

Lecture

CONGRESSIONAL POWER OVER THE JURISDICTION OF FEDERAL COURTS: THE MEANING OF THE WORD “ALL” IN ARTICLE III

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INTRODUCTION

Thank you, Dean Levi, for the invitation to deliver this year’s Brainerd Currie lecture. Professor Currie, a professor at Duke Law School near the beginning and then again at the end of his career, was an intellectual giant. He transformed the field of conflict of laws and made closely related contributions to other areas of the law, including subject matter jurisdiction, forum choice, and admiralty. I am honored to give a lecture that bears his name. Because my lecture touches on some of the themes of his work, I like to think that he would have found it of some interest.

Samuel Adams, the Massachusetts patriot, was not enthusiastic about the newly proposed Constitution. He particularly did not like its introductory phrase, “We the People of the United States.” The phrase signaled a departure from the Articles of Confederation that

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the Constitution was to replace. The constituting authorities for the Articles of Confederation were the states, which had signed the Articles as states in the same way that sovereign countries would sign a treaty. By contrast, the constituting authority for the Constitution was the people. Adams wrote to his friend Richard Henry Lee of Virginia on December 3, 1787, “[A]s I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a Federal Union of Sovereign States.”¹

I stumble at a smaller but nonetheless important threshold, this one in Article III of the Constitution. The threshold is the word “all,” which appears five times in the first two paragraphs of Section 2. The word, and its meaning, raise the same question the phrase “we the people” raised for Adams. The question was then, and it remains today, the division of authority between—to use Adams’s words—the national government and the sovereign states.

Article III is the judicial article of the Constitution, corresponding to Articles I and II, the legislative and executive articles. Article I, Section 8 is closely analogous to Article III, Section 2. Unlike state legislatures, Congress is not a legislative body with general legislative authority.² Before the post-Civil War amendments, Congress was limited to the heads of legislative power that appear in Article I, Section 8—such as the commerce power, the spending power, and the bankruptcy power. If Congress cannot tie federal legislation to a specified head of power, that legislation is unconstitutional.

Similarly, unlike state courts, federal courts are not courts of general jurisdiction. Rather, federal courts are limited to the heads of subject matter jurisdiction specified in Article III, Section 2, just as Congress was originally limited to the heads of legislative power specified in Article I, Section 8. If a case does not fall under one of the specified heads of jurisdiction in Article III, Section 2, a federal court cannot hear it.

The first paragraph of Article III, Section 2 sets forth the heads of jurisdiction for the federal courts generally, including but not limited to the Supreme Court. The first paragraph of Section 2 begins with three heads of jurisdiction, each of which is preceded by the word “all”:

1. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 4 THE WRITINGS OF SAMUEL ADAMS 324 (Henry Alonzo Cushing ed., 1908).

2. See U.S. CONST. art. I, § 8 (giving Congress only power “herein granted”).

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction³

I will call these federal question, ambassador, and admiralty jurisdiction. The first paragraph then continues with the remaining heads of jurisdiction, none of which is preceded by “all”:

The judicial Power shall extend . . . —to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁴

Do not be bothered by the change from “cases” to “controversies.” By “cases,” the Framers almost certainly meant either criminal or civil cases; by “controversies,” they meant only civil cases.⁵ That change will not be central to our discussion.

The second paragraph of Section 2 more specifically sets forth the jurisdiction of the Supreme Court. It provides that the Supreme Court shall have original jurisdiction in two categories of cases preceded by the word “all”—ambassador cases and cases in which a state is a party. In other categories of cases, the Supreme Court’s jurisdiction is appellate. The second paragraph provides:

3. *Id.* art. III, § 2, cl. 1.

4. *Id.*

5. *See, e.g.,* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431–32 (1793) (Iredell, J., dissenting) (stating that “controversies” was never intended to include criminal proceedings); 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* app. note E, at 420–21 (Phila., William Young Birch & Abraham Small 1803) (noting that the word “controversies” was understood to mean civil cases); JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 536 n.2 (Boston, Hilliard Gray & Co. 1833); Peter S. Du Ponceau, Provost, Law Acad. of Phila., *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, Valectory Address to the Students of the Law Academy of Philadelphia (Apr. 22, 1824), in *A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES* (Phila., Abraham Small 1824). For discussion, see William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 266–67 (1990), and James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 605–10 (1994), both arguing that “controversies” meant only civil cases. *But see* Robert J. Pushaw, *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 460–64 (1994) (disputing this interpretation of “cases” and “controversies”).

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.⁶

The word “all” thus appears as a lead-in to the first three heads of jurisdiction of the first paragraph dealing generally with subject matter jurisdiction in the federal courts—federal question, ambassador, and admiralty jurisdiction. Then it appears again as the lead-in to the two heads of original jurisdiction in the second paragraph dealing specifically with the subject matter jurisdiction of the Supreme Court—ambassador and state-as-a-party jurisdiction. Finally, it appears as the lead-in to the residuary clause in the second paragraph. The question I will address in this lecture is the meaning of the word “all” the first four times it appears in these two paragraphs.

Despite its textual prominence at the beginning of Section 2, the word has received relatively little attention, either in the Framers’ time or in our own. Far from stumbling at the threshold, most people—including the Framers and most modern academics—have stepped over the word without comment. There have been a few notable exceptions, however. For example, as I will discuss in a moment, Justice Story, writing for the Supreme Court in *Martin v. Hunter’s Lessee*⁷ in 1816, relied on the word in explaining his broad view of the constitutionally obligatory jurisdiction of the federal courts.⁸ Professor William Crosskey, in his two-volume study of the Constitution in 1953, had a similarly expansive view of federal court jurisdiction.⁹ Finally, Professor Akhil Amar has paid close and sustained attention to the word, beginning with his groundbreaking article in 1985.¹⁰

6. U.S. CONST. art. III, § 2, cl. 2.

7. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

8. *Id.* at 334.

9. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 614–15 (1953).

10. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *Neo-Federalist*]; see also Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) [hereinafter Amar, *Original Jurisdiction*]; Akhil Reed Amar, *The*

Building on but not entirely agreeing with Justice Story, Professor Amar argues that the word “all” means that Congress is constitutionally required to confer on the federal courts all of the jurisdiction authorized under the first three heads of jurisdiction of the first paragraph of Section 2—that is, federal question, ambassador, and admiralty. In Professor Amar’s view, however, this reading of the word “all” does not apply to the Supreme Court’s original jurisdiction in state-as-a-party cases in the second paragraph of Section 2. Therefore, according to Professor Amar, Congress is not constitutionally required to confer on the Supreme Court original jurisdiction over all state-as-a-party cases.¹¹

For the three heads of jurisdiction in the first paragraph of Section 2, to which he argues that his reading of the word “all” does apply, Professor Amar argues that the full extent of the constitutionally available jurisdiction must be conferred on some federal court.¹² In his view, it does not matter whether the jurisdiction can be exercised as an original matter by a federal trial court, or on appeal by the United States Supreme Court, provided that at some point in the life of the case a federal court can exercise jurisdiction. Nor, in Professor Amar’s view, does it matter in these three categories of cases whether federal jurisdiction is concurrent with or exclusive of the jurisdiction of the state courts.¹³ Thus, a case falling under one of the first three heads of jurisdiction might never actually come into a federal court. For example, the parties may choose to litigate a federal question case in state rather than federal court, and the losing party in state court may choose not to seek review in the United States Supreme Court.¹⁴

I agree that the word “all” is important, but I disagree with Professor Amar as to its meaning. As I read the historical evidence, the word “all” applies to, and has the same meaning for, all four heads of jurisdiction specified in the first two paragraphs of Section 2—the federal question, ambassador, and admiralty jurisdiction in the first paragraph, and the ambassador and state-as-a-party jurisdiction

Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499 (1990); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

11. Amar, *Original Jurisdiction*, *supra* note 10, at 480–83.

12. Amar, *Neo-Federalist*, *supra* note 10, at 206.

13. *Id.* at 234.

14. For thoughtful criticisms of Professor Amar’s argument, see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990).

in the second paragraph. I say four rather than five heads of jurisdiction because I am counting ambassador jurisdiction only once. As to these four heads of jurisdiction, the word “all” authorizes, but does not require, Congress to confer exclusive jurisdiction on the federal courts.

Under my reading of the word “all,” Congress may specify that some or all cases brought under federal question, ambassador, and admiralty jurisdiction are within the exclusive jurisdiction of the federal courts generally. Similarly, Congress may specify that some or all of the cases brought under ambassador and state-as-a-party jurisdiction are within the exclusive original jurisdiction of the Supreme Court. To the extent that Congress specifies that jurisdiction is exclusive, cases under these heads of jurisdiction can be brought only in the federal courts. As to such cases, the state courts can hear none of them. The federal courts must hear all of them.

I. THE CONSTITUTION’S FRAMING

I begin at the beginning, with the framing of the Constitution. The delegates to the Constitutional Convention easily agreed that there should be a national judiciary with a national Supreme Court. But they had difficulty agreeing on whether there should be inferior federal courts. On June 5, 1787, James Madison of Virginia and James Wilson of Pennsylvania suggested a compromise, now commonly known as the Madisonian compromise, under which the Constitution would authorize inferior federal courts, but Congress would decide whether actually to create them.¹⁵ On the same day the compromise was suggested, Wilson argued to the Convention that “admiralty jurisdiction ought to be given wholly to the national Government, [because] it relate[s] to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen.”¹⁶ In Wilson’s view, inferior federal courts ought to be created because if admiralty jurisdiction were given “wholly” to the federal courts—meaning, almost certainly, given exclusively to the federal courts—and if inferior federal courts were not created, all admiralty cases would have to be brought in the

15. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (1911).

16. *Id.* at 124.

national Supreme Court, far from the ports where the cases were likely to arise.

There was little recorded discussion of the scope of the federal courts’ jurisdiction during the course of the Convention. On July 18, the Convention unanimously resolved either “[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony,”¹⁷ or “that the jurisdiction shall extend to *all* cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.”¹⁸ The first version appears in the Journal of the Convention; the second version, which includes the word “all,” appears in Madison’s notes.

Edmund Randolph of Virginia and John Rutledge of South Carolina were members of the five-man Committee of Detail, charged with giving near-final form to the Constitution. Among the papers of George Mason of Virginia is an undated draft in Randolph’s handwriting, with emendations in Rutledge’s handwriting. In this draft, the federal courts’ jurisdiction was spelled out at follows:¹⁹

7. The jurisdiction of the supreme tribunal shall extend
- I to all cases, arising under laws passed by the general
<Legislature>
 - 2. to impeachments of officers, and
 - 3. to *such* other cases, as the national legislature may assign, as
involving the national peace and harmony,
in the collection of the revenue
in disputes between citizens of different states
<in disputes between a State & a Citizen or Citizens of another
State>
in disputes between different states; and
in disputes, in which subjects or citizens of other countries
are concerned
<& in Cases of Admiralty Jurisdn>
- But this supreme jurisdiction shall be appellate only, except in
<Cases of Impeachmt. & (in)> those instances, in which . . . the
legislature shall organize it[.]²⁰

17. 2 *id.* at 39.

18. *Id.* at 46 (emphasis added).

19. Angle brackets indicate emendations in Rutledge’s handwriting. Parentheses indicate material crossed out. *Id.* at 137 n.6.

20. *Id.* at 146–47 (footnote omitted) (noting that the words “in disputes between a State & a Citizen or Citizens of another State” were a “[m]arginal note”).

Note that in this draft the word “all” is a lead-in only to “cases, arising under laws passed by the general Legislature.”

Wilson was also a member of the Committee of Detail. Among his papers was an undated draft in his handwriting, also with emendations in Rutledge’s handwriting.²¹ This draft spelled out the federal courts’ jurisdiction somewhat differently. Here, apparently for the first time, the word “all” is used as the lead-in specifically to federal question, ambassador, and admiralty jurisdiction. The draft provided, in language similar to what was to become the first and second paragraphs of Article III, Section 2:

The Jurisdiction of the Supreme (National) Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; to all Cases affecting Ambassadors (and other) (other) public Ministers (& Consuls), to the Trial of Impeachments of Officers of the United States; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies between (States, — except those wh. regard Jurisdn or Territory, — betwn) a State and a Citizen or Citizens of another State, between Citizens of different States and between (a State or the) Citizens (of any of the States) (thereof) and foreign States, Citizens or Subjects. In Cases of Impeachment, (those) (Cases) affecting Ambassadors (and) other public Ministers (& Consuls), and those in which a State shall be (one of the) (a) Part(ies) (y), this Jurisdiction shall be original. In all the other Cases beforementioned, it shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make.²²

The significant differences between this and the final version of Article III, Section 2 were that the entire paragraph described only the “Jurisdiction of the Supreme Court,” that the Supreme Court was given original jurisdiction over “Cases of Impeachment,” that the jurisdiction over controversies between states did not include matters of jurisdiction and territory, and that the word “all” did not precede the heads of the Supreme Court’s original jurisdiction.

On August 6, the Committee of Detail provided its draft to the Convention. Article XI, Section 3 (as it was then numbered) of the draft provided for federal court jurisdiction in essentially the words of

21. *Id.* at 163 n.17 (noting that the words in parentheses were crossed out in the original draft, that the words in italics are additions by Wilson, and that emendations by Rutledge are in single brackets ()).

22. *Id.* at 172–73.

the Wilson draft I have quoted.²³ On August 27, the Convention debated what was to become Article III and approved amendments that brought it closer to what would be the final version.²⁴ On September 12, the Committee of Style reported the amended judicial article to the full Convention.²⁵ Leaving aside changes in punctuation and capitalization, Section 2 was then almost entirely in the form it was ultimately to take.

Sometime in its drafting process, the Committee of Style had removed the language preventing federal courts from hearing controversies between states involving jurisdiction or territory. Then sometime between September 12, when the Committee reported its draft to the Convention, and September 17, when the Convention approved the entire Constitution, a final change was made, adding the word “all” at the beginning of the clause authorizing the Supreme Court’s original jurisdiction over ambassador and state-as-a-party cases.²⁶ These two changes were made without recorded explanation.

The record of the Constitutional Convention’s deliberations over the judicial article is frustratingly cryptic. This is due in part to the fact that the delegates to the Convention were much more concerned about what became Articles I and II and in part to the fact that whatever reasons the drafters of Article III might have had for their choice of words—including the word “all” in Section 2—they kept those reasons largely to themselves. We have a hint from Wilson, when he argued for the creation of inferior federal courts based on the assumption that the federal courts would have exclusive jurisdiction over admiralty cases. But this is no more than a hint. As Professor Julius Goebel wrote of Article III in his volume of the *Holmes Devise History*, “The judiciary was subjected to much less critical working over than the other departments of government. . . . Certainly, when specific provisions were under discussion there was precious little divulged.”²⁷

23. *Id.* at 186.

24. *Id.* at 422–25.

25. *Id.* at 590 n.8, 600–01.

26. *Id.* at 661.

27. 1 JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801*, at 205–06 (1971). Professor Farrand writes similarly, “To one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention.” MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 154 (1913).

II. THE FEDERALIST PAPERS

I turn next to the Federalist Papers. They are a hazardous place to look for an authoritative interpretation of Article III, for they were written as federalist propaganda to persuade doubters to approve the proposed Constitution. They nonetheless occupy a special place in an interpretive endeavor, if for no other reason than the thoughtfulness and legal sophistication of their authors. In Federalist No. 82, Alexander Hamilton, who had been a delegate to the Convention, explored the distinction between the federal courts' exclusive and concurrent jurisdiction under Article III.

Hamilton first set up a straw man, asking whether the federal courts should have exclusive jurisdiction over all cases to which the judicial power extends under Article III, Section 2—which would include not only federal question, ambassador, and admiralty cases, but also controversies in which jurisdiction depended on the status of the parties, such as diversity suits.²⁸ He then asked whether, instead, federal courts should have concurrent jurisdiction with the state courts over at least some of the suits that come within the jurisdiction conferred by Article III.²⁹ Not surprisingly, Hamilton chose the second alternative.

In Hamilton's view, the state courts were to have concurrent jurisdiction over suits of which the states had "previous cognizance" as part of their "primitive" jurisdiction.³⁰ That is, the states would continue to have at least concurrent jurisdiction over suits over which they had jurisdiction before the adoption of the Constitution, for example, suits based on contract, tort, or other nonfederal law. An example in Article III is a case in which the jurisdiction is based on party identity rather than subject matter, such as a controversy between the citizens of diverse states. In these controversies, the federal courts would not be constitutionally permitted to have exclusive jurisdiction.

But in Hamilton's view, "cases which may grow out of, and be *peculiar* to, the Constitution to be established" could be within the exclusive jurisdiction of federal courts if Congress chose to make that jurisdiction exclusive.³¹ Such cases had not been part of a state's

28. THE FEDERALIST NO. 82, at 450 (Alexander Hamilton) (E.H. Scott ed., 1898).

29. *Id.*

30. *Id.* at 451.

31. *Id.*

“primitive” jurisdiction, because such cases could not have existed before the creation of the national government. According to Hamilton, the federal courts could have either exclusive or concurrent jurisdiction in such cases, depending on the will of Congress.³² For example, in a federal question case (a case that depended on the creation of the new national government for its existence), jurisdiction would be concurrent if Congress said nothing. However, if Congress “expressly excluded” the state courts from exercising concurrent jurisdiction, the federal courts’ jurisdiction would be exclusive.³³

Nowhere in Federalist No. 82 does Hamilton refer to the word “all” in discussing Article III. Nor does Hamilton’s distinction between cases depending on the new national government for their existence, over which the federal courts could have exclusive jurisdiction, and “primitive” jurisdiction cases, over which the federal courts could have no more than concurrent jurisdiction, map perfectly onto the heads of jurisdiction preceded, or not preceded, by the word “all.” For example, the state courts had exercised jurisdiction over admiralty cases under the Articles of Confederation.³⁴ Perhaps, given his audience, Hamilton preferred to argue at a level of general principle rather than fine-grained textual analysis. But despite his failure to mention the word “all” (or indeed to quote any of the text of Article III), and despite his somewhat imprecise sorting of the two types of cases, Hamilton’s argument tells us to read the heads of subject matter jurisdiction in Article III as authorizing either exclusive or concurrent jurisdiction for some suits and only concurrent jurisdiction for others.

III. THE JUDICIARY ACT

The first Judiciary Act,³⁵ adopted in September 1789 during the first session of the first Congress, gives us a clear idea of what Article III was to mean in practice. Because many of the members of the first Congress had been delegates to the Constitutional Convention only two years earlier, we may infer that many of the members of Congress voting for the Judiciary Act believed that the subject matter jurisdiction conferred by the Act was consistent with the Framers’

32. *Id.*

33. *Id.*

34. 1 ANNALS OF CONG. 831 (Joseph Gales ed., 1834).

35. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

understanding of Article III. Only a little of Professor Goebel's excellent history of the adoption of the Judiciary Act bears directly on the question before us.³⁶ But by combining Professor Goebel's history, an examination of the drafts of the Act, and an analysis of what record we have of the debates in Congress, we may obtain a fairly good idea of what the adopters thought they were doing when they passed the Act.

The first draft of the Act was prepared by members of the Senate and presented to that body. After some modifications by the Senate, the bill was sent to the House. The House, in turn, made some modifications before sending the bill to the President for signature, though none of those amendments affected the federal courts' subject matter jurisdiction. Ten senators, one from each of the states that had thus far ratified the Constitution, comprised the committee that prepared the first draft for the Senate.³⁷ Three of those men were preeminent by education and experience, and it was they who were "mainly responsible for the form and content" of the draft.³⁸ They were Oliver Ellsworth of Connecticut, previously a judge on the state trial court and later Chief Justice of the United States; William Paterson of New Jersey, previously the state's attorney general and later a Justice of the United States Supreme Court; and Caleb Strong of Massachusetts, previously a judge on the state trial court and later governor of Massachusetts. All three men had been delegates to the Constitutional Convention.³⁹ Indeed, Paterson had been a sponsor of the New Jersey Plan, proposed early in the Convention. None of the three had been on the Committee of Detail that drafted Article III, however, and none had been present on August 27, 1787, for the Convention's principal debate on Article III.⁴⁰ The portion of the final version of the Act dealing with the federal courts' subject matter jurisdiction was remarkably similar to the draft their committee presented to the Senate.⁴¹

Unfortunately, there is no record in the Annals of Congress of the debate in the Senate and only an incomplete record of the debate

36. GOEBEL, *supra* note 27, at 457-508.

37. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 22 (Maeva Marcus ed., 1992).

38. GOEBEL, *supra* note 27, at 459.

39. *Id.*

40. *Id.* at 459 n.8.

41. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 37, at 38-108 (containing a section-by-section comparison).

in the House. Professor Maeva Marcus’s excellent documentary history of the Supreme Court fills in some of the gaps by relying on letters written by senators and members of the House,⁴² but even with that assistance we are left with an incomplete picture. The recorded portion of the debate in the House took place on August 24, 29, and 31.⁴³ All three days were devoted to a motion by Samuel Livermore of New Hampshire to strike the section of the Senate bill that established the district courts.⁴⁴ The motion was understood by everyone to decide whether federal trial courts should be created or whether, instead, the state courts should be given all the trial court business of the new national government. Had the motion passed, Livermore almost certainly would have introduced a motion to strike the section creating the circuit courts. On August 31, Livermore’s motion was defeated by a vote of thirty-one to eleven.⁴⁵

The substance of the House debates was not new. Professor Goebel describes the debates as consisting “chiefly of warmed-over arguments from the days of the ratification struggle.”⁴⁶ Livermore and his allies contended that the jurisdiction given to the district courts, the most important of which was admiralty, could be equally well exercised by state courts. The central argument of those opposing Livermore’s motion was that admiralty and federal criminal jurisdiction should be exclusively given to the federal courts. At times, their argument appeared to be that Article III required this jurisdiction to be exclusive. At other times, the argument appeared to be that Article III permitted, but did not require, this jurisdiction to be exclusive.⁴⁷

The primary spokesperson for the federalists was William Smith of South Carolina. A native South Carolinian, Smith had received his education in England and Switzerland, but had returned to South Carolina in 1783 to practice law.⁴⁸ He had not been a delegate to the Constitutional Convention. Smith’s primary concern was to convince his listeners that federal district courts should be created to hear admiralty cases, but he argued broadly that Congress was obliged to

42. *Id.* at 22–38.

43. 1 ANNALS OF CONG. 783–84, 796–820, 820–34 (Joseph Gales ed., 1834).

44. *See id.*

45. *Id.* at 834.

46. GOEBEL, *supra* note 27, at 504.

47. 1 ANNALS OF CONG. 796–804 (Joseph Gales ed., 1834).

48. GEORGE C. ROGERS, *EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON 1758-1812*, at 98 (1962).

vest the judicial power authorized by Article III exclusively in the federal courts:

There is another important consideration; that is, how far the Constitution stands in the way of this motion. It is declared by that instrument that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other [tribunal] than the Supreme Court and the inferior courts of the United States. It is further declared that the judicial power of the United States shall extend to all cases of a particular description. How is that power to be administered? Undoubtedly by the tribunals of the United States; if the judicial [*sic*] power of the United States extends to those specified cases, it follows indisputably that the tribunals of the United States must likewise extend to them. What is the object of the motion? To assign the jurisdiction of some of these very cases to the State courts⁴⁹

At the beginning of his argument, Smith appears to contend that all of the jurisdiction authorized by Article III must be vested exclusively in the federal courts. By his later reference to “all cases of a particular description,” Smith may have intended to narrow the argument to the three heads of jurisdiction preceded by the word “all.” But his argument is ambiguous because each head of jurisdiction in Section 2 of Article III, not limited to these three, has a “particular description.”

Fisher Ames of Massachusetts also opposed Livingston’s motion. Ames, like Smith, had not been a delegate to the Convention. He focused on jurisdiction over federal criminal cases in the district court. The Annals reported:

His wish was to establish this conclusion, that offences against statutes of the United States, and actions, the cognizance whereof is created *de novo*, are exclusively of Federal jurisdiction These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district courts.⁵⁰

Madison also opposed the motion, but he took a more nuanced view than either Smith or Ames. Madison, of course, had been a delegate to the Constitutional Convention. Indeed, as I recounted

49. 1 ANNALS OF CONG. 801 (Joseph Gales ed., 1834).

50. *Id.* at 808.

earlier, he and Wilson were the authors of the famous Madisonian compromise that produced Article III. Madison was quite willing to contemplate the possibility, consistent with Article III, that the federal and state courts could have concurrent jurisdiction over cases arising under federal law:

Madison said, it would not be doubted that some Judiciary system was necessary to accomplish the objects of the Government, and that it ought to be commensurate with the other branches of the Government. . . . [I]n the new Constitution a regular system is provided; the Legislative power is made effective for its objects; the Executive is co-extensive with the Legislative, and it is equally proper that this should be the case with the Judiciary. If the latter be concurrent with the State jurisdictions, it does not follow that it will for that reason be impracticable.⁵¹

But the practical problems associated with a concurrent judicial jurisdiction were, in Madison’s view, greater than those associated with concurrent legislative jurisdiction: “[I]t may be safely affirmed that there is more, both of novelty and difficulty in that arrangement, than there will be in the other. To make the State courts Federal courts, is liable to insuperable objections”⁵²

Madison pointed out that “[i]t may be remarked” that “mak[ing] the State courts Federal courts” would take the power of nominating federal judges away from the federal executive.⁵³ Further, Madison pointed out, some state courts could not be trusted:

[A] review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States, it is true, they might, and would be safe and proper organs of such a jurisdiction ; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation.⁵⁴

As drafted by the Senate committee, and as ultimately adopted by the first Congress, the Act was closer to Madison’s view than to that expressed by Smith and Ames.

51. *Id.* at 812.

52. *Id.*

53. *Id.* at 812–13.

54. *Id.* at 813.

The Judiciary Act was extremely precise in its division between exclusive and concurrent jurisdiction. As will be seen, that division corresponds exactly to the use, and nonuse, of the word “all” in Article III, Section 2. First, in Section 9 of the Act, Congress conferred jurisdiction on the district courts.⁵⁵ The jurisdiction conferred was very similar to that conferred by the first draft of the bill proposed to the Senate.⁵⁶ Those courts were given exclusive jurisdiction over “crimes and offences . . . cognizable under the authority of the United States.”⁵⁷ Such jurisdiction was almost certainly seen as coming under federal question jurisdiction because any criminal prosecution for a crime against the United States was almost certainly seen as a crime in violation of federal law.⁵⁸ The district courts were also given exclusive jurisdiction over suits against consuls or vice-consuls.⁵⁹ This jurisdiction obviously came under ambassador jurisdiction. Finally, the district courts were given exclusive jurisdiction over admiralty cases, subject only to the famous “saving to suitors” clause.⁶⁰ In other words, the district courts were given exclusive jurisdiction over some of the cases that fell under each of the three heads of jurisdiction preceded by the word “all” in the first paragraph of Article III, Section 2—federal question, ambassador, and admiralty.

Also in Section 9 of the Act, the district courts were given concurrent jurisdiction over suits “for a tort only in violation of the law of nations or a treaty of the United States.”⁶¹ This was the original version of the Alien Tort Statute,⁶² recently addressed by the United States Supreme Court in *Sosa v. Alvarez-Machain*.⁶³ We may note two things about this jurisdiction. First, jurisdiction over suits brought for the violation of the law of nations was concurrent. The law of nations was what we today call customary international law. In 1789, no part of customary international law was federal law. A suit

55. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

56. See 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 37, at 53–57.

57. § 9, 1 Stat. at 76.

58. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33–34 (1812). See generally Du Ponceau, *supra* note 5 (arguing that federal courts do not have any common law jurisdiction that increases their jurisdiction beyond that given by the Constitution or Congress).

59. § 9, 1 Stat. at 77.

60. *Id.*

61. *Id.*

62. 28 U.S.C. § 1350 (2006).

63. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

brought under the law of nations thus came within the state courts’ primitive jurisdiction that existed before the adoption of the Constitution, and the only basis for subject matter jurisdiction in federal courts was party-based diversity jurisdiction. Therefore, federal court jurisdiction over such cases could be no more than concurrent. Second, jurisdiction over suits brought for violation of a United States treaty was also concurrent. A treaty is federal law within the meaning of federal question jurisdiction. Congress therefore could have made federal jurisdiction exclusive. But, as Hamilton had argued in Federalist No. 82, Congress could also choose—as it did here—to make the jurisdiction concurrent.

Second, in Section 11 of the Act, Congress conferred jurisdiction on the circuit courts.⁶⁴ Just as in Section 9, the jurisdiction conferred is very similar to that conferred by the first draft of the bill proposed to the Senate.⁶⁵ We should not think of the circuit courts as comparable to the federal circuit courts of today. There were no circuit judges, in the modern sense of the term. Rather, the circuit courts were staffed by district judges and by Supreme Court Justices riding circuit.⁶⁶ The circuit courts heard appeals from the district courts. In the exercise of that appellate jurisdiction, they had the same exclusive and concurrent jurisdiction as the district courts under Section 9 of the Act. But the circuit courts were primarily courts of original jurisdiction. Congress gave them original exclusive jurisdiction over criminal offenses against the United States, just as it gave such jurisdiction to the district courts. And Congress gave them original concurrent jurisdiction over controversies between citizens of different states when the amount in controversy was over five hundred dollars.⁶⁷ Because such suits were based on diversity of citizenship—a head of jurisdiction not preceded by the word “all”—Congress could not have given more than concurrent jurisdiction.

Third, in Section 13 of the Act, Congress specified the jurisdiction of the Supreme Court.⁶⁸ Just as in Sections 9 and 11, the jurisdiction specified by Section 13 is very similar to that specified by

64. § 11, 1 Stat. at 78–79.

65. See 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 37, at 58–63.

66. § 4, 1 Stat. at 74–75.

67. § 11, 1 Stat. at 78–79.

68. § 13, 1 Stat. at 80–81.

the first draft of the bill proposed in the Senate.⁶⁹ Section 13 authorized exclusive original jurisdiction in the Supreme Court over suits against ambassadors and other public ministers, and original, but not exclusive, jurisdiction over suits brought by ambassadors or other public ministers.⁷⁰ In other words, Congress granted to the Supreme Court exclusive original jurisdiction over a subcategory of ambassador jurisdiction cases, and allowed the state courts to have concurrent jurisdiction over another subcategory. When the ambassador or public minister was a defendant—and when United States foreign relations might be seriously and adversely affected by the suit—the Supreme Court alone was entrusted to decide the suit. When, on the other hand, the ambassador or public minister was a plaintiff, he was permitted to choose the court—state or federal—he thought most convenient or most likely to be sympathetic to his cause.

Also in Section 13, Congress authorized exclusive original jurisdiction in the Supreme Court over suits between states, and concurrent original jurisdiction over suits between a state and its citizens and between a state and citizens of other states or aliens.⁷¹ This is the only section of the Judiciary Act of 1789 in which a federal court was granted exclusive jurisdiction when the head of subject matter jurisdiction was not federal question, ambassador, or admiralty, as provided in the first paragraph of Article III, Section 2. But the basis for exclusive original jurisdiction in the Supreme Court was not the first paragraph of Section 2. Rather, it was the second paragraph, which provided for original jurisdiction over “all” ambassador and state-as-a-party cases.

In sum, the subject matter jurisdiction implemented in Sections 9, 11, and 13 of the Judiciary Act of 1789 corresponds perfectly with the heads of jurisdiction preceded, and not preceded, by the word “all.” Under each of the three heads of jurisdiction preceded by the word “all” in the first paragraph of Article III, Section 2—federal question, ambassador, and admiralty—the Judiciary Act authorized some exclusive jurisdiction in the newly created lower courts. Under the two heads of jurisdiction preceded by the word “all” in the second

69. See 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 37, at 69–71.

70. § 13, 1 Stat. at 80. For a particularly useful historical analysis of Section 13, see generally Pfander, *supra* note 2.

71. § 13, 1 Stat. at 80.

paragraph of Section 2—ambassador and state-as-a-party jurisdiction—the Act authorized some original exclusive jurisdiction in the Supreme Court. By contrast, under the heads of jurisdiction not preceded by the word “all,” Congress authorized only concurrent jurisdiction in the newly created lower courts and in the Supreme Court.

In 1801, the lame-duck federalists of the Adams administration passed a short-lived statute that created circuit courts staffed by genuine circuit judges and authorized original general federal question jurisdiction in those courts.⁷² The jurisdiction authorized by the Judiciary Act of 1801⁷³ is consistent with my reading of the word “all,” and consistent with the jurisdiction conferred by the 1789 Act. Section 10 of the Act conferred on the newly created circuit courts jurisdiction previously exercised by the circuit courts.⁷⁴ In addition, Section 11 conferred on the new circuit courts concurrent original jurisdiction over federal question cases and over common law cases to which the United States was a party.⁷⁵ Finally, Section 11 conferred on the circuit courts exclusive jurisdiction over “all penalties and forfeitures, made, arising or accruing under the laws of the United States.”⁷⁶

During the House debates leading up to the passage of the 1801 Act, Abraham Nott of South Carolina, who had not been a delegate to the Convention, explained his understanding of Article III, Section 2. In Nott’s view, the word “all” in the first paragraph of Section 2 required exclusive jurisdiction in the federal courts over federal question, ambassador, and admiralty jurisdiction. As recorded in the Annals:

[Nott] said there was a marked difference between the words of the Constitution relating to the catalogue of cases enumerated in the first part of [Section 2], and those in the latter part of the same. The word “all” was prefixed to each of the cases first mentioned, down to the words “admiralty and maritime jurisdiction” inclusive, but was omitted in all the subsequent cases. He could see no reason why that word was added in the former part of the section, and omitted in the latter, except it meant that there was no case of the former

72. See Judiciary Act of 1801, ch. 4, §§ 7, 11, 2 Stat. 89, 90, 92 (repealed 1802).

73. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

74. § 10, 2 Stat. at 92.

75. § 11, 2 Stat. at 92.

76. *Id.*

description to which the Judicial power of the United States should not extend; in fact that the courts of the United States should have exclusive jurisdiction of all those cases, and in the latter their jurisdiction should be concurrent with the State courts.⁷⁷

However, Nott's definition of the constitutionally required exclusive federal question jurisdiction was much narrower than the constitutionally available federal question jurisdiction outlined by the Supreme Court in *Osborn v. Bank of the United States*⁷⁸ in 1824, a little more than twenty years later. (Indeed, it closely resembles Justice Holmes's "arising under" test for statutory federal question jurisdiction under 28 U.S.C. § 1331, articulated in *American Well Works Co. v. Layne & Bowler Co.*⁷⁹) According to Nott,

the distinction was between cases arising under the Constitution and laws of the United States, and those that did not. . . . If a person should give a note of hand for a hundred dollars on unstamped paper, with a view of evading [the federal stamp act], he was liable to a penalty ; that would of course be a case arising under a law of the United States But an action brought on a note of hand written on stamped paper, is not a case arising under the law of the United States, but arises from the contract itself⁸⁰

IV. JUSTICE STORY'S VIEW

Finally, I turn to Justice Story's opinion in *Martin v. Hunter's Lessee*, written in 1816. There is some reason to be suspicious of Story's interpretation of Article III. Story was not a member of the Framers' generation, and he made no claim to know firsthand what the Framers had intended. Moreover, he was an ardent advocate of the expansion of federal judicial power, and his jurisdictional interpretations and arguments in his speeches, treatises, and opinions were all in the service of such expansion. I will give only two examples: Story campaigned for the elimination of the last sentence of Section 25 of the Judiciary Act of 1789, which restricted the Supreme Court's review of state court judgments to the federal

77. 10 ANNALS OF CONG. 894 (1851).

78. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).

79. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

80. 10 ANNALS OF CONG. 895 (1851).

question providing the basis for the Court’s jurisdiction.⁸¹ While riding circuit, Story wrote an opinion extending federal admiralty jurisdiction to cover marine insurance contracts.⁸² Indeed, Story’s enthusiasm for admiralty jurisdiction was so great that his contemporaries joked that he would assert admiralty jurisdiction over a corn cob floating in a bucket of water.⁸³ Nonetheless, we should take Story’s views seriously, for his was one of the preeminent legal minds of his generation.

In *Martin v. Hunter’s Lessee*, Justice Story argued that Congress was constitutionally required to confer on the federal courts the full extent of the jurisdiction authorized in Article III, Section 2. He wrote, “[T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.”⁸⁴ “It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the constitution itself. The judicial power shall extend to all the cases enumerated in the constitution.”⁸⁵ In Story’s view, Congress’s constitutional obligation to confer subject matter jurisdiction on the federal courts thus extended not only to the three heads of jurisdiction that were introduced by the word “all” but also to the later heads of jurisdiction that were not preceded by “all.” I do not argue for this expansive interpretation of Congress’s constitutional obligation to confer jurisdiction on the federal courts, but I note that this view has some support among modern scholars.⁸⁶

Justice Story attached significance to the word “all” that preceded the federal question, ambassador, and admiralty heads of jurisdiction in the first paragraph. But he did not argue that the word meant that Congress must confer the full extent of the constitutionally authorized jurisdiction under only these three heads.

81. See, e.g., *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 325–26 (1818). This sentence was eliminated after the Civil War, but the Court refused to expand its jurisdiction to questions of general law present in the case. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 617, 635–36 (1875).

82. *De Lovio v. Boit*, 7 F. Cas. 418, 418 (C.C.D. Mass. 1815) (No. 3776).

83. See, e.g., Note, *Extension of Federal Jurisdiction over State Canals*, 37 AM. L. REV. 911, 916 (1903).

84. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816).

85. *Id.* at 333.

86. See, e.g., 1 CROSSKEY, *supra* note 9, at 613–16; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

Rather, he argued that Congress was required to confer the full extent of jurisdiction under *every* head of jurisdiction in Article III, not limited to those three.

Although most of Justice Story's voluminous writings are extremely clear, parts of his opinion in *Martin v. Hunter's Lessee* are uncharacteristically opaque. But his reading of the word "all," and his reasons for that reading, are reasonably clear. In Story's view, the function of the word "all" was to confer exclusive, or potentially exclusive, jurisdiction on the federal courts for the three heads of jurisdiction introduced by that word. Based on this reading of "all," Story argued that Congress was obliged to create some inferior federal courts. I will explain his reasoning in three steps.

First, Justice Story asked what part of the judicial power granted in Article III, Section 2 is exclusive, either by direction of the Constitution or at the pleasure of Congress. His answer was the three heads of jurisdiction preceded by the word "all." He wrote:

In what cases (if any) is this judicial power exclusive, or exclusive at the election of congress? It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States ; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to *all cases* ; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason ; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases* ; and in the latter class to leave it to congress to qualify the

jurisdiction, original or appellate, in such manner as public policy might dictate.⁸⁷

Second, Justice Story argued that, as to those cases over which the federal courts have constitutionally required exclusive jurisdiction, and over which the Supreme Court cannot have original jurisdiction, Congress is obliged to create inferior federal courts:

It would seem, therefore, to follow, that congress are bound to create some inferior 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. They might establish one or more inferior courts ; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure.⁸⁸

Third, Justice Story explicitly differentiated between the two categories of heads of jurisdiction in Section 2. As to controversies, which were not preceded by the word “all,” federal court jurisdiction may be concurrent with that of the state courts. As to cases, which were preceded by the word “all,” exclusive federal court jurisdiction “might well” be justified. He wrote:

The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states ; between citizens of different states ; between citizens claiming grants under different states ; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive

87. *Martin*, 14 U.S. (1 Wheat.) at 333–34.

88. *Id.* at 331.

nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.⁸⁹

CONCLUSION

History is not science, which we think, or at least hope, can provide a single right answer if we work hard enough. Rather, history (including legal history) is necessarily indeterminate. I do not claim to have found the single right answer to the meaning of “all” in Article III. But I do think that I have found the answer that makes the most sense of the available historical materials.

In my view, the word “all,” when it precedes federal question, ambassador, and admiralty jurisdiction in the first paragraph of Section 2, authorizes but does not require Congress to confer exclusive jurisdiction on the federal courts generally. The same word, when it precedes ambassador and state-as-a-party jurisdiction in the second paragraph of Section 2, authorizes but does not require Congress to confer exclusive original jurisdiction on the Supreme Court. By negative inference, the absence of the word “all” preceding the other heads of jurisdiction in Section 2 prevents Congress from conferring on the federal courts anything more than concurrent jurisdiction with the state courts. This view is perfectly consistent with the words of Article III itself, with the Judiciary Act of 1789, passed two years after the approval of Article III by the Constitutional Convention, and with the ill-fated Judiciary Act of 1801. It is somewhat, but not perfectly, consistent with the views expressed by Hamilton in Federalist No. 82, by members of Congress in the debates leading to the enactment of the 1789 and 1801 Acts, and by Justice Story in *Martin v. Hunter’s Lessee*.

This reading of the word “all” is also perfectly consistent with the modern jurisdictional structure of the federal courts. As in the original Act, there is now statutorily conferred exclusive federal question,⁹⁰ ambassador,⁹¹ and admiralty jurisdiction⁹² in the federal trial courts. As in the original Act, there is now exclusive original

89. *Id.* at 347.

90. *See, e.g.*, 15 U.S.C. § 78aa (2006) (securities); *id.* § 717u (natural gas); 18 U.S.C. § 3231 (2006) (crimes against the United States); 28 U.S.C. § 1334(a) (2006) (bankruptcy); *id.* § 1338(a) (copyright, patent, and plant variety); 29 U.S.C. § 1132(e) (2006) (ERISA).

91. 28 U.S.C. § 1351.

92. *Id.* § 1333.

jurisdiction in the Supreme Court in state-state diversity cases,⁹³ and concurrent original jurisdiction in the Supreme Court in some ambassador cases,⁹⁴ in controversies between the United States and a state, and in controversies brought by a state against an out-of-state or foreign citizen.⁹⁵ As in the original Act, there is concurrent jurisdiction under some of the heads of jurisdiction preceded the word “all.”⁹⁶ Finally, as in the original Act, there is only concurrent jurisdiction over the heads of jurisdiction in Article III that are not preceded by the word “all.”⁹⁷

What is the modern significance of this reading of the word “all”? One may prefer Professor Amar’s reading of the word because of its relevance to the jurisdiction-stripping debates that arise when Congress (or, more recently, the President) is extremely unhappy with decisions by the federal courts. Under Professor Amar’s reading, Congress cannot strip the federal courts of any of their constitutionally authorized federal question, ambassador, or admiralty jurisdiction. Under his reading, Congress is required by the word “all” to authorize subject matter jurisdiction in some federal court—either originally or on appeal—to the full extent of the constitutionally available jurisdiction under these three heads. Under my reading, an argument against jurisdiction stripping by Congress cannot rely on the word “all,” although it can rely on other grounds.⁹⁸

93. *Id.* § 1251(a).

94. *Id.* § 1251(b)(1).

95. *Id.* § 1251(b)(2)–(3).

96. *See, e.g., id.* § 1331 (general federal question).

97. *See, e.g., id.* § 1332 (diversity).

98. There is an enormous academic literature on jurisdiction stripping. Excellent recent articles include Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000). Excellent earlier articles include Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL’Y 31 (1984); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’*

This result may be regarded as an unfortunate consequence of my reading of the word. But I am not so sure.

One of the abiding difficulties in our democracy is reconciling the exercise of judicial power, especially the power to declare Acts of Congress unconstitutional, with our sense that we should be governed by our collective democratic will. The late Professor Charles Black recognized that the power of Congress over the jurisdiction of the federal courts may help achieve that reconciliation. Professor Black loved to tell the story—perhaps true, perhaps not—of a renowned French priest sailing into New York, in the days when people came to the United States by sea. As his ship came into the harbor, the priest said to waiting reporters, “It is wonderful to breathe the sweet air of legitimacy!”⁹⁹

The legitimacy of our government is produced by the mutually reinforcing actions of the political and judicial branches. If the federal judiciary has the power of judicial review, and if it chooses to leave acts of Congress undisturbed, the judiciary has to that degree accepted and legitimized the exercise of Congress’s power. And if Congress has the power to strip the federal courts of their jurisdiction, and if it chooses to leave their jurisdiction undiminished, Congress has to that degree in turn accepted and legitimized the exercise of judicial power.

Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17 (1981). The classic article is Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

99. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 34 (1960).