courts otherwise competent.’” *See* Kenney v. Supreme Lodge, 252 U.S. 411, 415 (1920) (Holmes, J.) (full-faith and credit decision). On such a reading, *Crain* might be reduced to a holding of jurisdictional nondiscrimination, similar to the Court’s conclusion just a few years later in *Mondou*.

But even reading *Crain* for all it might be worth, it probably says no more than that states may be obliged to provide judicial remedies to redress the unconstitutional (or
IV. STATE COURT AUTONOMY AND HISTORY’S LESSONS

A. Reassessing Testa v. Katt

The long-settled understandings about the limits of state court powers and duties discussed in this Article suggest that the Court in Testa misread the history of the role of state courts in the enforcement of federal law, and exaggerated the impact of Claflin upon that history. Testa held that a state court would be obligated to hear a suit for treble damages under wartime, federal price-control legislation, even without an explicit congressional command to do so. Justice Black’s opinion for the Court acknowledged that there had been a period of state court resistance to the assumption of jurisdiction over federal judicial business which the first Congresses had invited them to share. For him, the jurisdictional resistance was an antebellum tradition that he characterized as challenging the “constitutional supremacy of the Federal Government.” Largely tracking the historical argument made by the United States in its brief to the Court,\(^{360}\) Justice Black minimized the extent and universality of this perhaps other wrongful or arbitrary) acts of state officials. Cf. Parratt v. Taylor, 451 U.S. 527 (1981); Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 COLUM. L. REV. 309 (1993). Insisting that states provide their own remedies to make good an actual or threatened injury associated with unconstitutional state action is not quite so dramatic a reading of Crain as one that would require them to entertain federal causes of action to redress constitutional deprivations even when no obvious parallel action existed in the state courts. Not even the modern Court seems to have gone that far. See Howlett v. Rose, 496 U.S. 356, 369 (1990). Viewing the remedy that state courts must provide under Crain as grounded in state law also leaves the states free to choose a remedial scheme of their own, provided it stands to offer recovery sufficient to satisfy the Constitution. The freedom to select from familiar, home-grown remedial mechanisms results from the fact that the Constitution may not require any particular remedy to ensure its vindication, although it may require a meaningful or adequate one. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731 (1991). Cases subsequent to Crain seem consistent with the idea that the Constitution may require states to supply an adequate remedial system of their own in certain instances of official illegality, while leaving them with considerable remedial flexibility. See, e.g., McKesson Corp. v. Florida Div. of ABT, 496 U.S. 18 (1990); Ward v. Love County, 253 U.S. 17, 24 (1920).

360. See Brief for the United States at 28-32, Testa v. Katt, 330 U.S. 386 (1947) (No. 46-431). The government’s brief openly disparaged what it perceived to have been the wrongheaded era in which “Story and Kent were ascendant” and asserted that Claflin and Davis, had destroyed once and for all any notion of state court freedom to refuse jurisdiction over actions for penalties arising under federal law. See id. at 31-32. The brief relied heavily on Charles Warren’s writings and his conclusion that, if there was nothing problematic about federal court jurisdiction over criminal cases on removal from state courts, then there was “equally” no problem with state court prosecution of federal
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opposition by treating it as just another part of the pre-Civil War rhetoric associated with extreme claims of state sovereignty. The historical reality, however, was that opposition to state court adjudication of certain areas of Article III business came from nationalists and localists alike, and it was a sentiment endorsed by federal courts as much as state courts. Resistance, moreover, was based not simply on perceived limits of federal power, but on well-settled (if debatable) ideas about the limits of state court power. And, as noted above, it was not a tradition that fell out of favor with the intervening events of the Civil War and Reconstruction.

Justice Black also suggested in Testa that older state court refusals to share in the administrative burden of enforcing federal regulatory statutes were actually a deviation from a still earlier time when the federal government was accustomed to rely on state court cooperation. That Congresses in the early Republic left the door open to state court assistance in civil and criminal enforcement actions is incontestable. But the historical record of cooperation is scanty, and state court objections to the assumption of unwanted jurisdiction were made early on, and well before the Supreme Court's not-too-tacit approval of such objections in Martin v. Hunter's Lessee. The actual understanding of the early Congresses, moreover, was consistent with state courts' jurisdictional refusals. Nearly all who addressed the issue of shared jurisdiction in the context of the enforcement of federal penal provisions perceived that the state courts could either take it or leave it. It is therefore somewhat misleading to suggest, as Justice Black did, that there was once anything like a jurisdictional rebellion on the part of state courts in defiance of the Supremacy Clause, since it was also generally understood that Congress had made no serious effort in its statutes to compel the exercise of jurisdiction in the examples to which he alluded.

More importantly, Testa concluded that the tradition of state court refusals to entertain certain federal judicial business was halted by the Civil War, which put a practical stop to challenges to national supremacy. For the modern Court, Claflin enshrined that change of reality by admonishing state courts not to treat federal law like the law of a foreign sovereign, or even as they treated the law of another state under the Full Faith and Credit Clause (concerning which the state courts traditionally had great latitude). From Claflin, Justice Black seemed to conclude

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361. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (federal court will invalidate state court's choice-of-law decision only where there are no significant contacts between the state and the litigation). Yet even here the controlling principle is one of jurisdictional nondiscrimination. See Hughes v. Fetter, 341 U.S. 609 (1951)
that state courts were under a general duty to assist in the administration of federal law by taking in federally created claims for relief. Because of this, and given his statements about jurisdictional rebellion, he appeared to locate the initial power as well as the duty of state courts to hear federal causes of action, not in jurisdictional sources of the state courts, but in the Supremacy Clause itself.\(^{362}\) While that may be the accepted view today, its first articulation in *Testa* marked a fundamental change in thinking about the force of the Supremacy Clause. What Justice Black did in these absolute-duty sounding passages of *Testa* was to conflate what were long perceived as separate dimensions of the clause, by assuming that the state courts' duty to adhere to federal norms (in cases that they were capable of hearing under their own law), and a duty to entertain federal claims for relief (even in cases that they could not hear under state law) were not meaningfully distinguishable.\(^{363}\)

\(^{362}\) *Testa*, 330 U.S. at 391. See Redish & Muench, supra, note 5, at 347 n.159 (noting that *Testa* supposed a nondiscriminatory duty would exist even when Congress was silent). The recognition in *Claflin* that federal substantive norms were binding on the states when state courts carried out their jurisdictional obligations under state law was not what was new about *Testa*. Even in the heyday of state court jurisdictional refusals, state and federal judges alike could object to the more extreme suggestions that federal substantive norms be treated as emanating from a foreign sovereign. See, e.g., Taylor v. Carryl, 61 U.S. (20 How.) 583, 605 (1857) (Taney, C.J.) (state-federal court relationships not to be regarded as involving “separate and independent sovereignties” governed only by “comity of nations”); United States v. Stearns, 22 F. Cas. 1188, 1189 (C.C.D. Vt. 1827-40) (No. 13,341) (Thompson, Circuit Justice).

\(^{363}\) As noted above, *Claflin* acknowledged on a seemingly unnecessary number of occasions that concurrent jurisdiction existed only when the state courts were empowered under their own laws to take it. Although, as *Testa* noted, *Claflin* stated that there “is no reason why the State courts should not be open” for litigating the rights at issue in that case, it had also, as *Testa* failed to note, simultaneously qualified that same statement by noting that self-imposed limits under state law might be a barrier to entertaining certain Article III business. The Court in *Claflin* invoked the “there is no reason why” sentiment twice. See *Claflin*, 93 U.S. at 137. But the opinion in *Testa* only refers to one of them. See *Testa*, 330 U.S. at 391. The notion is qualified in *Claflin* in the fuller of the two references: “[T]he fact that the state and federal sovereignties are distinct . . . is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.” *Claflin*, 93 U.S. at 137 (emphasis added). The sentence does not have the jurisdictionally obligatory sense that Justice Black's interpretation in *Testa* would suggest. Even reading this snippet of *Claflin* generously, it may have simply foreshadowed the eventual conclusion of the Court that otherwise open jurisdictional doors
Nevertheless, and despite the direction of the Court's reasoning in much of \textit{Testa}, it is traditionally observed that the Court pulled its strongest punch when it emphasized in its final paragraphs that the state courts had "jurisdiction adequate and appropriate under established local law" to adjudicate "this same type of claim," and thus were obligated to hear the federal treble damages action.\textsuperscript{364} By sliding back into the older language of nondiscrimination, \textit{Testa} seemed to retreat from its suggestions about the existence of an absolute duty on the part of the state courts to entertain federal enforcement actions, apart from any limitations on state court power to do so. Yet if \textit{Testa} was only about nondiscrimination against federal claims, it was not a significant advance over older decisions like \textit{Mondou}, which in turn were analytically akin to the simpler command of the Supremacy Clause that required the application of federal law in cases ordinarily entertained by state courts.

Even though \textit{Testa}'s bark was worse than its bite, there was at least one crucial difference between its nondiscrimination model and that of earlier cases. Decisions such as \textit{Mondou} had involved ordinary common-law negligence suits onto which federal standards of liability were engrafted; the degree of "likeness" between the FELA claim at issue in that case and a state negligence claim was substantial to the point of complete overlap. Only the norm to be applied was different. In the general common-law universe that predated such decisions as \textit{Erie Railroad v. Tompkins},\textsuperscript{365} one did not always have to be overly careful about identifying the sources of rights, even remedial rights, that litigants employed in the state and federal systems. After \textit{Testa}, however, one could no longer say that the particular statutorily created federal action was the "same" action that state courts ordinarily enforced, differing only in the norm being enforced. The source of the action was unmistakably federal, and any similarity was now a question of degree.\textsuperscript{366}

The consequences of this almost imperceptible step were important. In a state court of general jurisdiction, it might be hard to imagine how some plausible analogy under state law could fail to be found, provided

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{364} \textit{Testa}, 330 U.S. at 394. Herbert Wechsler has apparently suggested that the quick change of direction in this last paragraph was politically compelled to bring along other members of the Court. \textit{See} Gordon & Gross, \textit{supra} note 8, at 1159 n.62.
\item \textsuperscript{365} 304 U.S. 64 (1938).
\item \textsuperscript{366} \textit{See} Neuborne, \textit{supra} note 6, at 757 (noting that after \textit{Testa}, federal claim need only be "generically" similar to ones heard in state courts). The change in focus to whether the federal claim is only generically similar may also reflect the evolution of the notion of a "case" as reflected in other areas, such as pleading, claim and party joinder, and preclusion rules.
\end{itemize}
\end{footnotesize}
it were drawn at a sufficiently high level of abstraction. As a result, Testa’s “nondiscrimination” model was a stronger version than that which preceded it, and it had a predictable tendency to assume the shape of the absolute duty model that neither it nor its ancestors purported to embrace.\footnote{Cf. Weinberg, supra note 5, at 1777 (concluding that “discrimination” analysis is unhelpful, given the existence of state courts of general jurisdiction, because any jurisdictional refusal would likely be impermissible).} Such duties, moreover, could devolve on state courts even when Congress had not—as it had not in Testa—been explicit about state courts assuming jurisdiction. In addition, even if Testa’s holding could be confined to one of jurisdictional nondiscrimination, the decision did not necessarily provide a limit to congressional power to compel state courts to assume nonanalogous jurisdiction.\footnote{Cf. Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare, 411 U.S. 279, 297-98 & n.12 (1979) (Marshall, J., dissenting) (arguing that states would be obligated under Testa to hear Fair Labor Standards Act claims for minimum wages even though state courts might not entertain similar claim).} So, while Testa looked backward to an era that largely honored state court jurisdictional choices and limitations, it also set the stage for a substantial reshaping of our attitudes toward state courts and the jurisdictional freedom they had ordinarily been accorded.

B. Constitutional Values in the Noninsistence of Absolute Jurisdictional Duties

1. THE THEME OF JURISDICTIONAL AUTONOMY

Given Testa’s effort to recast state court roles in the enforcement of federal law, there might seem to be little use in resurrecting an alternative vision that harks back to what must seem like the jurisdictional Stone Age. In addition, many of the concerns for state judicial autonomy expressed by the older tradition discussed in this Article are hard to translate into modern discourse about federal courts. For instance, it is difficult today to argue convincingly that there exist constitutionally exclusive heads of Article III jurisdiction (outside, perhaps, of the High Court’s original jurisdiction). In the area of federal powers more generally, the idea of separate, mutually exclusive spheres or enclaves of control has frequently given way to broader understandings of concurrent or shared power.\footnote{Regulation of commerce provides the obvious parallel. See U.S. Const. art. I, § 8, cl. 3; cf. Levy, supra note 294, at 521 (noting erosion of “categorical and mutually exclusive” powers). The idea of federal exclusivity has given way to a recognition that states may ordinarily regulate where Congress has not preempted them from doing so by statute, subject to limits against “discrimination” against out-of-state commerce and}
unfettered freedom of state governments and their officers (including judicial officers) from affirmative duties to conform their behavior to federal law and the Constitution are difficult to make given the modern Court's construction of the Civil War Amendments and of congressional power generally, and given its more recent tradition of affirmative judicial remedies to insure compliance with the Constitution.

But these developments do not drain the historical tradition of state court jurisdictional autonomy of all of its normative force. The fading of formalistic boundaries between state and federal spheres hardly leads to a conclusion that the federal government's power to impose jurisdictional duties on state courts is limitless, or to a conclusion that state law limitations on the powers of the state courts should have no bearing at all on what judicial business they have an obligation to hear. Similarly, the evisceration of the prohibition on affirmative relief does not mean that all concerns for state governmental autonomy in our federal system have been abandoned. Concerns for state court jurisdictional autonomy expressed by the pre-Testa tradition have occupied a well-established place in our thinking about the role of the state courts in handling Article III business, and about Congress's role in allocating it. Even Testa did not purport entirely to shake off that tradition. Nor, as discussed below, do I think that it is fair—either to this tradition or to Testa—to engage in the reductionist argument that, if the powers of state courts of general jurisdiction are read broadly enough, then any refusal to entertain any Article III business is tantamount to "discrimination."

To be sure, giving twentieth-century meaning to eighteenth- and nineteenth-century constitutional concerns is not free of difficulty, but neither is wiping the slate clean and pretending that they never existed, or that they have nothing to say in light of other changes in constitutional reality. And although once discussed in formal terms, perhaps the concerns for state court jurisdictional autonomy expressed by the pre-Testa tradition can better be captured in today's world of constitutional balancing by focusing on the impact that jurisdictional duties would have upon state judicial structures and state self-governance, on the impact that jurisdictional refusals might have on the vindication of federal
interests, and on their implications for federal power to enforce those interests.

a. Unqualified Jurisdictional Choice

The older rules respecting state court power and duty emphasized the structural independence of state courts as decisionmakers, even when the substance of their judgments was subject to later (federal) judicial review or correction. By recognizing that the power of a state court to hear a case was a question of state law, the older tradition respected how the people of a state might legislate to organize their judicial system and honored their particular political choices as to what judicial services they would provide for themselves. An earlier theory of coordinate federalism which recognized that certain judicial business might have been constitutionally off-limits to the states affirmed that such business would be administered and financed by the national government, while implicitly acknowledging that there might be spheres of state judicial exclusivity as well. The unwillingness to admit that Congress, even in the many areas of shared jurisdiction, could coerce the exercise of jurisdiction, meant that state participation in the project of federal law enforcement would proceed (except for rules of decision) largely on state rather than federal terms and conditions. Such a regime also expressed a preference that the lines of authority and responsibility for the administration of federal programs remain visible. These underlying elements of the old tradition therefore reflected values of constitutional dimension insofar as they respected a large measure of state independence in the operation of our

371. A rigid ideal of separation would, however, be in some tension with a specific suggestion from The Federalist No. 27. Alexander Hamilton seemed to welcome the prospect of a blurring of the lines of authority when he wrote that if "the ordinary magistracy" of each state can enforce federal law—a proposition that Hamilton endorsed—"[i]t is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed . . . ." THE FEDERALIST No. 27, supra note 19, at 174. See Powell, supra note 4, at 663-64 (rightly observing that Hamilton relished the idea). Nevertheless, it was also an overarching political theme of The Federalist that state and federal governments would vie with one another for their loyalty. See James W. Ducayet, Note, Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, 68 N.Y.U. L. REV. 821, 857-65 (1993); see also Amar, Sovereignty, supra note 165, at 1492-1519. This more general theme, therefore, would seem to value the ability to maintain lines of accountability, even if some governmental chores are shared, and all officials perceive the Constitution as the supreme law of the land.
The Madisonian Compromise

federal system and, more importantly, served the individual and community values that federalism is thought to reinforce.372

b. Qualified Jurisdictional Choice

The problem with the old regime, of course, was that states could avoid hearing federal claims simply because they disagreed with the substance of the federal law that they would otherwise have been obligated to apply had they taken jurisdiction. It thus ran the risk of compromising even a minimalist version of the Supremacy Clause. The jurisdictional nondiscrimination model that grew out of the nineteenth-century precedents, and that Testa at least formally retains, aimed at redressing these traditional supremacy concerns while honoring the federalism values that underlay the earlier rhetoric about state court power and duties. An approach that focuses on jurisdictional nondiscrimination therefore reinforces federalism concerns to the extent it announces that state courts will only be required to work within established structures and to consider familiar judicial business. Obviously, the federal substantive norms that state courts may be called on to apply in cases that they otherwise hear under a nondiscrimination model can bring an element of novelty or unfamiliarity. And they can impose burdens to the extent they cause the displacement of state regulatory choices when federal substantive norms are contrary to state law. But in the typical case, the additional burden of understanding and applying a new rule of law will not have to be substantial, even if the political burden might be.373 And more importantly, the Supremacy Clause


This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting States in competition for a mobile citizenry.

Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . [A] healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front.


373. That, presumably, was the Court's point when it observed that it was "neither new nor unusual in judicial proceedings to apply different rules of law." Mondou, 223 U.S. 1, 58 (1912). But cf. id. at 58 (rejecting argument that it might be "inconvenient
Clause was thought to countenance such a burden, even if it stopped short of requiring others.

In addition, the nondiscrimination model assumed, in its original pre-Testa form, that the "federal" cases state courts were impermissibly refusing to hear were in fact cases that they already did hear, but were excluding under the guise of a "jurisdictional" objection because of their hostility to the particular federal norm at issue. Under such a regime, it was still possible to indulge the notion that no new jurisdictional duties were being imposed on the state courts.\(^\text{374}\) Also, a nondiscrimination approach reinforced the Court's practice in other areas in which it upheld the enforcement of affirmative obligations on state officials, while adhering to otherwise constitutional, state-imposed limitations on that official's powers.\(^\text{375}\) And although discussions of nondiscrimination

\(\text{and confusing}^{*}\) for state court to apply federal norms). For a thoughtful defense of letting states go their own institutional ways within a regime that otherwise polices for substantive conformity, see Ann Althouse, \textit{How to Build a Separate Sphere: Federal Courts and State Power}, 100 \textit{Harv. L. Rev.} 1485 (1987).

\(^\text{374}\). And, under such a regime, state courts would have to hear federal defenses in cases (including those grounded in state law) that fell within their jurisdictional repertoire, because deciding a case in ignorance of a properly raised federal defense would be a violation of the simplest command of the Supremacy Clause to not enter judgment on a state law ground when it would be barred by federal law.

\(^\text{375}\). A state's executive branch officials may now be commandeered to carry out affirmative federal court orders to bring a state agency or institution into compliance with the Constitution (free from any claim of sovereign immunity). See, e.g., \textit{Pennhurst State Sch. & Hosp. v. Halderman}, 465 U.S. 89, 105 (1984); \textit{Edelman v. Jordan}, 415 U.S. 651 (1974). But the orders given to the officials are ordinarily ones that they would be otherwise able to carry out as a matter of powers conferred upon them under state law. Compare, e.g., \textit{Griffin v. School Bd. of Prince Edward County}, 377 U.S. 218, 233 (1964) (indicating in dicta that federal court might "if necessary . . . require the Supervisors to exercise the power that is theirs to levy taxes to raise funds" to enforce desegregation order) and \textit{Riggs v. Johnson County}, 73 U.S. (6 Wall.) 166 (1867) (ordering official to collect tax to pay for prior judgment debts) with \textit{Meriwether v. Garrett}, 102 U.S. 472, 501 (1880) (state's repeal of city charter deprived city of ability to tax to pay debt incurred after revocation of charter). \textit{But cf. Missouri v. Jenkins}, 495 U.S. 33 (1990) (indicating that incident to enforcement of federal court order, state officials might be forced to ignore otherwise constitutional limit on their powers under state law). In \textit{Jenkins}, the defendant officials were ordered to assess necessary taxes to pay for a court-awarded desegregation decree, and the Court upheld an order enjoining the operation of a state statute that would have capped the amount of tax that officials could assess. \textit{See id. at 57}. The instruction to state tax officials to collect taxes was old hat. \textit{See, e.g., Riggs}, 73 U.S. (6 Wall.) at 166. As Justice Kennedy rightly noted in dissent, however, prior caselaw could only be called on to support the commanding of state officials (to enforce federal court orders) by insisting that they exercise powers that were otherwise theirs to exercise as a matter of state law, and that state law limitations could be ignored only if they were themselves unconstitutional or if they were developed to thwart the enforcement of the federal judgment; they could not be ignored simply
usually focus on state court litigation concerning matters of federal substantive law, the model is also reflected in the diversity context in which states are ordinarily allowed to refuse Article III business based on nondiscriminatory state practices such as forum non conveniens, limitations on personal jurisdiction, and other door-closing rules.\textsuperscript{376}

From the perspective of the parties, the nondiscrimination model treats state and federal law litigants with equality in terms of court access, insofar as a party bringing a claim arising under federal law will be treated like a similarly situated party with a comparable suit under state law. Indeed, discrimination by a state court against litigants on the basis of their pleading of a federal claim that is otherwise like the claims the state court already entertains, arguably implicates equal protection and perhaps other concerns of the Fourteenth Amendment.\textsuperscript{377} The intervening events of the Reconstruction amendments may therefore be reason enough to limit the earlier, unqualified freedom to reject jurisdiction, even when the basis of the state court’s rejection is premised on its federalness, rather than specific hostility to the underlying right. Those events therefore provide an argument for certain aspects of the tougher version of the nondiscrimination model which made its appearance in \textit{Testa}.

Of course, even requiring state courts to adhere to a nondiscrimination model may impose additional (if similar) burdens on them,\textsuperscript{378} quite apart from the burden of their having to cope with new because they posed a burden on the enforcement of a federal court’s order. \textit{See Jenkins}, 495 U.S. at 71 (Kennedy, J., dissenting). Of course, the officials in \textit{Jenkins} had the power generally to assess property taxes (i.e., a kind of general jurisdiction to assess), even if, as a matter of state law, the amount they could assess was limited. The decision in \textit{Jenkins} is thus some support for the idea that the functions of state officials might be modified to accommodate the enforcement of the Constitution, where an otherwise neutral limit under state law poses an undue burden on the vindication of constitutional rights.

\textsuperscript{376} Indeed, such state limitations, if constitutional, must ordinarily be adhered to by federal courts when they hear diversity litigation. \textit{See} HART & WECHSLER, \textit{supra} note 7, at 830-48.

\textsuperscript{377} \textit{See} U.S. CONST. amend. XIV.

\textsuperscript{378} Increased federalization of civil or criminal activity will not necessarily add to the jurisdictional burdens of the state courts, however. Sometimes increased federalization will simply displace a state claim that would otherwise have been enforced in the state courts and that would have been governed by state law. \textit{See}, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (discussing § 301 of Labor Management Relations Act, 29 U.S.C. § 185 (1988), which federalized rules governing certain labor-management contracts that previously would have been governed by state law). In those circumstances, the state’s caseload may remain constant, or even be reduced to the extent that federal courts might pick up some new business that would formerly have gone mainly to the state courts. \textit{See}, e.g., Charles Dowd Box Co. v. Courtney, 368 U.S. 501 (1962) (finding concurrent jurisdiction of suits under § 301).
norms. But nondiscriminatory jurisdictional duties would less likely involve institutional retooling, or any affirmative requirement other than the traditional application of federal law in the kinds of cases that the state courts already heard. As noted above, however, the argument that any particular federal claim is insufficiently like some existing state law claim may be hard to make in a general jurisdiction world. Thus, Testa’s version of nondiscrimination may require the state courts to do (federal) government work if it is “close enough,” thus adding not just greater numbers of similar cases but cases that are marginally different in kind. But if the nondiscrimination model is to retain its vitality, it is important for courts to consider the question of the degree of jurisdictional novelty as well as its impact on the state courts when assessing the proverbial question of how close is close enough. And while it might be supposed that the notion of discrimination is illusory given courts of general jurisdiction (and that any refusal to entertain Article III business would necessarily be discriminatory), there is at least some Article III business that even today would pretty clearly lie outside the statutory limits of most state courts of general jurisdiction.

379. If a state court were to just say “no” to unwanted federal judicial business in order to retain its ability to conduct its own, it would be difficult to argue that the jurisdictional refusal involved simple hostility to the underlying federal norm, or that the refusal did not offer an arguably legitimate state interest separate from such hostility. But Testa (and perhaps the Fourteenth Amendment) suggests that the nondiscrimination model is applicable even when states might have a good faith reason for refusing to hear a case, quite apart from any question of hostility to the particular federal norms at issue. In any event, there ought to be no problem with Congress’s offering legitimate carrot-and-stick incentives to encourage the acceptance of additional and even unfamiliar (nonanalogous) jurisdiction, at least to the same extent that Congress would otherwise be permitted to do so. But see infra note 417.

380. For example, admiralty jurisdiction, traditionally considered a league apart from either law or equity, and with institutional and historical characteristics of its own, would not readily be assimilated by the typical general jurisdiction court, even if its jurisdiction were broadly fixed. Such matters might not be constitutionally off-limits to the state courts (as they once were thought to be), and state courts might have some experience in applying the federal substantive norms associated with admiralty. But if Congress were to close down shop tomorrow on admiralty jurisdiction, significant institutional modification would be required for the states to be able to handle such cases. A similar but less compelling argument might be made respecting state enforcement of federal crimes, insofar as state criminal courts are not courts of general jurisdiction in the sense of ordinarily being empowered to hear prosecutions for violations of the criminal laws other than its own.
c. The Role of Federal Interests

Of course, even a nondiscrimination model still poses the potential for conflict with federal law to the extent that it might excuse a state court from hearing a particular piece of nonanalogous Article III business. In the ordinary case, such a refusal vetoes the choice of litigants who have presumably concluded that the state courts provide at least as good a forum as the federal courts for vindicating the Article III claim. The refusal to hear a federal cause of action also arguably intrudes on federal policy to "give" state courts subject matter jurisdiction and to give federal litigants the right to invoke it, at least when Congress has not opted to make a particular cause of action exclusively enforceable in the federal courts. But the current nondiscrimination approach refuses to draw an inference of interference with federal policy from congressional silence. The focus on questions of discrimination and valid jurisdictional excuses suggests, therefore, that the modern Court does not perceive it to be a conflict with federal policy that a state court might have a neutral rule that limits its ability to hear a federal claim. The force of the Supremacy Clause is not read as demanding the displacement of state jurisdictional rules that would deny its courts the power to hear a federal claim, even though the clause is read as demanding the displacement of


382. See Redish & Muench, supra note 5, at 346-47. The authors argue that congressional statutory silence should be read as a command from Congress that state courts must exercise the jurisdiction that Congress has given them. I find the suggestion problematic for at least two reasons. First, its assumption of the role performed by Congress is inconsistent with long-standing notions that jurisdiction is not ordinarily "given" or "conferred" by Congress on the state courts. Second, there is an important value to be served in insisting on a clear statement from Congress before a jurisdictional obligation is imposed, at least insofar as nonanalogous business is concerned. See infra text accompanying note 433.

383. See Susan N. Herman, Why Parity Matters, 71 B.U. L. Rev. 651, 655 (1991) ("The Court seems willing to tolerate some disparity with concomitant cost to the vindication of federal constitutional rights, because the cost offsets what the Court perceives as the enormous countervailing cost of not adequately respecting values of federalism."). But see Felder v. Casey, 487 U.S. 131 (1988) (concluding that state court could not apply its "notice of claim" statute to civil rights action under 42 U.S.C. § 1983, in part on ground that state statute "discriminated" against federal claim). For doubt whether the notice-of-claim statute in Felder, which was applicable to lawsuits against state and local officers based on state law, was discriminatory, see Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 13 n.57 (1994). As Louise Weinberg has demonstrated, even in the ascertainiment of whether there exists a nondiscriminatory valid excuse to shun jurisdiction, one must initially engage in an inquiry that asks whether there is a conflict between state and federal law. See Weinberg, supra note 5, at 1787-88.
state rules of decision where federal law has preempted state law. Such
an approach to the Supremacy Clause is consistent with the historical
tradition of state court jurisdictional autonomy in a federal system which
also insists that the judicial business the state courts do entertain will be
resolved in conformity to substantive federal norms raised in the course
of those proceedings.

2. VARIATIONS ON A THEME—SUPREMACY AND
THE DISPLACEMENT OF STATE PROCEDURE

The values expressed in a nondiscrimination model for state court
jurisdiction over federal judicial business are reflected in at least two
overlapping doctrines that seek to advance similar values of federalism
and judicial autonomy within a framework of federal supremacy. Both
concern the extent to which state courts may be obligated to displace their
own procedural rules when parties come to them to litigate questions of
federal law. State procedural rules have the clear potential to compromise
federal rights and defenses to the extent that they provide a less hospitable
or simply different litigational environment than that of the federal courts.
And yet there is no ordinary requirement that state courts mimic federal
courts procedurally when they hear federal matters; instead, the prevailing
principle until recently has been to "take[ ] state courts as [one] finds
them."384 While this principle has itself been subject to important
qualifications to accommodate federal interests, it suggests the propriety
of a procedural nondiscrimination model that is deferential to existing
state decisionmaking machinery and is careful to avoid its restructuring,
even when state courts handle Article III business.

a. Adequate State Procedural Grounds

For purposes of direct review of federal questions in the Supreme
Court, state courts have ordinarily been allowed to insist on compliance
with their own reasonable procedural rules when litigants raise questions
of federal law in state courts, even when the underlying action is
grounded in state law. A party's failure to follow such rules can result
in a procedural default on the federal issue that may justify the Court's

384. Hart, supra note 5, at 508; see also Howlett v. Rose, 496 U.S. 356, 372
(1990); Southland Corp. v. Keating, 465 U.S. 1, 33 (1984); cf. RESTATEMENT (SECOND)
OF CONFLICT OF LAWS § 122 (1988) (noting general freedom of host forum to apply its
own procedures); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 358
(1963).
refusal to hear it on direct review.\textsuperscript{385} Although the scope of the adequate state procedural grounds doctrine has been the subject of debate, it provides a set of principles under which a state court may refuse to entertain a federal issue even when state court jurisdiction has been otherwise properly invoked.

In this respect, the adequate state grounds doctrine closely tracks the principles surrounding jurisdictional nondiscrimination. States may insist on adherence to a procedural rule even if it is different from, and less friendly than, a parallel federal procedure would be, and even if it results in a state court’s refusal to hear a particular federal issue or claim.\textsuperscript{386} The fact that a less drastic procedure (i.e., one more hospitable to the federal right) might have been available to achieve the same general procedural purpose has been all but rejected by the Court as a reason for refusing to insist on compliance with existing rules.\textsuperscript{387} One reason for the rejection is that few procedural choices would be immune from such an attack, and states would rarely be able to insist on compliance with their otherwise reasonable and constitutional procedures.\textsuperscript{388} There is, moreover, a structural value in being able to rely on procedural rules of general applicability, and allowing an after-the-fact focus on whether the state might have used less drastic procedures would threaten to undermine the utility of rules.\textsuperscript{389} By providing a principle for direct review that

\textsuperscript{385} There are some acknowledged limitations to the principle. In addition to being constitutional, the procedural rules must be nondiscriminatory, and they must be reasonable. See generally HART \& WECHSLER, supra note 7, at 604-10, 619-27; cf. Alfred Hill, The Inadequate State Ground, 65 COLUM. L. REV. 943, 953, 976-77, 999 (1965) (doubting whether “reasonableness” is a requirement beyond that of constitutionality).

\textsuperscript{386} The simple fact that outcomes would be different in a federal rather than a state court has not itself been a reason for ignoring compliance with state procedural law in typical circumstances. See Robertson v. Weggman, 436 U.S. 584 (1978) (fact that application of state law which, under 42 U.S.C. §1988, would govern “survival” of constitutional claim might cause plaintiff to lose did not render it inconsistent with federal law); cf. Michael Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts, 71 B.U. L. REV. 609, 615 (1991) (noting “consensus” that state court procedural adequacy is not brought into question by possibility of differing results).

\textsuperscript{387} See Meltzer, supra note 358, at 1145 (charting the unhappy history of some of the broader suggestions in Henry v. Mississippi, 379 U.S. 443 (1965)).

\textsuperscript{388} See HART \& WECHEISLER, supra note 7, at 620 (referring to the state’s interest “in enforcing [its] rule as a rule”). Indeed, even if the state rule mirrored the federal rule, one could always ask if another reasonable alternative would have been available, rendering the adequate state ground rule of little force.

\textsuperscript{389} Another reason for the rejection of an approach focusing on less drastic means is that their availability to achieve a state’s procedural goals does not suggest that an existing rule lacks a rational relationship to the achievement of a legitimate legislative end. See, e.g., Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978) (noting that “so long
sustains state court insistence on compliance with its own procedures, the adequate state procedural grounds doctrine allows the Court to work from a baseline of honoring a state’s choices respecting the manner in which its judicial decisionmaking processes shall operate.

b. "Reverse-Erie"

A closely related set of concerns surrounds the so-called reverse-Erie doctrine. When parties litigate federal claims for relief in state courts, state procedural rules will ordinarily govern the mode of proceeding, at least where those rules are otherwise constitutional and do not discriminate against federal claims, and unless another procedural rule can be said to be “part and parcel” of the underlying federal substantive right. The first two inquiries are virtually indistinguishable from those at work in the adequate state procedural grounds context, while the third seems to ask whether the operation of state procedural rules would conflict with the substantive purposes of federal law. That inquiry, of course, mirrors the Court’s suggestion in the adequate state grounds context that state procedures, even if constitutional and nondiscriminatory, not “unduly burden” the vindication of federal rights.

as the State has a legitimate interest in enforcing its rule, "it would be enforceable). 390. See Alfred Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 OHIO ST. L.J. 384 (1956). The issue is thought to parallel that associated with importing state procedural and related rules to accompany the litigation of state-created rights in federal court after Erie R.R. v. Tompkins, 304 U.S. 64 (1938). 391. Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 363 (1952). 392. As in the jurisdictional context, refusals to hear federal questions because of state procedural grounds may work a denial of rights every bit as much as an erroneous decision. See Lawrence v. State Tax Comm’n, 286 U.S. 276, 282 (1932) (Stone, J.). Accordingly, there has been some insistence (perhaps as part of the inquiry into reasonableness) that a state’s procedural rule not “unduly burden” the exercise of a federal right, in addition to the requirement of the rule’s neutrality. See Davis v. Wechsler, 263 U.S. 22, 24 (1922) (Holmes, J.) (concluding that state courts could not throw up “unreasonable obstacles” in the way of vindicating federal rights, even if they did so with state-created rights); Meltzer, supra note 358, at 1142-45. The inquiry seems to ask whether the state procedural rule conflicts with the purposes of the underlying federal right, such that the state rule will be considered preempted, and failure to comply with it may be overlooked on direct review in the Supreme Court. To the extent that one sees the analysis engaged in by the Court as a variety of federal common law, there may be a stronger obligation on the part of the state courts to revise their practices generally. See id. at 1183-85. For this very reason, I think, the Court has been reluctant to read this "undue burden" limitation broadly, or readily to find a conflict or incompatibility with federal law. See Monaghan, supra note 359, at 293 n.93; see also, e.g., American Dredging Co. v. Miller, 114 S. Ct. 981, 987-88 (1994) (state court could ignore forum
Some commentators have suggested that these inquiries (in both contexts) represent a species of federal common law—allowing the High Court to fashion federal procedures and other peripheral rules in state courts when federal rights are at issue. But as in other areas of federal common law, one can insist on greater or lesser indications from Congress respecting the ease with which such common law should be created and otherwise applicable state rules displaced. Given the state interests at stake in these contests, the Court has usually, but not invariably, insisted on a fairly strong showing that a conflict exists or on a clear congressional signal to displace state procedural rules before fashioning federal common law in either of these areas. As in the non conveniens objection to suit under federal maritime statute, even though objection would have been honored in federal court; substantive admiralty policy not implicated by state practice). But see Brown v. Western Ry., 338 U.S. 294 (1949) (excusing noncompliance with state's strict pleading rules in FELA case).

393. See Weinberg, supra note 5, at 1756-57 (noting that reverse-Erie cases, adequate state ground cases, and jurisdictional duty cases make up part of a single problem related to the Supremacy Clause).

394. See, e.g., Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 885-86 (1986); Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 COLUM. L. REV. 1291 (1986); Meltzer, supra note 358, at 1157-76. Among the quasi-procedural baggage that might accompany federal claims into state courts are "remedies," see Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969); burdens of proof, see American Ry. Express Co. v. Levee, 263 U.S. 19 (1923); the measure of damages, see Monessen Sw. Ry. v. Morgan, 486 U.S. 330 (1988); and provisions for fee-shifting in the enforcement of particular federal statutes, see Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980). Note that this is true even though rules respecting burdens of proof, fee-shifting and certain remedies might be considered "procedural" for conflicts purposes. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122, 133 (1988).


396. See Brown v. Western Ry., 338 U.S. 294 (1949) (displacing state's strict pleading rules in FELA case). Brown has been justifiably criticized, given the weak indicators of congressional intent to displace, and the questionable impact of state pleading requirements on federal policies embodied in Congress's statutory scheme. See, e.g., Note, supra note 5, at 1561-62; cf. Felder v. Casey, 487 U.S. 131 (1988) (finding, inter alia, that reverse-Erie analysis mandated non application of state's notice-of-claim statute to state court § 1983 action); Hill, supra note 390, at 407 n.143 (arguing that Brown involved the quantum of proof in FELA cases, not pleading requirements). Felder also relied on the doubtful ground that the state rule "discriminated" against § 1983 claims. See supra note 383.

397. See Fallon, supra note 173, at 1215 n.334 (noting Court's imputation of "Federalist understandings" to Congress in this area, as well as its occasional deviations). Some have argued that Dice's "part and parcel" inquiry asks the post-Erie question whether the (federal) "procedural" rule argued for has a sufficiently close nexus with the
jurisdictional context, a weighty presumption in favor of allowing states to apply their neutral and otherwise constitutional state procedural rules when considering federal questions respects state court autonomy and vindicates the national interest in state governance by honoring state choices respecting their mode and forms of litigation, even at the cost of nonuniformity in the manner in which federal rights are vindicated nationally.  

Significantly, however, the Court has suggested that there may be limits on Congress's ability to insist on particular procedures in state court as incident to the litigation of federal judicial business. In Dice v. Akron, for example, the Court required a state court jury trial for all aspects of an FELA case, finding the jury trial to be a component of the substantive right given by Congress; the state court's contrary practice of dividing up questions between judge and jury was thereby displaced. Nevertheless, the Court had previously held that state courts did not have to provide a jury system different from that which they already used, and had upheld various states' practices of non-unanimous verdicts in FELA cases, contrary to the practice that would have obtained in federal court. The majority in Dice additionally suggested that its own result might have been different had the state not provided for jury trials at all and had given all of the issues in FELA cases to a judge. While states were thus obliged to let juries hear all questions in such actions underlying primary conduct to be regulated so as to be treated "substantively." See Neuborne, supra note 6, at 766-70; cf. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

398. Cf. Richard A. Epstein, The Consolidation of Complex Litigation, 10 J.L. & COM. 1, 40 (1990) ("The institutional values of federalism in the round are more powerful than the asserted weaknesses of the limited federal system in the particular case.").

399. 342 U.S. 359 (1952); see Hill, supra note 390, at 413 & n.180; Note, supra note 5, at 1558 n.52 ("As there exists a constitutional limitation on the federal power to require enforcement of a federally created right . . . there probably exists a similar limitation on the congressional power to remodel a state's judicial machinery in the course of enforcement of that right.").

400. Quite arguably, Dice too readily found that state procedural law had been displaced and that a jury trial right was bound up with the substantive rights under the Act, given the less-than-clear indication from Congress that it wanted a jury trial for all aspects of an FELA case. See Dice, 342 U.S. at 368 (Frankfurter, J., concurring).


402. Dice itself made no such substantial demand, even while it gave the state jury a new slice of business that had been previously allocated to another decisionmaker.
when they had established a jury system, there may have been no requirement for such a system in the first place. Although a somewhat far-fetched supposition, it nevertheless indicated the Court’s reluctance to impose entirely new structures on the states for the disposition of federal claims for relief. It also suggests that, while there is federal power to redefine the fluid border between substance and procedure in order to protect federal rights, and while procedure can be part of the substance that state courts must honor under the Supremacy Clause, federal power to displace state procedure may not be limitless. And at some point, sufficiently novel procedural requirements may also indicate that the jurisdiction is no longer “analogous.”

c. Unconstitutional Procedures and Process Autonomy

As noted in both of these contexts, state procedural rules can certainly be displaced when they are unconstitutional. Particular procedural rules in criminal cases may be inconsistent with Bill of Rights guarantees, the allocation of burdens of proof in civil actions for

403. The manner in which state procedures are displaced in these overlapping contexts of adequate state procedural grounds and reverse-Erie also reflects a reluctance to compel structural reform of otherwise constitutional state judicial machinery. Granting review in the typical inadequate state ground case does not direct the reformulation of state procedure in so many words. Such action may have the predictable effect of affecting state procedure by letting state courts know that litigant failures to comply with a particular procedure will not be a basis for declining review in the future. The state courts are then free, perhaps, to behave as before or, more realistically, to apply a different procedural rule the next time around in a case that raises a similar issue. Compare Field, supra note 394, at 956-57 (suggesting that Court’s rejection of state procedure as inadequate does not necessarily impose affirmative duty of procedural reform) and Sandalow, supra note 8, at 233 (same) with Meltzer, supra note 358, at 1155-58, 1202 (finding affirmative obligation in states to change procedures in such circumstances). In the usual case, therefore, even if one conceded that the state courts were constitutionally “bound” not to apply their old rule, the offending state procedure could be replaced with any other procedure that was not unconstitutional or did not conflict with the federal right at issue. Thus, some measure of choice would be available to the states in coming up with a rule that would pass muster the next time around.

By contrast, displacement of state procedures in reverse-Erie cases (such as Dice) is more likely to require the state to apply a particular procedure to a given category of federal claims in the future, thus giving the state less choice in the matter the next time around. If a particular procedure is part-and-parcel of the substantive package envisioned by Congress in its cause of action, state courts could be expected to honor that choice once they took the case, just as they would be required to honor any substantive norm. But once again, the guarantee of procedural reform is not by structural injunction. Instead, it is by threat of future reversal and remand for failure to accommodate the express or implicit command of Congress to apply a particular procedure.
defamation may run afoul of the First Amendment, and the absence of judicial review to test the rationality of factfinding by juries may offend due process. Cases disposed of on direct (or collateral) review because of an unconstitutional state procedure not only can effectively displace that procedure, but they pose the potential for more serious structural change on state courts. The constitutional infirmity of any procedural rule clearly imposes an affirmative duty of reform, even if that duty will ordinarily only be policed on a case-by-case basis. This displacement of unconstitutional procedures and the duty to provide constitutional alternatives is an unavoidable accommodation of state judicial systems with the Fourteenth Amendment.

Yet even in the constitutional arena, there is often a measure of freedom for the states to select from among constitutionally permissible procedures of their own choosing to substitute for unconstitutional procedures. Similar results are visible in those cases in which the Court has concluded that state courts may be obliged as a matter of due process to provide a meaningful remedial scheme for official deprivations. States are generally allowed to choose a mix from among home-grown remedies to pass constitutional muster. In addition, despite the fact that procedural reform in such contexts is relatively unproblematic, the Court has still been hesitant to insist on the creation of novel decisionmaking structures that a state has previously failed to provide. For example, the Court has thus far refused to impose as constitutional requirements on the states, judicial institutions such as second-tier appeals, collateral attack machinery to challenge criminal convictions, or Article III's

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405. I do not mean to suggest that Congress could not, by statute, insist on particular procedures for the trial of federal causes of action—procedures that state courts would then have to apply by force of the Supremacy Clause. But as noted in the text, one might nevertheless insist on a clear congressional statement to that effect. In addition, as Dice suggests, there could conceivably be limits on the lengths to which Congress could go. Cf. FERC v. Mississippi, 456 U.S. 742, 772-75 (Powell, J., concurring in part and dissenting in part) (reiterating Henry Hart’s notion that federal law “takes state courts as it finds them,” and finding congressional command to state agencies to conform to federal procedures in their consideration of federal guidelines to be unconstitutional).

406. See generally Fallon, supra note 359; sources cited supra note 359.


408. See Huffman v. Florida, 435 U.S. 1014, 1017-18 (1978) (Stevens, J., concurring in denial of certiorari) (doubting federal power to insist that states supply collateral attack machinery of their own); Case v. Nebraska, 381 U.S. 336 (1965);
case or controversy requirements, when federal rights are litigated in state
courts. Such reluctance may also be partly to blame for the Court’s
surprising, but long-standing, refusal to impose on the states the grand
jury and civil jury trial requirements of the Fifth and Seventh
Amendments. The reluctance is also expressed at a sub-constitutional
level in the extraordinariness of federal injunctive relief against state
officials even when those officials are engaged in unconstitutional
systemic practices. It is similarly reflected in the myriad abstention
doctrines that look to correction of state court error through case-by-case
decisionmaking on direct or collateral review, rather than through
injunctions that would arrest or cut short state judicial processes. And it is
reflected in those statutes that seek to channel federal judicial
business to the state courts by cutting off federal jurisdiction if “plain
speedy and efficient” remedies are available in state court. The
paradigm in all of these areas is to refrain from restructuring state court

Sandalow, supra note 8, at 213 (viewing question as unresolved).

Fletcher, The “Case or Controversy” Requirement in State Court Adjudication of Federal
Questions, 78 Cal. L. Rev. 263 (1990). Fletcher argues for a uniform case or
controversy requirement when federal rights are litigated in state courts. Such
requirements might reasonably be considered, in Dice’s terms, “part and parcel” of the
underlying federal right being litigated, and a state court’s failure to provide at least as
generous a case-and-controversy requirement can compromise (or “unduly burden,” to use
the language of the adequate state ground cases) the substance of the right at issue. While
the issues are close, Fletcher concludes that standing to assert a federal right is not
“jurisdictional” in the sense spoken of by Testa.

410. See U.S. Const. amend. V, VII; Hurtado v. California, 110 U.S. 516
(1881) (nonincorporation of grand jury); Walker v. Sauvinet, 92 U.S. 90 (1876)
(nonincorporation of civil jury trial right).

Allen, 466 U.S. 522 (1984) (allowing plaintiff to seek federal court injunction against state
decision requiring bond for non-bailable offenses); Gerstein v. Pugh, 420
U.S. 103 (1975) (allowing challenge to pre-trial detention practices).

principles may even apply when state processes are alleged to be unconstitutional, so long
as they provide for a mechanism to make that challenge. See Pennzoil Co. v. Texaco,
Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State
Court Proceedings, 66 N.C. L. Rev. 49, 60-72 (1987); Calvin R. Massey, State
Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61, 78-82
(1989) (noting constitutional underpinnings to abstention doctrines).

413. See, e.g., Tax Injunction Act, 28 U.S.C. § 1341 (1988); Rate Injunction Act;
rights, 42 U.S.C. § 1983, focuses on providing a federal forum rather than reshaping or
correcting the deficiencies in a state forum. See Monroe v. Pape, 365 U.S. 167 (1961)
(refusing to make availability of federal forum under § 1983 turn on availability of state
court remedy).
practices, while leaving open the federal courthouse doors. It strongly suggests there is a structural value served in accommodating a variety of institutional "sets" within which Article III matters are addressed. 414

3. OLD WINE, NEW BOTTLES: THE IMPACT OF NEW YORK V. UNITED STATES

a. "Commandeering" State Governments to Administer Federal Law

These concerns for a qualified version of jurisdictional and procedural autonomy have lately been reflected in the Court's affirmation that there may be federalism-based constraints on Congress's ability to enlist state governments in the enforcement of federal law. In New York v. United States, 415 the Court struck down a congressional statute that would have required the states to regulate the disposal of radioactive waste produced by private industry, or else take title to it. Although the area was clearly one that Congress could have regulated on its own, 416 the Court rejected any suggestion that Congress could constitutionally, in the Court's words, "commandeer the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program," or insist that states govern according to Congress's instructions. For the majority, Justice O'Connor portrayed the historical move from Confederation to Constitution as having undone the failed experiment of governing the nation through the intermediary of state legislation. The possibility of governing through coercive congressional

414. See Bator, supra note 342, at 631; cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (referring to states as "laboratories" within a federal system).


416. Congress's scheme arguably showed a greater concern for states to the extent that it empowered them to legislate on their own within some general federal parameters. Somewhat similar arguments had flown before. See FERC v. Mississippi, 456 U.S. 742 (1982) (upholding, inter alia, congressional requirement that state agencies "consider," in a manner consistent with federal law, the adoption of certain federal regulatory standards). But in New York, the alternative of federal preemption in the event of state failure to regulate was not available as it had been in FERC. Other criticisms have been made of the decision in FERC, including its reliance on Testa, see id. at 769, to support the imposition of regulatory obligations. See, e.g., Margaret G. Stewart, Federalism and Supremacy: Control of State Judicial Decision-Making, 68 Chi.-Kent L. Rev. 431, 439-40 (1992); The Supreme Court, 1981 Term—Leading Cases, 96 Harv. L. Rev. 62, 193 (1982); see also FERC, 456 U.S. at 775-97 (O'Connor, J., concurring in judgment in part and dissenting in part). But the argument from "the possibility of federal preemption" to the theme of state coercion would have been a nonstarter during much of the nation's history.
commands to state legislatures, said the Court, had been rejected in the plan of the Convention.\footnote{417}

By insisting that the states regulate as a means of achieving otherwise legitimate congressional ends, the New York Court concluded that Congress had displaced the otherwise constitutional choices of state citizens respecting how and what they would regulate, and had done so without offering any meaningful constitutional alternative, either through financial incentives or outright congressional regulation.\footnote{418} Not only did the kind of coercion of state governmental processes served up in Congress's take-title plan displace those choices, but, concluded the Court, it diminished democratic values and eroded governmental accountability by removing federal officials from political visibility for consequences surrounding the enforcement of this federal program. In addition, Congress had shifted the costs of enforcement of the federal program by placing them entirely on the states and their legislatures.\footnote{419}

\footnote{417. 112 S. Ct. at 2422-23. But see Levy, supra note 294, at 515-22 (arguing that Justice O'Connor overstated the historical evidence). Professor Levy rightly argues that the enlargement of federal power to act directly on individuals did not necessarily mean that Congress lost any power to act through the states. And admittedly, Justice O'Connor failed to consider the possibility. Nevertheless, even among the Constitution's supporters, there was a remarkable dearth of open advocates for such a position. See also Edward S. Corwin, National Power and State Interposition, 1787-1861, 10 Mich. L. Rev. 535, 543 (1912) ("Undoubtedly the Convention of 1787 designed to obviate all necessity for State coercion, which had proved ineffectual under the Articles of Confederation."). For the possibility that The Federalist advocated such a position, see supra text accompanying notes 278-99.}

\footnote{418. The Court therefore distinguished incentive schemes by which states might be encouraged to govern in ways preferred by Congress in exchange for federal dollars or some other federal benefit. See New York, 112 S. Ct. at 2427. And it distinguished as well arrangements whereby the federal government encouraged state regulation of a particular subject consistent with federal standards by offering the constitutional alternative of outright preemption if a state chose to forego the job of regulation. See id. These sorts of arrangements, argued the Court, theoretically give choices to the people of a state, even if Congress drove such a hard bargain that the offer might not realistically be refused. But if they are hardy enough and so inclined, the people of a state can direct their governmental resources to other matters and insist that the proposed regulatory duties be borne by the federal government. The federal program at issue in New York did neither. For doubts about the political visibility associated with such state "choices," see William Van Alstyne, "Thirty Pieces of Silver for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law," 16 Harv. J. L. & Pub. Pol. 303 (1993); see also Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847 (1979); Note, Federalism, Political Accountability, and the Spending Clause, 107 Harv. L. Rev. 1419 (1994).}

\footnote{419. Some visibility is lost, of course, even when state officials enter into the enforcement of federal programs as an alternative to threatened federal regulatory preemption—something that the Court is prepared to accept. But in such cases, visibility exists at the inception of such a venture insofar as politically accountable state officials}
b. New York’s Implications for Jurisdictional Autonomy

The Court’s concern for state institutional or “process autonomy” in New York has implications in the judicial context, although the match is not perfect. The current regime of jurisdictional noncoercion with its proviso for nondiscrimination against federal claims vindicates a set of concerns for state decisionmaking autonomy similar to those advanced in New York, by allowing the people of a state a large measure of freedom to structure their judicial systems as local conditions may require. Problems of political accountability, moreover, may present themselves in the context of jurisdictional coercion no less than in commands to legislate. Congress might seek, for example, to displace state jurisdictional choices simply by federalizing more areas of civil and criminal activity, while, as in New York, shifting the bulk, if not all, of the administrative costs of enforcement to the states. Of course, it might be argued that merely having to apply federal norms instead of state norms can blur the lines of accountability as to the substance of any state court judgment. But unlike the choice of what cases to hear, a state court can readily identify accountability for its

have made a conscious decision to strike a bargain with the national government.

420. Commentators have dubbed the vision of federalism articulated in New York as one of “process autonomy” to distinguish it from the older theories of regulatory autonomy associated with the notions of dual federalism. See Powell, supra note 4, at 639-52. While the older theories supposed that there were enclaves of local matters that the states alone could regulate, New York’s federalism is seen as accepting the nationalist premises involved in the New Deal Court’s rejection of dual federalism by conceding a broad scope of congressional power, even in areas that might have once been thought beyond the reach of Congress. See id. at 670. The Court in New York therefore did not purport to resurrect the vision of federalism embodied in National League of Cities v. Usery, 426 U.S. 833 (1976), which, before its reversal in Garcia v. San Antonio Metro. Trans. Dist., 469 U.S. 528 (1985), sought to protect certain, but not especially well-defined, “traditional governmental functions” from congressional regulatory control. But cf. Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 SUP. CT. REV. 341, 361-80 (perceiving National League of Cities to be based on process autonomy rather than regulatory autonomy).

421. See Joan Steinman, Reverse Removal, 78 IOWA L. REV. 1029, 1085-88 (1993) (arguing in favor of constitutionality, after New York, of proposals by the American Law Institute’s Complex Litigation Project, to provide for “removal from federal court to state court of certain complex litigation). Professor Steinman is right, I think, to recognize that there is a potential problem raised by New York regarding federal control of state court jurisdiction, and I also think she is right that the voluntariness of the ALI’s removal proposals save them from constitutional objection.
results by clearly spelling out the respective state and federal grounds for its decisions.\textsuperscript{422}

The Court in \textit{New York}, of course, was immediately concerned with the problem of state legislative commandeering by Congress, not jurisdictional coercion of the state courts. In fact, the Court noted in light of \textit{Testa}, that its observations did not apply altogether to state courts, and conceded that the Supremacy Clause commanded state courts to decide cases otherwise properly before them consistently with federal law.\textsuperscript{423} To this extent, said the Court, state courts are different from legislatures and could indeed be "commandeered." Of course, the Supremacy Clause also imposes obligations on state legislatures to conform their actions to federal law and the Constitution—a point not discussed in \textit{New York}. But they are given a freedom from immediate control by federal decisionmakers, even when the Constitution expressly imposes a specific injunction on them not to enact certain legislation.\textsuperscript{424} While federal law and the Constitution are enforceable against state legislative action through federal judicial review, such review comes only after intervening events and actions by state law enforcement officials have given rise to a

\textsuperscript{422}\textit{Cf.} Michigan v. Long, 463 U.S. 1032 (1983) (insisting on clear articulation of adequate and independent state law grounds before Court will decline review based on federal grounds). While \textit{Long} did not focus especially on the problem of accountability, it can be justified on such a basis. \textit{See} Fletcher, \textit{supra} note 409, at 289-90. Based on accountability concerns associated with what would otherwise be unreviewable questions of federal law, William Fletcher argues that the Court should be able to review federal questions in cases heard in state courts that have case and controversy requirements more liberal than those of Article III. \textit{See also} Matasar & Bruch, \textit{supra} note 394, at 1368-69 (noting how \textit{Long}'s clear statement rule can undermine state court judicial freedom to act through writing ambiguously). For the distinct possibility that at least one of the framers would have been prepared to tolerate the sort of line-blurring that \textit{New York} fears, see \textit{supra} note 245.

\textsuperscript{423} \textit{See} \textit{New York}, 112 S. Ct. at 2429-30.

\textsuperscript{424} For example, while state legislatures are enjoined from passing a law impairing the obligation of contract (U.S. CONST. art. I, § 10, cl. 1), depriving United States citizens of their national privileges and immunities (\textit{id.} amend. XIV, § 1, cl. 1), or ex post facto laws (\textit{id.} art. I, § 9, cl. 3), no one seems to have suggested that a legislature could be judicially enjoined if it tried to pass such a law. That obviously is part of the legislative autonomy associated with the traditional immunity of legislators from lawsuits for their lawmaking activities. \textit{See} Woolhandler, \textit{supra} note 164, at 406-09. Federal review of unconstitutional state legislative action therefore tends to take place only when the legislative action has resulted in actual or imminently-threatened enforcement by another branch of state government, and the dispute has come before a court, either state or federal. \textit{But cf.} South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding, based on congressional power under § 2 of the Fifteenth Amendment, federal "preclearance" provisions of Voting Rights Act of 1965, § 5, 79 Stat. 473); Robert Shapiro, Comment, \textit{The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction}, 99 YALE L.J. 231 (1989).
justiciable controversy. Thus, the supreme law of the land is not, and traditionally has not been, as immediately enforceable against state legislatures as it has been against state courts whose decisions are directly reversible by federal decisionmakers, often without the intervention of other events or actors.

It would appear that such indirection was caused, in no small part, by the demise of the proposal to give the federal government a direct negative on state legislation before its going into operation, and by the substitution of a judicially enforceable provision for federal supremacy. State courts, therefore, have a direct bureaucratic relationship with the Supreme Court (and perhaps other federal courts) that the state legislative branches do not. It is this relationship that allows for the ability to command state courts to follow federal law, or face correction for their failure to do so. The ability to command state courts in this unmediated manner, definitively resolved in \textit{Martin}, also derives, perhaps, from the fact that state judges alone take two oaths under the Supremacy Clause, one to support the Constitution—which all officials take—and an extra one to conform their decisionmaking to federal norms.\footnote{See U.S. Const. art. VI, cls. 2, 3; see also Prakash, \textit{supra} note 4, at 2011-12; Clinton, \textit{supra} note 40, at 814.}

But it does not follow from a recognition that the Supremacy Clause may uniquely dictate to state courts how to decide cases over which they have jurisdiction, that they may be compelled to undertake the adjudication of unfamiliar judicial business, or to alter substantially their manner of processing cases, or to develop new judicial structures in the service of federal law enforcement. It was the early Republic's worries about such possibilities that led it to its own conclusions about state court jurisdictional autonomy. It is true, of course, that one does not readily associate the assumption of judicial business with anything like the command to legislate at issue in \textit{New York}. Even Justice O'Connor had noted that state courts of general jurisdiction do not set their own agendas, and thus may have a more diminished claim to autonomy respecting the business that they must entertain.\footnote{Operating in the shadow of \textit{Testa}, Justice O'Connor had previously indicated that commandeering of legislatures was different from the particular commandeering of state judiciaries that the Supremacy Clause requires. See \textit{FERC v. Mississippi}, 456 U.S. 742, 784-85 (1982) (O'Connor, J., concurring in part and dissenting in part) (treating \textit{Testa} as a jurisdictional antidiscrimination rule). \textit{FERC} had unanimously held that state agencies could be required to resolve disputes under federal regulatory provisions when they ordinarily resolved "similar actions" under state law, and uncontrovertially relied on \textit{Testa} to reach that result. See id. at 760; cf. \textit{supra} note 416 (discussing more doubtful use of \textit{Testa} to support other parts of the regulatory scheme at issue in \textit{FERC} that were directed to legislative coercion).}

Their diminished claim is also reflected in the Court's recognition that, to the extent they
hear certain general categories of cases, state courts might be obligated to hear similar federal issues.

Yet courts, including courts of general jurisdiction, do not exist in a legislative vacuum. No less than federal courts, state courts are creatures of government and antecedent legislative choices. It is therefore not altogether accurate to conclude that the coercion of state judiciaries to entertain certain jurisdiction does not entail the coercion of state legislatures, because judicial jurisdiction is itself inevitably a legislative creature. Indeed, any argument in favor of absolute (as opposed to nondiscriminatory) state court jurisdictional duties must face the reality that it would impose a constitutional mandate on states to create courts and to supply them with a form of unlimited general jurisdiction. Perhaps such an obligation can be argued. But the Constitution speaks no more (and perhaps less) expressly to that requirement than to the obligation of Congress to create lower federal courts and give them jurisdiction.

427. The Court has rightly perceived the problem of such compulsory jurisdiction as whether states can be compelled to create courts and supply them with particular jurisdiction. See, e.g., Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."); cf. Holmgren v. United States, 217 U.S. 509, 517 (1910) ("It is undoubtedly true that the right to create courts for the states does not exist in Congress."). In the admittedly different context of whether a state court had to take jurisdiction over an out-of-state cause of action, Justice Holmes for the Court noted that the argument for jurisdiction reduced to an argument that states were obligated to create courts. The reality, he said, was that states were simply not obliged to furnish a court at all. See Kenney v. Supreme Lodge, 252 U.S. 411, 414 (1920) ("[T]here is truth in the proposition that the Constitution does not require the State to furnish a court."); accord Missouri v. Lewis, 101 U.S. 22, 30 (1880); see also Weinberg, supra note 5, at 1774 n.107 (questioning "whether this view is sound" based on the Compromise); cf. Milwaukee County v. White Co., 296 U.S. 268, 276 (1938) (interstate full faith and credit to judgments need not be given when cause of action was one "for which the state of the forum has not provided a court").

One might try to approach the problem of a state court's refusal to entertain certain federal judicial business by insisting that a state court ignore a particular jurisdictional limitation that would deny it the power to hear such business, and require it to fall back to its general jurisdictional powers to hear the case. Cf. Hart, supra note 7, at 1401 ("[S]tate courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution."). If a state has gerrymandered-out certain federal claims on a discriminatory basis, such a result would be unproblematically consistent with decisions such as Mondou. But even this conclusion presupposes that states have created courts of general jurisdiction in the first place, and, more questionably, that they might be obligated to do so and/or to keep them in place thereafter.

428. The Constitution clearly refers to state courts in the Supremacy Clause, when
Thus, despite the New York Court’s recognition that state courts can be commandeered in a way that state legislatures may not, the Court’s decision provides a constitutionally grounded argument against Congress’s ability to insist—as it so far has not—that states provide their courts with the requisite jurisdiction to carry out the enforcement of federal programs. If so, then it is arguable that when Congress insists that state courts exercise particular jurisdiction, it can go no further than to rely on the nondiscrimination principle that already binds state courts even when Congress has been silent on the issue. To be sure, an argument for greater coercive power in Congress can be made from the procedural displacement cases, in which the Court has recognized a federal ability to restructure even otherwise constitutional and nondiscriminatory state practices in the service of federal law. But Congress’s power to insist that states conform to nonanalogous procedures in cases that they entertain may not be a completely satisfactory argument for its being able to impose nonanalogous jurisdiction.

In addition, and consistent with it declares that state judges will be bound by supreme federal law. But the history of the clause suggests that the ordinary understanding was that state judges would be bound by federal law as a rule in cases that they decided, and not that federal law would supply authority for deciding in the first instance. See supra part III.

As noted elsewhere in the text, this nondiscrimination model might start to approximate an absolute duty model, given courts of general jurisdiction. But a fair application might also prevent Congress from imposing either substantially novel judicial business, or business that required the development of unfamiliar institutions, such as admiralty, or perhaps, federal criminal matters. See supra text accompanying note 380. In addition, using a nondiscrimination model as a limit on even the express exercise of congressional power would be consistent with the important and repeated suggestions that Congress could not confer jurisdiction on state courts and that state court jurisdiction generally trickled up from state law sources, not down from federal ones. See also Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) (“Neither Congress nor the British Parliament ... has power to confer jurisdiction” upon the courts of a state.). Writing in the wake of National League of Cities v. Usery, 426 U.S. 833 (1976), Martin Redish and John Muench concluded that it was “likely” that any constitutional limits on congressional power to compel state court jurisdiction “would correspond closely to the content of the ‘valid excuse’ doctrine.” Redish & Muench, supra note 5, at 344. I think the decision in New York confirms their observation. It should be pointed out, however, that their reading of what would constitute a nondiscriminatory valid excuse for state courts to refuse jurisdiction is far more limited than that suggested here. See id. at 345.

Being able to insist on the adjustment of procedures in litigation already handled by the state courts typically demands far less than requiring the assumption of novel jurisdiction in the first place. Procedural displacement usually only tells state judicial officials how to go about business that is otherwise theirs to go about, and therefore tends to honor state limitations on their general scope of agency. See supra note 375. Imposing nonanalogous jurisdiction might require ordinary limitations on agency to be ignored. The imposition of sufficiently drastic procedural innovation might even begin to approximate nonanalogous jurisdiction, and would argue in favor of allowing state
New York, the Court has recognized that even in the procedural displacement context there may be limits to the federal government's ability to make-over the state courts' otherwise constitutional procedures when they handle federal judicial business.

Although neither the procedural displacement cases nor New York speak in the language of constitutional balancing, perhaps an accommodation to federal needs and to the jurisdictional autonomy interests of the states can be achieved by insisting that Congress at least provide a compelling reason before it insists (as so far it has not) that state courts undertake substantially new and nonanalogous jurisdictional duties. Questions about the degree of necessity or propriety of congressional action under Article I are not, admittedly, the usual stuff of decisions about the reach of congressional power. But it is at least arguable that such heightened scrutiny is appropriate when Congress seeks not to develop its own institutions to achieve its permissible ends, but instead seeks to enlist coercively another set of the People's agents in the administration of federal law. This conclusion would suggest that Congress might be obliged, as an alternative to compelling state courts to hear nonanalogous jurisdiction, to create judicial institutions of its own. Neither the Compromise nor the Constitution would be incompatible with such an obligation, provided that they are read—as the historical materials suggest they should be—as assuming merely that Congress could forgo the creation of judicial tribunals of its own only so long as state courts of competent jurisdiction, fairly construed, were available.

courts a right of jurisdictional opt-out at some point.

431. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (degree of necessity for particular exercise of federal power is to be decided “in another place”); see also Garcia v. San Antonio Metro. Trans. Dist., 469 U.S. 528 (1985) (largely relegating to political process claims of congressional overreaching of its commerce powers). Justice Blackmun, however, from the time of National League of Cities, 426 U.S. at 856 (Blackmun, J., concurring), and up to Garcia, engaged in a form of balancing to accommodate federalism concerns with congressional power. Cf. Garcia, 469 U.S. at 568-77 (Powell, J., dissenting). That is arguably what Justice O'Connor has done in New York. See also Lawson & Granger, supra note 4. The source of congressional power to compel state courts to exercise jurisdiction over Article III business is thought to reside in the necessary and proper power (see U.S. CONST. art. 1, § 8, cl. 18) to enforce Article III, or the underlying federal right that may be at issue. See Sandalow, supra note 8, at 207 n.84.

432. To assume that state courts would exist as an underlying premise of the Compromise does not mean that it was part of the Compromise that they must exist. Historically, such a conclusion seems hard to support. Rather, the contrary seems true: when the premise of the Compromise is withdrawn, the discretion not to create courts may be lost. See Amar, supra note 40, at 256 n.165 (noting that “[t]he Framers did not contemplate this dilemma, because they believed that state courts of general jurisdiction would always be open to entertain all suits, and would willingly do so”). Because of the
Finally, however one approaches the hypothetical problem of express congressional insistence that state courts assume jurisdiction, New York offers a line of argument that easily justifies the current regime of jurisdictional nondiscrimination when Congress has been silent. Whether constitutionally driven or merely prudential, the Court’s concerns seem to provide a workable set of presumptions that would keep the nondiscrimination principle in place as the default rule, absent a fairly explicit effort by Congress to insist on state court enforcement of federal judicial business. As in a host of other contexts, a clear-statement requirement here would reinforce federalism concerns, and avoid constitutional problems lurking in the background of alternative readings that would be less solicitous of such concerns.

**c. The Historical Challenge to New York from “Field Office Federalists”**

Predictably, doubts have been raised about the constitutional pedigree of New York and whether it provides a proper basis for limiting congressional action to enlist state governments in the enforcement of federal law. Critics have argued that, even if the process-autonomy federalism of New York is distinguishable from the regulatory federalism of an earlier era, it too ultimately lacks a legitimate basis. Because a major support for the structural argument made by the Court rests on originalist material, that is where the most of their criticism has focused. However, as discussed above, the historical foundation for the vision of federalism put forward in New York is not so weak as its detractors would suggest, at least as reflected by the early understanding of the role that state judiciaries would play in the enforcement of federal law. While it may be the case that the founding generation was less concerned about constitutional difficulties associated with mandatory state court jurisdiction, “the better solution in such cases ["where no discrimination or allegations of state misconduct are involved"] would be to create lower federal courts out of respect for state autonomy—an ironic twist on the states’ rights position at the Constitutional Convention.” *Id.* at 256-57 n.165.


434. See *supra* part III.
maintaining rigid lines of state and federal accountability in the administration of federal law than New York would seem to suggest, and while the Court may have made the historical record seem neater than it was, the historical materials respecting state judicial involvement in the enforcement of federal law generally do not appear to go beyond proposals for voluntary, cooperativist arrangements. The one notable exception to the arrangement was the Supremacy Clause's unique commandeering of judicial officials to sometimes ignore state law when deciding disputes that were properly before them, and Article III's implicit recognition of direct federal judicial control through review and reversal. Thus, with respect to state court jurisdictional powers and duties, the early implementation and dialogue surrounding the Constitution seem to reinforce rather than undermine New York's historical vision. If anything, they argue for a potentially more radical version of state jurisdictional autonomy than the New York Court, in a post-Testa universe, was prepared to concede.

CONCLUSION

As a historical matter, the notion that Congress might make use of the state courts to enforce federal law any time it was arguably necessary and proper to the achievement of some legitimate congressional goal, is inaccurate. The role of the state courts in the enforcement of federal norms and other Article III business was far more complex than such a picture would suggest. A primary reason for the different picture of the role of state courts in the enforcement of federal law described in this Article was the legal community's past unwillingness to reason about state court powers and duties from the events of the Madisonian Compromise. While the logic of the Compromise now stands for the proposition that enforcement of nearly all Article III business might have rested originally with the state courts, and that therefore, a corresponding duty devolved upon them to take up such business, such reasoning would have been foreign to the legal community of the early Republic. In addition, as I have tried to show, the events surrounding and the ultimate "meaning" of the Compromise may be much more uncertain than scholars have previously supposed.

Although many in the early Republic started from similar understandings about state court jurisdiction, they did not all agree about the consequences of those understandings. The legal mainstream, not just the redoubtable Justice Story, supposed that some Article III jurisdiction was constitutionally off-limits to the state courts, quite apart from any items in the Supreme Court's original jurisdiction. Some of them therefore supposed that federal courts might have to be created for those matters not in the High Court's original jurisdiction, and off-limits to the
state courts. Others in the mainstream did not. But no one seems to have
supposed that the failure of state court jurisdiction would have been an
argument in favor of congressional power to coerce such jurisdiction.
True, there were original expectations that state courts would cooperate
in the adventure of federal law enforcement, but those hopes were not
long-lived, and gradually evaporated as intergovernmental jealousies grew
more acute in the antebellum era. But even those who argued for a more
cooparativist federalism seem not to have admitted the possibility of
jurisdictional coercion. If nothing else, these understandings of the
anticipated role of state courts in the enforcement of federal law suggest
that the meaning of Article III was still in some flux throughout most of
the nation’s first century, just as it clearly was at the time of the
Madisonian Compromise. While the revisionist view of the Compromise
taken in this Article has its most significant impact on the issue of state
court roles and duties in the enforcement of Article III business, it may
also suggest the need to reconsider other areas of federal courts law that
are heavily dependent for their support on the logic that we attribute to
the Compromise.

I have also tentatively suggested in this Article the direction in which
these historical events might point in today’s world of scarce federal
judicial resources, and the growing federalization of matters that were
once handled largely by state and local governments. As in the early
Republic, the need for cooperation and voluntary assistance in the
enforcement of federal law is as desirable as it is essential. But I have
argued that surviving concerns from the historical role of state courts in
the enforcement of federal law support the existing model of jurisdictional
nondiscrimination, and support an approach that would place curbs on
Congress’s ability further to conscript state courts in the administration
of federal law. Post-New Deal changes in thinking about federalism and
supremacy, of which Testa v. Katt was a part, have admittedly reshaped
and limited the past’s concerns with jurisdictional autonomy, but they
have not wiped such concerns off the map. While the Court has lately
professed its abandonment of the task of policing federalism limits on
congressional power, that abandonment is itself comparatively recent in
our constitutional tradition, and the modern Court seems to be badly
conflicted on the issue. In any event, the Court’s decision in New York
suggests that it has made a partial reentry into the field. Perhaps the
limits on congressional power here, if any, should remain inexact, and the
People allowed to insist that their state judicial institutions remain
identifiably institutions of their state governments rather than institutions
of the federal government. But reinvigorating the idea of limits on the imposition of state judicial jurisdiction would retrieve a lost element of an overall nationalist vision of the role of the federal courts, and would lend a dash of historical legitimacy to the Court’s unwillingness to impose anything more than a duty of jurisdictional nondiscrimination on state courts.

435. It is out of concern for these very issues of maintaining lines of state and federal accountability that some scholars have recently sought to rejuvenate the Constitution’s Republican Guarantee Clause as a firmer textual basis for the kinds of federalism and autonomy values articulated in New York. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); D. Bruce La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 577, 639-65 (1985); Merritt, supra note 4; Note, The Supreme Court, 1991 Term—Leading Cases, 106 HARV. L. REV. 163, 173-83 (1992) (discussing New York v. United States); cf. Zoë Baird, State Empowerment After Garcia, 18 URB. LAW. 491, 504 (1986) (“The structural interests of the states . . . are quite separate and distinct from the substantive policy interests of the people of the various states which are reflected in Congress.”); Massey, supra note 412, at 66 (suggesting that Tenth Amendment reflects historical understanding that federal power to coerce states through legislation was problematic). The Republican Guarantee provision, has, however, been held nonjusticiable. But the very reasons for its nonjusticiability in suits by private parties demanding federal judicial intervention into otherwise constitutionally organized state governments could actually argue in favor of finding justiciable limits on federal legislative power seeking to impose particular governmental structures on states that are otherwise constitutionally organized. See, e.g., TRIBE, supra note 369, § 5-23; Merritt, supra note 4, at 77-78; Note, supra, at 181-82.