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## FOREWORD

### THE CONSTITUTION IN EXILE: IS IT TIME TO BRING IT IN FROM THE COLD?

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Exile *n.* 1a: Enforced removal from one's native country by authoritative decree; banishment [from Latin *exilium*, from *exul*, one who is exiled].<sup>1</sup>

#### INTRODUCTION

When Professors Christopher Schroeder and Jefferson Powell organized this second annual public law conference at Duke University, I was three thousand miles away in California, a visitor at the University of California, Los Angeles. Professor Schroeder's invitation to provide the keynote address for the conference arrived by e-mail out of the blue. It identified the general question the conference would examine in two days of panel discussions. The title was to be "The Constitution in Exile," and the question to be addressed was, "Is it time to bring it in from the cold?" Professor Schroeder added some details on the time, place, and possible panel participants but he said little more to elaborate on the subject at hand.

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1. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 460 (William Morris ed., 8th prtg. 1971).

To one so removed from the conference planning, as I had been while at UCLA, it was difficult to know just what to do. Certainly, I felt grateful to my colleagues for asking me to provide the keynote remarks. But I was far from certain that the way I might construe the subject of the conference—even to form first thoughts, much less to undertake a keynote address—could fit with what they had in mind. What were they talking about? Had I missed something along the way? What was one to make of the topic, especially given the way it was framed? And how was one to go about preparing some useful keynote remarks unless one had some coherent idea of just what the topic meant?

Was I to presume that the Constitution somehow *had* been exiled, put out of the country by some kind of authoritative decree? When did this happen? By whom was it done? Was it even true? Given the extremely active role of the Constitution as it seemed to me to be from my office at UCLA, the claim of the Constitution in exile seemed to be a challengeable idea.<sup>2</sup> Could I usefully frame a

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2. Consider merely the following brief comparisons, even as they might serve to furnish substantial grist for such an address. First, as virtually every student of American constitutional history knows, more than a half-century passed between *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), the first case holding an act of Congress unconstitutional, and *Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857), the second case to do so. In other words, during the first seven decades of the United States after ratification of the Constitution (1789–1859), only *twice* was the Constitution applied by the Supreme Court in a manner invalidating an act of Congress. Yet, there was no widely held notion that the Constitution was therefore “in exile,” despite this appearance of merely feeble use of the Constitution by the Court, in terms of checking congressional enactments as either unauthorized or in defiance of some part of the Bill of Rights.

Next, as against that history, one might compare a single week in our own time; indeed, one might compare a mere three consecutive days in June, 1997 (the last three days of the Supreme Court’s 1996 Term). On Wednesday, June 25, 1997, the Court struck down parts of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding Congress had exceeded its legislative authority under Section 5 of the Fourteenth Amendment). The following day, the Court struck down major provisions of the Communications Decency Act of 1996, 47 U.S.C. § 223. *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (holding several provisions void under the First Amendment). The Court completed its term on Friday by striking down an enforcement provision of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2). *Printz v. United States*, 521 U.S. 898, 923–25 (1997) (holding that Congress had exceeded its legislative authority under Article I, Section 8, Clause 3 (the Commerce Clause) and under Article I, Section 8, Clause 18 (the Necessary and Proper Clause)). Three days, three separate acts of Congress, each rejected by the Supreme Court, and each rejected on different constitutional grounds. Even during the early New Deal years that produced the alleged crisis on the Court—before Roosevelt restaffed the Supreme Court (beginning with the appointment of William O. Douglas)—*never* had three different acts of Congress fallen before the Court in so short a stretch. Just since 1995, moreover, twenty-six different federal enactments have been found constitutionally wanting by the Supreme Court. (For a complete listing, see Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 n.8 (2001)). “The Constitution in Exile?” Not if one

questioning keynote address in those terms? If I could, should I accept the invitation and take on that particular task, i.e., to challenge the very premise of the conference for which this was to be the keynote address?

Possibly, but it seemed to me at once that any such approach was likely to be misspent, not to mention unwelcome as well. After all, the question posed for the conference did not invite remarks of that unresponsive kind. Rather, the Constitution “in exile” was a given. The matter at hand before the house was not *whether* the Constitution was, or should be, in exile. It was, rather, whether the Constitution should be “brought in from the cold,” i.e., *returned* from exile in some manner or degree. In brief, the challenge was not an open-ended invitation to quibble with the premise of the conference. Rather, it was to take up a provocative thesis along quite a different line of address. Were circumstances sufficiently different *since* the time the Constitution was placed in exile (whenever that might have been) that it might *now* be let loose once again? Was this not the topic the conference would examine? Obviously it was, and neither more nor less.

The overall subject, and object, of the conference, though still puzzling to me, gradually emerged to come more clearly into view. Buried in the background was the suggestion that at some earlier point in our national life the Constitution, under the administration of the Supreme Court, had taken on a rather menacing mien, something, say, like a Napoleonic complex, an overreaching authority, intrusive,

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were to judge by these particular comparisons. Rather, one might think, “The Constitution Rampant,” ferocious, at large, virtually devouring the legislative branch in the jaws of the judiciary.

Yet, to be sure, there might be a far simpler explanation for these differences, i.e., those respecting the greater frequency with which acts of the current Congress have been found wanting on constitutional grounds than those enacted in the early years. Perhaps it is merely the case not only that far fewer bills tended to get enacted by early Congresses (far fewer, that is, than the vastly larger number now passed virtually each new session whenever Congress meets), but that early Congresses may well have legislated with significantly greater regard for constitutional boundaries, than “poll-driven” members in Congress are inclined to observe today. *See, e.g.,* MEG GREENFIELD, WASHINGTON 8 (2001) (“These are people who don’t seem to live in the world so much as to inhabit some point on graph paper, whose coordinates are (sideways) the political spectrum and (up and down) the latest overnight poll figures.”). *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 (2001). If so, that difference may itself go quite a long way in explaining why so many more of today’s sprawling national laws will inevitably bring a (careless) Congress into more frequent collision not merely with the Court but, rather, with the Constitution itself. It is, perhaps, less the Court or the Constitution that may warrant critical review in symposia of this sort, and much more a Congress that behaves ever more self-aggrandizingly in the manner of the leviathan state. At least it may be a thought one might consider worth exploring, though it will not be pursued here.

arbitrary, and damaging to democratic institutions.<sup>3</sup> And that it had on *that* account been rightly “exiled,” even as Napoleon was rightly removed from his country for the devastation he had wrought in taking unto himself an emperor’s robes.

Assuming it was so, perhaps I was being invited simply to recall the circumstances, to reset the stage for the conference in the keynote address.<sup>4</sup> In that case, the real question was this: even with the passage of time, were circumstances now sufficiently different to warrant any change? If not, did it appear nonetheless that the current Supreme Court—the untrustworthy Rehnquist Court—was flirting with the dubious notion of letting loose this exiled Constitution still *again*? If so, was this tentative disinterment of the exiled Constitution necessarily a good idea? Or, even as one might find already implied by way of the answer from the very manner in which the question had been posed for this conference, might that be a naive and even a dangerous mistake? So, more bluntly, evidently this was the idea: whether now to uncage the Constitution—those parts generally and previously regarded as having been rightly sent into exile and removed from judicial activism—or leave well enough alone. Presumably, the conference participants would discuss matters along these lines.

And in fact, so it appeared the agenda was expected to be for the conference. For soon following our initial e-mail correspondence, Professor Schroeder responded to my inquiry about the inspiration for the conference title, by referring to a recent book review by Judge Douglas Ginsburg.<sup>5</sup> And in that review, Judge Ginsburg provided a number of examples to make his point of the Constitution in exile, as he deemed it to be. As his first example, Judge Ginsburg referred favorably to the nondelegation doctrine. The doctrine, even as Judge

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3. The period would include the first thirty-five years of the twentieth century, the judicially “interventionist” decades, concluding with the withdrawal of economic-interventionist judicial review, signaled first by *Nebbia v. New York*, 291 U.S. 502, 521–39 (1934) (holding state regulation of milk prices consistent with the Fourteenth Amendment), and then by *United States v. Darby*, 312 U.S. 100, 118–23 (1941) (considering it within Congress’s powers to establish labor standards for employees producing goods for interstate commerce).

4. The task would be the easy one of parading horrible cases of judicial excess. Obligatory examples would tritely include such cases as *Lochner v. New York*, 198 U.S. 45, 53 (1905) (striking down a state law that prevented bakers from working more than sixty hours in a week or more than ten hours in a day), and *Hammer v. Dagenhart*, 247 U.S. 251, 269–77 (1918) (deeming unconstitutional a law that banned interstate commerce in goods manufactured in violation of certain child labor regulations).

5. Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, No. 1, 1995, at 83 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

Ginsburg usefully recalled it, is simply the familiar idea that when laws are made, *Congress* must make them, even as the Constitution straightforwardly seems to require.<sup>6</sup>

Judge Ginsburg then noted, however, that "for 60 years the non-delegation doctrine has existed only as part of the Constitution-in-exile."<sup>7</sup> And he declared that much the same also held true for a number of other structural features and clauses of the Constitution, including "the doctrines of enumerated powers,<sup>8</sup> [and] unconstitutional conditions,<sup>9</sup> and substantive due process, and their textual

6. See U.S. CONST. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested *in a Congress . . .*") (emphasis added). Note, as Judge Ginsburg surely would urge, that Article I, Section 1, Clause 1 does not declare that: "All legislative Powers herein granted shall be vested in a Congress *and* in such agencies or departments as Congress may establish *and* to which it may delegate such portions of its power to make laws as it deems appropriate so to delegate to them." Thus, there being no such "*and*" clauses, Congress is given no power to sport away its responsibilities, however eagerly it would, if it could, do precisely that.

7. Ginsburg, *supra* note 5, at 84.

8. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring):

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it . . . . The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction.

*Cf.* *Kansas v. Colorado*, 206 U.S. 46, 89 (1907) ("[T]he proposition that there are legislative powers . . . not expressed in the grant of powers [to Congress], is in direct conflict with the doctrine that this is a government of enumerated powers."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.):

[S]hould [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [national] government . . . it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

*United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) ("[U]nder a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."); ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 452 (1919) (remarks of John Marshall during the Virginia ratification debates):

If . . . [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the [national] judges as an infringement of the Constitution they are to guard. They would not consider such a law as coming under their jurisdiction. *They would declare it void.*

THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the . . . Constitution to the federal government are few and defined."):

9. For an early example of the doctrine of unconstitutional conditions as a means of limiting government-imposed burdens on enterprises doing business within a state by threatening to cut off certain privileges unless the enterprise would meet the state's demands, see *Frost v. Railroad Commission*, 271 U.S. 583, 593 (1926). The Court in *Frost* noted that:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the

cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses.”<sup>10</sup> Judge Ginsburg then went on to conclude his rueful observations in the following, quite eloquent, manner: “The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive [only] by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.”<sup>11</sup>

Plainly, in all of this, Judge Ginsburg was writing in praise, certainly not in criticism, of these exiled (“banished”) parts of the Constitution. These clauses and doctrines clearly were, in his thinking, among the most vital parts of that document—valued parts that, in his view, stand (or stood) “in opposition to unlimited government.”<sup>12</sup> And they are crucial (albeit now neglected) parts of “the Constitution of liberty” as against the leviathan state.<sup>13</sup> So the thesis is thus laid out.

But others—perhaps most of those in the academy (though many also on the courts)—fervently *disagree* with Judge Ginsburg.<sup>14</sup> Indeed, in remembering the past, they distance themselves from Judge Ginsburg and other judges of his ilk. For unlike Judge Ginsburg, they regard *these* constitutional doctrines and provisions in particular, at least as the Supreme Court formerly applied them (i.e., *before* their “exile”), as representing only the worst features of the Constitution, virtual black holes of antiprogressive constitutional despair.

The revival of these doctrines and clauses, accordingly, these participants reasonably could be expected to declare, might *very well*

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guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

*Id.* For a case arguably exiling (i.e., virtually abandoning) the doctrine in dealing with Congress’s power to spend with strings attached, on the other hand, see *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (approving an authorization to withhold some federal highway funds from states that permit persons under twenty-one to purchase or possess alcoholic beverages).

10. Ginsburg, *supra* note 5, at 84.

11. *Id.*

12. *Id.*

13. *Id.*

14. So, for example, the *New York Times* recently reported on a virtual seminar conducted by Laurence Tribe and Cass Sunstein to urge solid Democratic Senate resistance to judicial nominees holding views of the sort reflected in Judge Ginsburg’s book review. Neil A. Lewis, *Washington Talk: Democrats Ready for Judicial Fight*, N.Y. TIMES, May 2, 2001, at A19; see also Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (presenting the same argument for Democratic Senate resistance); Robin Toner, *Interest Groups Set for Battle on a Supreme Court Vacancy*, N.Y. TIMES, Apr. 21, 2001, at A1 (arguing, similarly, for Democratic Senate resistance, advanced by Bruce Ackerman et al.).

represent a “second coming,” even as Judge Ginsburg suggested. If so, however, it would be far less likely in their view to be a second coming of liberty, as Judge Ginsburg opined, and far more likely, rather, to be a second coming of some nightmare shambling beast—a second coming of the dread apocalyptic sort that William Butler Yeats described in his famous poem of that very name.<sup>15</sup> Necessarily, they want no part of *that* second coming, and most certainly, no part of any campaign to revive these exiled parts of the Constitution, such as they are. Presumably the papers gathered for the conference would—and will—reflect rival positions, some supporting, others deploring, Judge Ginsburg’s proposal and the positive description he presented of the particular “exiled” clauses and doctrines enumerated in his review.

Here, however, in my own remarks, I want to come to the subject from a somewhat different point of view than may be reflected in the various papers prepared for this conference. A suitable way of providing that view, I think, may begin with an ancient but suitably famous quote by a suitably famous jurist. And so I mean in the next brief section at once to do.

## I.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, *what part of it are they forbidden to read or to obey?*<sup>16</sup>

What part—or what parts—indeed. This question framed so trenchantly by Chief Justice John Marshall in *Marbury v. Madison* is as pertinent now as when it first appeared in 1803. In a straightforward sense it not only suitably frames the larger topic with which we

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15. See W.B. Yeats, *The Second Coming*, in THE POEMS 235, 235 (Daniel Albright ed., 1990) (“And what rough beast, its hour come round at last, / Slouches towards Bethlehem to be born?”).

16. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (Marshall, C.J.) (emphasis added). Marshall is addressing the question of the Court’s powers and its obligation of constitutional review of acts of Congress. In elaborating the scope of that responsibility, he begins by reciting the words of Article III, Section 2, “The judicial Power shall extend to *all* Cases . . . arising under this Constitution . . .” U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

are—or should be—concerned, but also, albeit merely by implication, supplies its own answer. If there are any such clauses, where are they? If there are, moreover, what makes them so, i.e., what makes these crossed out (or unread) clauses the clauses suitable for judges to ignore or treat as of less concern than others?<sup>17</sup>

Is the clause that forbids state laws impairing contractual obligations one of these clauses?<sup>18</sup> Or the Fifth Amendment clause that declares there shall be no taking of private property, even for public use, without just compensation?<sup>19</sup> Or perhaps just the clause empowering Congress to “regulate commerce among the several states,” a clause occasionally treated by a number of judges and a greater number of academics as though some—maybe all—of the last five words of the clause had been crossed out?<sup>20</sup>

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17. So to treat them as of “less concern” than, say, the Equal Protection Clause of the Fourteenth Amendment—a clause much like the clauses in Article I, Section 10 (in that it, like each of them, is merely another, equally express, constitutionally enacted restriction on what states are permitted—or rather, *not* permitted—to do). Compare U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”), with *id.* art. I, § 10 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.”). There is assuredly no interest on the part of many attending this conference in dismissing, or exiling, the Equal Protection Clause. Indeed, criticism is virtually unanimous of some early decisions of the Supreme Court, in which the Court appeared to do virtually that, such as, for example, *Plessy v. Ferguson*, 163 U.S. 537, 540–51 (1896) (sustaining the use of race as a classification in ways merely enforcing standards comporting with prevailing custom and usage—as in segregation of seats in public conveyances). The “test” employed by the Court in *Plessy* was merely that of minimum rationality, *id.* at 550, a standard the state was able to meet easily (the law, the state observed, served the general comfort and convenience of passengers overall—or so it claimed). Seeing no basis to disagree, the Court permitted the law to stand. *Id.* at 550–51. So, with that facile rationale, the Clause went into “exile” for another fifty years or so, even as the “Contracts Clause,” in Article I, Section 10, has now—in Judge Ginsburg’s view—been submitted to much the same sort of fate.

18. U.S. CONST. art I, § 10, cl. 1. Evidently, John Marshall thought not. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 712 (1819) (Marshall, C.J.) (applying a rigorous and expansive view of the Contracts Clause in invalidating New Hampshire legislation); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810) (Marshall, C.J.) (same in regard to a Georgia law); cf. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 443–44 (1934) (discussing the limits of the Contracts Clause in emergency situations). The *Blaisdell* case, with some others, was mistaken by many effectively to read the Clause out of the Constitution. Even now, for example, the most that the Congressional Research Service of the Library of Congress is prepared to say on the subject is this: “It should not be inferred [from the case law since *Blaisdell* was decided] that the obligation of contracts clause is today totally moribund.” CONG. RES. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 395 (Johnny H. Killian & George A. Costello eds., 1996); see also *supra* note 17.

19. U.S. CONST. amend. V.

20. U.S. CONST. art. I, § 8, cl. 3. Or, though not “crossed out,” more “suitably explained” so that, either way, the power thus given is textually revised as a power effectively without bounda-

The challenge framed in this way, as it was by Marshall, sometimes appears today in discussions distinguishing justiciable from nonjusticiable constitutional clauses and justiciable from nonjusticiable claims. Constitutional claims thought to be justiciable, we commonly say, are one and all determinable “on their merits” in the courts—they are claims in which judges are expected to “look into” the Constitution, claims in which judges *are* to give a constitutional claim its full due to determine the case at hand. Claims of a nonjusticiable kind, on the other hand, are just the opposite. These are claims ordinarily conceded to be beyond the ken of courts. Such claims, to be sure, are not limited to—but may include—constitutional claims, including some claims concededly brought in the requisite form of a “case arising under the constitution” (i.e., a “case” between genuinely adverse parties, each with much at stake, on highly concrete facts, with what is admittedly a serious, substantial, constitutional question squarely on point).

But despite occasional misunderstandings to the contrary, the fact or conclusion that a given kind of constitutional claim is not to be determined by a court—that it is nonjusticiable in just this sense of not being *judicially* determinable—does not thereby imply that judges regard themselves as empowered “to read [and] to obey” only some parts of the Constitution, but not other parts. To the contrary, quite often nonjusticiability stands for nearly the opposite—it is a reminder that they—the judges—are to read and respect all parts of the Constitution rather than only some parts.

In brief, obedience to the Constitution by the judges may itself consist of recognizing distinctions established within the Constitution, including distinctions as to who determines what—that the Constitution may place certain questions in the hands of others, and not in the courts.<sup>21</sup> And if that is so, then whenever it is so, and to the extent that it *is* so, the essence of the judicial duty is to declare the law accord-

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ries, a more general power of unlimited scope: “Congress shall have power to make laws on any subject, and to regulate any subject, in just such manner and degree as Congress decides so to do.”

21. The Court has put the matter well. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political [i.e., nonjusticiable] question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .”); *id.* at 246 (Douglas, J., concurring) (“Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.”).

ingly, accept the Constitution's directive and disengage the Court from proceeding any further, even as the Constitution suggests.<sup>22</sup>

Of course, it is a nice question how many clauses of this kind, if any, the Constitution contains. Very few come labeled as justiciable or nonjusticiable as such—actually none do. Still, it may not be difficult to propose an example or two of a sort that Marshall himself might have approved. So, as one such plausible example, consider a provision in Section 5 of Article I. The pertinent section provides that: “*Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .*”<sup>23</sup>

Now, no one, as far as I know, whether in Marshall's day or in ours, has suggested that the judges are forbidden to open, read, or yield to this part of the Constitution. To the contrary, one would say, it is to be “opened,” read, and obeyed in the sense of “respected” by the courts. Here, however, judicial application of this provision may itself direct that judges accept its instruction, i.e., to take that instruction seriously, give it full faith and credit, and accordingly refer such questions as may arise in respect to whether a member of either house of Congress possesses the requisite qualifications to serve in that house, to the determination of *that* house. And this may be so, to be sure, though the “qualification” is one the Constitution itself prescribes—for example, that a particular person was, “when elected” to the House, in fact “an inhabitant of the State in which he or she was elected, rather than (as others may contend) an “inhabitant” of some other state.”<sup>24</sup>

In this instance, rather than presuming to empanel a jury in an otherwise seemingly appropriate case—to take evidence, hear argument, and decide, with or without a jury—the court might refer the

22. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Here, wholly in keeping—rather than not in keeping—with Marshall's description of the judicial duty, the judicial department does not evade its duty “to say what the law is.” Rather, the judicial department performs its duty to say what the law is. It does so simply by saying: “‘The law’ is that ‘whether what x requires is satisfied in this case is reserved for Congress to say,’ i.e., the law—in this instance the Constitution as ‘the law’—assigns the power and responsibility to Congress, and not to the courts, to determine all cases and controversies of this particular kind.”

23. U.S. CONST. art. I, § 5, cl. 1 (emphasis added).

24. The quoted phrase, requiring that one be “an inhabitant” of the state choosing its Representatives, and that one be such an inhabitant “when elected,” is excerpted from the Constitution. The clause expressly limits eligibility for serving in the House of Representatives: “*No Person shall be a Representative* who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and *who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.*” U.S. CONST. art. I, § 2, cl. 2 (emphasis added).

dispute to the House of Representatives for resolution. And why? Perhaps it is simply because the Constitution so suggests or even directs. And if that is so—if that is what the Court is meant to do in keeping with the plain sense of this clause—then, as the Court has acknowledged, there is nothing amiss. The “judicial duty is not less fitly performed by declining *ungranted* jurisdiction than in exercising firmly that which the Constitution and the laws confer.”<sup>25</sup> Nothing Marshall wrote, either in *Marbury* or elsewhere, suggests that he would disagree.<sup>26</sup>

Thus, one may likewise raise a proper constitutional challenge on the basis, say, that “Representative James Smith lied about his age when he filed for election to the House of Representatives. He is in fact twenty-three and not twenty-six, as he has claimed. And he is thus ineligible to serve in the House.” But if judges are right in the way they have read the provision in Article I, Section 5, it is for the House of Representatives—and not for the courts—to say whether the assertion made about Smith has merit, and, if it does, as the House may itself so determine, what, if anything, shall be done.<sup>27</sup>

Similarly, one might consider the following clause of the Constitution in Article IV, Section 4: “*The United States* shall guarantee to

25. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869) (emphasis added). “Jurisdiction” in this instance, one would say, is “ungranted” to the courts and instead “granted” by the Constitution to the Senate and House of Representatives, respectively.

26. *See, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (“We have no more right to decline the exercise of jurisdiction which is given, *than to usurp that which is not given*. The one *or the other* would be treason to the constitution.”) (emphasis added); *see also Powell v. McCormack*, 395 U.S. 486, 518–19 (1969). Adam Clayton Powell was denied his seat in Congress not because—as the House might have determined (but failed to do)—he was not, when elected, an actual “inhabitant” of New York (he stayed out of the state except on Sundays, to avoid service of process), but because of varieties of alleged misconduct during his previous terms in Congress. *Id.* at 489–90. The Supreme Court held that the sole qualifications requisite for election to the House are those prescribed in the Constitution, i.e., those set forth in Article I, Section 2, Clause 2; it is therefore just in respect to the three specific qualifications listed in the Constitution that the Constitution empowers the House to judge. *Id.* at 550. The House itself therefore lacked jurisdiction, in the Court’s view, to declare him unqualified, and deny him his seat, on some other stated ground such as his alleged misconduct in a previous session of Congress. *Id.*; *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995) (“[T]he qualifications for service in Congress set forth in the Constitution are ‘fixed,’ at least in the sense that they may not be supplemented by Congress.”).

27. For example, the House might refuse to seat Smith as a member of the House (as lacking the requisite qualification by age), or to declare the seat vacant, an action that might then mean that a special election would be forthcoming to fill the vacancy, as provided in the Constitution. U.S. CONST. art. I, § 2, cl. 4 (“When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”).

every State in this Union a Republican Form of Government.”<sup>28</sup> The Supreme Court has “opened” and read this clause, but read it as reserving to the political departments of the United States the determination of whether a state possesses the form of government thus identified in the clause as the kind of government each state is guaranteed (as well as reserving to the political departments *what* measures to take to secure that form of government).<sup>29</sup> In brief, the reference to “The United States” in Article IV, Section 4, is, on this reading by the Court, distinct from another, quite different reference, such as that “*the Courts of the United States shall guarantee*” (or “also” guarantee). It is different as well from one that might declare (as the actual clause does not): “The United States, *including its courts*, shall guarantee . . . .”

Moreover, to be sure, if this way of reading the clause is correct, then *given* the manner in which the clause confides this particular constitutional responsibility to the political departments, it might even be within Congress’s power to require that states apportion *state* legislative districts (and not merely congressional districts)<sup>30</sup> according to a “Republican” representative principle of “one person, one vote.” It would not, however, be appropriate for any court to take upon itself an authority to employ *this* clause to do so. To the contrary, one might say (as the Court has seemed to say) that the clause forbids the courts from taking any such role.<sup>31</sup>

28. U.S. CONST. art. IV, § 4 (emphasis added).

29. *See, e.g., Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 134–51 (1912) (determining that a state constitutional provision providing for legislation by referendum was political and governmental, and therefore outside the reach of the judicial power); *Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849) (observing that the question of whether a state’s government has been legitimately replaced belongs in the political, not the judicial, sphere).

30. In the case of congressional districts (as distinct from state legislative districts), the congressional authority to provide for election of House members from districts of equal population (or equal numbers of voters) comes from express provision in the Constitution. U.S. CONST. art. I, § 4, cl. 1 (stating that Congress may determine the “Manner” of holding congressional elections, such as, by single-member districts rather than at large).

31. *Cf. Baker v. Carr*, 369 U.S. 186, 209 (1962) (forcing state legislative reapportionment, but relying on the Equal Protection Clause of the Fourteenth Amendment, and observing that “the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause”); *id.* at 226–27:

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender.

To be sure, this reading of the “Guarantee” Clause of Article IV is contestable.<sup>32</sup> Indeed, it has been contested as one might suspect.<sup>33</sup> Still, if one were persuaded that this is a correct understanding of the

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32. It is obviously contestable if only because the Clause does not say that: “The United States, *exclusive of its courts*, shall . . .” Thus, the exclusion of courts from any active role with respect to the Guarantee Clause is at most implied, rather than expressed—it is at most a mere deduction, “*expressio unius, exclusio alterius est.*” The point was made by Justice Frankfurter, in his dissent in *Baker*: “Art. IV, § 4, is not committed by express constitutional terms to Congress.” 369 U.S. at 297 (Frankfurter, J., dissenting). Fully exploiting Frankfurter’s observation, Justice Douglas went further, to declare his own view that “[t]he statements in *Luther v. Borden* that this guaranty is enforceable *only* by Congress or the Chief Executive is [sic] not maintainable.” *Id.* at 242 n.2 (Douglas, J., concurring) (emphasis added) (citation omitted). Accordingly, Douglas would have treated claims brought under the Clause as not foreclosed to the courts.

33. See *supra* note 29. And in fact, despite the disclaimers, the Court has not always declined to hear and decide cases arising under the Clause. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (declaring the ability to determine the qualifications of important government officials to be at the heart of representative government); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897) (rejecting a claim based on the Clause for failure to state a claim, rather than treating it as a nonjusticiable case or controversy or as a matter solely for Congress to decide); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76 (1875) (same).

Additionally, it is plausible to suppose that although the Guarantee Clause does not contemplate an original enforcement power vested in the courts, questions nonetheless may arise under that Clause that are fully justiciable. Perhaps a useful (even if merely hypothetical) example would be this: an act of Congress forbidding laws “to be enacted in any State directly by initiative or referendum, rather than by representatives duly chosen in each State, by the people thereof.” Here, by claiming power to enact this act pursuant to the Guarantee Clause in Article IV, Congress asserts its authority to say what *is* a “Republican Form of Government”; contrasts it as one distinctive from “direct democracies”; and presumes to make good its obligation to each state to guarantee a republican form of government by providing the controlling yardstick. May the states thus be forbidden by Congress to share lawmaking power with the people of the state, and must they, rather, restrict it—that power to make law—to some “representative” elected few? Here, the question—such as it is (and it is far from trivial)—is just what *is* the latitude of power enumerated in Article IV, as vested in the United States? However uncertain it may be as an original proposition, it is surely *not* “whatever Congress chooses so to declare.”

The question, then, of whether Congress has acted within the scope of the power granted it by the Constitution, whether pursuant to Article IV or otherwise, in imposing this “how-to-make-laws” restriction upon the states, is raised squarely in our hypothetical. Here, the courts may apply the Act of Congress only if it was enacted “pursuant” to the Constitution and not otherwise. Nor, in determining that matter may the court just “irrebuttably presume” that it was, or supinely genuflect and “defer to Congress’s view” that it was, or—and here is the point—least of all treat the question as nonjusticiable *per se*. We are back to the bedrock of *Marbury v. Madison* itself. See also THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.

For a recent, welcome review of this very issue, see generally William Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 269 (1999).

Clause (i.e., a reading that gives it “full faith and credit”—its full and exact due—neither more nor less), then one would not complain that the courts had placed the Clause in exile. The Constitution, we would say in reference to this Clause, is emphatically *not* in exile.<sup>34</sup> Rather, it has been merely respected by the judges, even as one should want them to do.<sup>35</sup>

And, briefly, then, to state the basic proposition in a manner that must by now be all too obvious—so ought the judges to do generally as they go about their work. Exactly insofar as judges succeed in that task (for this *is* the judicial task) they cannot be accused of having sent any part of the Constitution into exile. Or, rather, though judges may be accused, we should, upon our own reading of the relevant material, be able simply to say whether the accusation is misplaced. And so, to return one more time to John Marshall’s challenge, one will be satisfied that the clause in question (whichever it may be) will not have gone unread. Neither, if the judges are performing their task properly, will any parts have been underread, nor overread, in the manner Judge Ginsburg faults in his critique.<sup>36</sup> When, on the other hand, one may be persuaded that the Constitution has been treated disdainfully in any of its salient parts, that one would seek those parts’ return from exile seems scarcely surprising, much less cause for ridicule, and even less for excited expressions of dismay or of alarm. Nor is the notion merely one partisan to Judge Ginsburg’s particular selection of arguably “exiled” parts—that is, the various structural and

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34. If one were still to speak of the Constitution being in exile, it could be only in some different respect, not as a criticism of the judges, but rather as a criticism of the political departments, for their unwillingness to take appropriate measures to fulfill the “guarantee” made to the states (such as what one regards the nature of the guarantee to have been). Here, however, I do not take the question of the “constitution in exile” as directed to these different kinds of alleged defaults, i.e., those of the political departments rather than those of the courts, although a public law conference on that subject would be eminently suitable to hold.

35. Cf. U.S. CONST. art. VI, cl. 3 (“[A]nd all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support *this* Constitution . . .”) (emphasis added). Here, one would say, one exactly supports “*this* Constitution” by recognizing in one’s judicial role the manner in which *this* Constitution reserves certain issues as appropriate for resolution elsewhere than in the courts.

36. So—just to illustrate these terms—Judge Ginsburg clearly believes that the provision in Article I, Section 10 (prohibiting state laws impairing the obligations of contracts) has been “underread,” just as he believes, too, that the provision in Article I, Section 8, Clause 3 (“To regulate Commerce . . . among the several States.”) has in turn been overread (i.e., “overread” to confer virtually unlimited power on Congress; thus overread in a manner utterly at odds with the Framers’ design as well as with the limiting language of the clause itself). Ginsburg, *supra* note 5, at 83–87.

substantive clauses identified in his review.<sup>37</sup> Rather, it is exactly what one should seek to do, whether as a judge or as an academic, and without regard to the complaints others may raise, whether from the left or from the right.

## II.

Indeed, in the remaining pages of this Foreword, I should want to try to sustain the suggestion, just offered, that no constitutional provision should be in exile, in the context of a clause I think has suffered that fate. The clause I have in mind appears in Article III of the Constitution. After giving Congress power, including an express power to establish an array of federal courts inferior to the Supreme Court,<sup>38</sup> and providing that the jurisdiction of these federal courts could, if Congress so willed, extend to “all Cases . . . arising under . . . the Laws of the United States,”<sup>39</sup> Article III provides however:

The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>40</sup>

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37. So, for example, a number of notable writers focus on doctrines and clauses in the Constitution very different from those that are featured in Judge Ginsburg’s book review. Where Ginsburg’s are typically identified (as he suggests) with the Constitution of “liberty,” Ginsburg, *supra* note 5, at 84, other writers’ selections include other clauses, words, phrases, and preambles, in which they find a strong countervailing Constitution, that of “community,” and of mutual support and concern. The object of their writing is to suggest a Constitution of “positive rights” and (even) of enforceable “entitlement to”—rather than (merely) “freedom from”—certain things (e.g., an entitlement to welfare, to a minimum level of support, education, police protection, health care, work, etc., the means without which “freedom” is for them merely a Hobbesian freedom of neglect, of want, of sickness, and of malnutrition—a freedom to be unequal, as it were). See, e.g., Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257, 258–59 nn. 6, 7 (Winter/Spring 2000) (referencing numerous authors and sources that discuss these issues). Many (I include myself) find nothing to sustain these writers’ claims (that they have recaptured what these clauses were meant to do and how they were meant to apply), but that is beside the point. Indeed, were one persuaded—whether by these writers or whether by still better sources for resolving one’s uncertainties—that these *were* “lost” or “exiled” (or “underread”) parts of the Constitution, there would be nothing amiss in their being “brought in from the cold.” For, here too, even as Justice Frankfurter once observed, albeit in a somewhat different setting: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” *Henslee v. Union Planters Nat’l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

38. U.S. CONST. art. III, § 1.

39. *Id.* art. III, § 2, cl. 1.

40. *Id.* art. III, § 2, cl. 3.

When this provision came to be considered in state ratification conventions, some thought it too weak a safeguard.<sup>41</sup> On the one hand, it made no guarantee of the right to trial by jury in civil cases.<sup>42</sup> And even in criminal trials, where the right was now to be safeguarded—not subject to congressional discretion to disallow or to abridge but, instead, constitutionally guaranteed—the assurance was troublesome to some, such as George Mason and Patrick Henry, who spoke to the point in the course of the Virginia ratification debates. For example, Henry objected that although the trial of any crime would need to be held in the state where the said crime was committed, it evidently might be held *anywhere* in the state, though the place selected be remote from the place of the alleged crime and remote, too, from the district of the accused's residence. In brief, a clause that permitted Congress to vest power in federal prosecutors to situate a trial anywhere within a state (perhaps a place willfully picked, where jurors would be indifferent to the fate of the defendant charged with a federal crime) was thought to be too permissive to provide a guarantee of trial by jury in a truly meaningful way.<sup>43</sup> George Mason thought the provision too weak in an additional respect, which he raised by way of a question:

This great palladium of national safety, which is secured to us by our own government, will be taken away from us in those courts; or, if it be reserved, it will be but in name, and not in substance. In the government of Virginia, we have secured an impartial jury of the vicinage. We can except to jurors, and peremptorily challenge them in criminal trials. If I be tried in the federal court for a crime which may affect my life, have I a right of challenging or excepting to the jury? . . . This sacred right ought, therefore, to be secured.<sup>44</sup>

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41. I FEDERALISTS AND ANTIFEDERALISTS—THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 120, 127, 129–32, 135 (John Kaminski & Richard Leffler eds., 1989).

42. A defect, as it was seen to be, corrected in the framing of what became the Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

43. *See, e.g.*, 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 545 (Jonathan Elliot ed., 1996) (remarks of Patrick Henry) (“Juries from the vicinage being not secured, this right is in reality sacrificed.”).

44. *Id.* at 528 (remarks of George Mason).

The point that the jury provision in Article III did not limit where a federal criminal prosecution might be brought (other than that it be somewhere within the state where the crime was committed), eventually carried over to produce a more specific, more limiting clause in the Sixth Amendment.<sup>45</sup> As to the objections that Mason and Henry<sup>46</sup> made to the Jury Guarantee Clause in Article III—on the ground that it did not explicitly spell out the familiar law of challenges, both for cause and peremptory, however, James Madison demurred:

He [George Mason] is displeased that there is no provision for peremptory challenges to juries. There is no such provision made in our Constitution or laws.<sup>47</sup> The answer made by an honorable member lately is a full answer to this. He said, and with great propriety and truth, that where a technical word was used, all the incidents belonging to it necessarily attended it. The right of challenging is incidental to the trial by jury, and therefore, as the one is secured, so is the other.<sup>48</sup>

Madison's reference to the "technical word" of trial by jury, as including the "incidents belonging to it," is drawn from William Blackstone's Commentaries, as Madison specifically adverted at the Virginia convention in another colloquy with Patrick Henry that same day, June 18, 1788.<sup>49</sup> The relevant passages from Blackstone strongly confirm Madison's representations regarding the entitlements to peremptory challenge, as well as challenge for cause:

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45. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State *and district* wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI (emphasis added).

46. *E.g.*, 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 43, at 542 (remarks of Patrick Henry) (describing the right to challenge potential jurors to be as valuable as the right of trial by jury).

47. What Madison is saying here is that although Mason is correct—that the state constitution's bill of rights *does* indeed secure the right of peremptory challenge (as well as challenge for cause) in criminal cases—it is because of the provision guaranteeing trial by jury as such (i.e., that the right of peremptory challenge is an implied, incidental feature of the state constitutional clause), which is equally the case in respect to Article III.

48. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 43, at 530–31 (remarks of James Madison); *see also id.* at 546 (remarks of Edmund Pendleton) ("It is strongly insisted that the privilege of challenging, or excepting to the jury, is not secured. When the Constitution says that the trial shall be by jury, does it not say that every incident will go along with it?").

49. *Id.* at 501 (remarks of James Madison) ("I will refer you to a book which is in every man's hand—Blackstone's Commentaries."); *see also* United States v. Wood, 299 U.S. 123, 138 (1936) ("Undoubtedly, as we have frequently said, the framers of the Constitution were familiar with Blackstone's Commentaries. Many copies of the work had been sold here and it was generally regarded as the most satisfactory exposition of the common law of England.").

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made . . . on the part of . . . the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be in civil causes. For it is here at least as necessary, as there . . . that the particular jurors be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum* . . . or *propter delictum*.

Challenges upon any of the foregoing accounts are styled challenges *for cause*; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, in *favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.<sup>50</sup>

And Blackstone then discussed the number of peremptory challenges secured to the accused in all felony cases as a matter of right—namely, twenty peremptory challenges, down from the earlier, larger number of thirty-five. He declared, “For the law judges that [the rules regarding peremptory challenges] are fully sufficient to allow the most timorous man to challenge through mere caprice.”<sup>51</sup> But he noted, too, the *asymmetry* between the prosecution and the prisoner in respect to peremptory challenges and in contrast with challenges for cause. So, he observed: “This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court.”<sup>52</sup>

Wholly in keeping with *these* understandings, moreover, the first acts of Congress applicable to federal court criminal trials were ex-

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50. 4 WILLIAM BLACKSTONE, COMMENTARIES \*346 (“Public Wrongs”).

51. *Id.* at \*347.

52. *Id.*; see also *Swain v. Alabama*, 380 U.S. 202, 243 (1965) (Goldberg, J., dissenting) (“[A]lthough the Crown at early common law had an unlimited number of peremptory challenges, as early as 1305 that right was taken away, and since that time in England peremptories may be exercised only by the defendant.”).

actly in accord with these views.<sup>53</sup> What one may reasonably suggest from this is that in the subsequent elaborations respecting trial by jury (both criminal and civil), as framed in the Bill of Rights, principally in the Sixth and Seventh Amendments, the text of those provisions reflected either specific changes, specific additions, or specific clarifications. Where, however, there was no apparent misunderstanding or uncertainty as to what the provision in Article III itself provided, no change would be necessary.

So, for a good and uncontroversial example, one finds no language in the Sixth Amendment expressly providing that the verdict of the federal court criminal jury be unanimous (i.e., no language pre-

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53. See, e.g., Act of Apr. 30, 1790, ch. 9, 1 Stat. 119:

*And be it further enacted*, That if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if he or they shall also stand mute or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty . . .

The number of peremptory challenges affirmatively authorized by Congress never has been reduced to fewer than twenty in capital cases, and to this extent reflects a completely consistent treatment of its usage in Blackstone's day as well. The basic changes, for the most part, have been those that granted, and then gradually expanded, the authorization of peremptory challenges allowed to the government, first permitting it five such challenges, Act of June 8, 1872, ch. 333, 17 Stat. 282, then moving it to six, Act of Mar. 3, 1911, ch. 231, 36 Stat. 1167, and eventually all the way to twenty in capital cases (the same number as is provided for an accused person facing death at the hands of the state). FED. R. CRIM. P. 24(b).

Of course, no one has claimed (nor could they reasonably claim) that the *government* has a "constitutional" right of peremptory challenge. Thus, neither its elimination, reduction, or limitation in its uses, would frame any particular constitutional distress. See *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that the Equal Protection Clause of the Fourteenth Amendment forbids state prosecutors from using peremptory challenges to eliminate jurors on the basis of sex); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (barring prosecutors from using their peremptory challenge authority to exclude potential jurors based on race, a decision which overruled, in part, *Swain*, 380 U.S. at 221–22, where the Court had presumed that the prosecutor properly exercised the state's challenges without violating constitutional limits). The emphasis in both cases, *Batson* and *J.E.B.*, is on the use of state power to compose a jury stripped of persons of the defendant's race or sex, a device forbidden to the state legislature acting directly, and a device likewise forbidden though it acts indirectly, i.e., through the prosecutor's use of peremptory challenges, to achieve the same end. Cf. *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (extending *Batson*, but in no untoward way, in finding standing in the criminal defendant to object to the prosecutor's use of peremptories to eliminate jurors by race, which jurors the defendant may believe to be beneficial if not dismissed, though not of the same race as himself). The emphasis in *Powers* remains an emphasis on the *state's* use of peremptories, not the accused's use. See *id.* at 408 ("Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.").

venting Congress from undercutting the guarantee of trial by jury by authorizing a determination of “guilty” by less than the full jury).<sup>54</sup> Nor, for that matter, does one find language that the jury must be of twelve, rather than some lesser number of persons (i.e., preventing Congress from further undercutting the guarantee of trial by jury by the simple expedient of making the jurors but two or three, or any number less than twelve, while simultaneously eliminating the requirement of unanimity of verdict).<sup>55</sup> That these assurances are obviously at least as vital as some lesser ones spelled out in the Sixth Amendment (e.g., that the trial be held not just within the state, but also within the district, wherein the crime shall have been committed) would appear to be self-evident. That they are not “spelled out” in the Sixth Amendment does not imply they are omitted from the Constitution. Rather, that they were not spelled out gratuitously in that Amendment, one may well suppose, merely reflects the understanding that they already were taken into account, implicitly, as part-and-parcel of the original provision in Article III.<sup>56</sup> As Madison suggested, without further dissent by Mason or by Henry, in the Virginia debates: “where a technical word was used, all the incidents belonging to it necessarily attended it.”<sup>57</sup> A jury of twelve, in all felony cases, was well established.<sup>58</sup> So, too, was the settled requirement of verdict

54. U.S. CONST. amend. VI.

55. *Id.*

56. *Cf. Johnson v. Louisiana*, 406 U.S. 356, 369–71 (1972) (Powell, J., concurring) (concluding that although unanimity of jury verdict is not provided for in either the Article III provision or the Sixth Amendment, unanimity is required in all federal criminal prosecutions, and that “in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law”); *Apodaca v. Oregon*, 406 U.S. 404, 406, 407 n.2 (1972) (declining to regard the unanimity requirement as applicable to the states via the mere Due Process Clause of the Fourteenth Amendment and sustaining noncapital felony verdicts of ten of twelve jurors).

In *Apodaca*, the Court suggested that it was only in the latter half of the fourteenth century that “it became settled that a verdict had to be unanimous.” *Apodaca*, 406 U.S. at 407 n.2. “Only?” One surely would have thought that a feature unexceptionally identified to a certain institution for centuries easily would fit the bill as understood, part-and-parcel thereof. *See* Peter Sperlich, *Trial by Jury: It May Have a Future*, 1978 SUP. CT. REV. 191, 197 (“To produce this ruling [in *Williams v. Florida*, 399 U.S. 78, 86 (1970), which permitted juries of as few as six], the Court arguably had to discard about 700 years of common law and 200 years of American constitutional history.”).

57. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 43, at 531 (remarks of James Madison).

58. *See Baldwin v. New York*, 399 U.S. 66, 67–68 (1970) (overturning a conviction for “jostling” secured without a jury trial); *see also Williams*, 399 U.S. at 122 (Harlan, J., dissenting):

unanimity.<sup>59</sup> And so, too, “the right of challenging,” not just for cause, but also peremptorily.<sup>60</sup> This was a challenge the accused possessed, “an arbitrary and capricious species of challenges,” albeit only to a certain limited number. This right, moreover, was not subject to question; rather, it was a right to be deployed exclusively as the accused might find best, against the terror of criminal conviction and the full weight of the prosecutorial state.<sup>61</sup>

The principal case law today, to be sure, is very much to the contrary.<sup>62</sup> Indeed, one of the most frequently repeated statements pertinent to this subject appears in *Stilson v. United States*,<sup>63</sup> in just the following quite emphatic terms:

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With all respect, I consider that before today it would have been unthinkable to suggest that the Sixth Amendment’s right to a trial by jury is satisfied by a jury of six, or less, as is left open by the Court’s opinion in *Williams*, or by less than a unanimous verdict . . .

*Id.* at 124 (“[S]ound constitutional interpretation requires, in my view, fixing the federal jury as it was known to the common law.”); *id.* at 126 (“Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six?”); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719–20 (1971) (explaining how the twelve-person jury provides a criminal defendant significantly greater security than a jury of six).

59. See *supra* note 56.

60. See *supra* notes 52–53 and accompanying text.

61. See *Swain v. Alabama*, 380 U.S. 202, 212, 219 (1965) (dictum) (“The peremptory challenge has very old credentials . . . The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury . . . The denial or impairment of the right is reversible error without a showing of prejudice.”); *Pointer v. United States*, 151 U.S. 396, 408 (1894):

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . Any system for the empanelling of a jury that . . . embarrasses the full, unrestricted exercise by the accused of that right must be condemned.

*Cf.* 4 BLACKSTONE, *supra* note 50, at \*352 (summarizing the general view of criminal punishment that Blackstone saw reflected in the common law of England). Bloody as that system generally was—and it surely was (most felonies were punishable by death)—this was the view Blackstone declared was the philosophy of criminal trials: “the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.” *Id.*

62. See, e.g., *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reaffirming that peremptory challenges are not of “constitutional dimension,” but merely “one means to achieve the constitutionally required end of an impartial jury”); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (same); *Gray v. Mississippi*, 481 U.S. 648, 663 (1987) (“Peremptory challenges are not of constitutional origin.”); *United States v. Wood*, 299 U.S. 123, 145 (1936) (declaring that the number of peremptory challenges parties are to receive should be regulated by Congress or by the common law).

63. 250 U.S. 583 (1919).

There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.<sup>64</sup>

Yet, it is interesting to note that in *Stilson* itself, as in virtually every other case in which this statement—or some close variation thereof—appears, the telling reference of the Court is nearly always solely to the Sixth Amendment, nothing more. And, indeed, if one confines oneself to the text of the Sixth Amendment—if one exiles the separate, strong, original clause as it appears, unchanged from Article III, by leaving it either unread, or, if you will, underread—then it is easy enough to agree with the Court. If one considers only the Sixth Amendment's syntax, and confines oneself strictly to its phrases, one may easily say that “trial by an impartial jury” is “all that is secured.”

In which case, if the government could save time and money by empanelling a jury of three, then so long as that panel were constituted in a manner not partial to the government (albeit not partial either to the accused), the requirement of the Sixth Amendment also is met. Furthermore, if the government permits this “impartial jury” of three to convict by a simple majority vote, even where the consequence is death, then one can declare with equal equanimity that “the accused” shall have “enjoy[ed] the right to a speedy and public trial, by an *impartial* jury,” which, again, is all the Sixth Amendment provides by way of constitutional guarantee.

Perhaps it is. But perhaps, also, in thinking this way about the Sixth Amendment, something has been left out of mind, as out of sight. If one thought that there was this *other* clause, the first one, the original, still embedded in Article III, with an accompanying pedigree of its own, one might understand *that* exiled provision on jury trials in different terms than mere “impartiality”—terms less antiseptic, terms cast from a history of criminal trials, and terms responsive to understandable human fears. These were terms actually meant to be tilted in several ways for the predicament of the accused; terms more in keeping with the philosophy Blackstone claimed was central to com-

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64. *Id.* at 586. But note, of course, the assumption built into this statement, namely, that if there is nothing in the Constitution “which requires Congress to grant” peremptory challenges, then, insofar as Congress elects not to grant any, that ends the matter; the assumption being that a defendant—even a capital defendant—must invoke some act of Congress as the source of a beneficial feature of trial “by jury”—and not merely some provision in the Constitution “standing alone.” But why would one suppose this to be true? If one were to believe Madison's answer to Mason and to Henry, it is not true. Whether Congress is so “required” or not, one would say, the right descends not—or not just—from any such act, but from the provision “as is,” i.e., as it is in Article III.

mon law: that, while others may disagree, “the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”<sup>65</sup>

As it is, however, the Court has reached the point where it treats the state and the accused with an altogether withering equality. As the state may not, acting through its prosecutor, seek the displacement of a provisionally seated juror on grounds the state legislature could not itself use to determine that person’s fitness to serve on a particular jury (e.g., the person’s sex or race), neither may the person whose fate is at stake in the trial be permitted to do so.<sup>66</sup> As the state cannot use a peremptory challenge to displace from the jury box a prospective female juror, in order that the next juror to be called (a man) might instead be seated in a death-penalty case, so, likewise, we are now advised neither may the person on trial for his life use a peremptory challenge to displace from the jury box a prospective male juror, in order that the next numbered juror to be called (a woman) might instead be seated.<sup>67</sup> What a nice symmetry this provides.

65. 4 BLACKSTONE, *supra* note 50, at \*352.

66. See *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (stressing that potential jurors have a right guaranteed by the Equal Protection Clause not to be excluded on the basis of gender); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (prohibiting criminal defendants from using peremptory challenges based on race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (prohibiting private civil litigants from using peremptory challenges based on race).

67. Of course, in using a peremptory challenge to displace a male juror in order that the next person (a woman) be seated, a hypothetical capital defendant may be making a mistake; for all he knows, the woman whose presence he seeks on his capital jury will in fact be more sanguinary than he supposes. But what of that? It is this very matter that is for the accused and his or her counsel to decide (i.e., it is the right to take this chance that is the very heart of the right).

Consider also the right to vote, to serve on a city council, on a board of county commissioners, as a state legislator, or as governor. Is this “right to vote” merely a “state-delegated” power one is authorized to use as a mere agent of the state, a means of “aiding the state,” to choose those who will serve in office? If so, then it is logical to suppose that it may not be used to keep one from office, or used to prefer another for office, just because of race or sex. Accordingly, whenever it is ascertainable that any votes cast in a given precinct plainly reflect “racial” or “gender” bloc voting, such ballots should be disallowed. Only a vote cast reflecting no “prejudice” on the voter’s part should count. To *permit* any other kind of vote to count, one would say, is to engage “state action” (if not in the casting of that vote by the voter, then in the state’s “counting” of—i.e., of giving ballot box *effect* to—any such vote), in a way the Fourteenth and Fifteenth Amendments forbid, insofar as it operates to keep some well-qualified candidates from being elected. “The state,” one should say, “simply may not ‘count’ (i.e., give effect to) *any* such vote.”

To be sure, determining which votes were thus “impermissibly based” such that they must be thrown out may be more difficult in election environments than in jury-selection environments. But if that is *all* there is to say, it is not very impressive, for there are assuredly reasonable means of “getting at the truth.” If, by way of example, upon a *prima facie* showing of “possible sex- or race-based” use of a peremptory challenge, the defendant can be put to an examination (to explain it away), there seems little reason to excuse voters whose precinct ballot boxes present a strong *prima facie* case of “possible sex- or race-based” voting from accounting for their votes in some fair

Moreover, that the jury the accused confronts happens (by chance) to be nearly or even wholly “all male” presumably cannot matter, for in seeking to displace a juror already in the box, the accused—equally with the prosecutor—may not, if one takes the Court’s current view at face value, draw any inferences based “merely” on sex. Indeed, under the current view, the Court has chosen to regard the defendant as little more than a “designated agent of the state,” merely one who assists the state in composing a jury, not a person with a life-and-death interest diametrically opposed to the state’s interests. The following Wiley Miller cartoon<sup>68</sup> tells us how far we have come.



measure as well. In the end, one may as well recognize that what is at issue here is not the difficulty of the inquisition, such as it may be. What is at issue here is one’s idea of to what the individual’s “right” to vote extends.

68. Non Sequitur © 2000 Wiley Miller. Dist. By UNIVERSAL PRESS SYNDICATE. Reprinted with permission. All rights reserved.

Something is missing from this picture, and something is missing from the Supreme Court's current direction, something in exile, something dimly remembered—back in Article III, a provision applicable (at least) to criminal trials in our federal courts, something lost and very much in the cold.

#### CONCLUSION

In worrying aloud about respecting the seemingly solid phalanx of judicial utterances and conventional constitutional wisdom that seems now to hold that any provision in our law enabling those accused of crime to have even *one* right of peremptory challenge, even in death-penalty cases, is solely a matter of legislative grace,<sup>69</sup> and not contemplated by the Constitution itself—a position I think deeply wrong,<sup>70</sup>—I have but tried to locate at least one clause congenial to the notion of the “Constitution in exile.” That theme, best expressed two centuries ago by Justice Marshall (well before Judge Ginsburg brought it back), is the important matter. Marshall expressed that theme in a manner that I do not think can be improved upon, and so I return to his formulation once more. Recall that Marshall began by referring to the Constitution itself: “The judicial power of the United States is extended to all cases arising under the Constitution.”<sup>71</sup> And so:

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. *And if they can open it at all, what part of it are they forbidden to read or to obey?*<sup>72</sup>

What part, or what parts, indeed. I think there is no such part. To be sure, it may be difficult to determine what it means to obey the Constitution in a particular case, but that *is* the challenge to be met—to be sorted out as best one can, neither more nor less. The challenge is

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69. And thus it may be taken away whenever Congress or a state legislature finds it useful to do so.

70. Or, if this seems too strong for the reader, merely on the strength of the slim materials in Part II of this Foreword, at least it is not “obviously correct.”

71. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (Marshall, C.J.).

72. *Id.* at 179 (emphasis added).

neither to figure out how to give some provision or clause more sweep or scope than is its due nor to figure out how to give some vexing clause less efficacy than plainly would appear to be required. Rather, each is an abdication, although they are different kinds of abdications. Such conduct is not what judges who take an oath “to support *this* Constitution” should feel free to do.