



6-1-1999

Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts

Robert J. Pushaw Jr.

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447 (1994).

Available at: <http://scholarship.law.nd.edu/ndlr/vol69/iss3/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts

Robert J. Pushaw, Jr.*

Article III of the Constitution extends federal "judicial Power" to (1) "all Cases" arising under federal law, concerning admiralty, or affecting foreign ministers, and to (2) "Controversies" between certain parties (the United States, states, foreign nations, and their citizens) in six specified situations.¹ The Supreme Court has treated the words "Cases" and "Controversies" as synonymous and collapsed them into a single Article III requirement of "justiciability," which determines whether a particular matter (invariably a federal question case) is fit for judicial disposition.² Justiciability includes the doctrines of standing, ripeness, and mootness, which limit federal courts to adjudicating only concrete disputes between directly adverse parties.³ Therefore, justiciability presupposes that a

* Associate Professor, University of Missouri School of Law. B.A., LaSalle, 1980; J.D., Yale, 1988. Many friends and colleagues gave me valuable assistance. I am especially indebted to Akhil Amar for his thorough and incisive criticism of several drafts of this Article. I would also like to thank Dave Engdahl, Bill Fisch, Willy Fletcher, Michael Froomkin, Dan Meltzer, Walter Oberer, Jim Pfander, Christina Wells, and Jim Whitman for their helpful suggestions. Finally, I am grateful for the generous support provided by the Charles H. Rehm and the Donald P. Thomasson Faculty Research Fellowships through the Missouri Law School Foundation and by the John M. Olin Foundation at Yale Law School.

1 U.S. CONST. art. III, § 2, cl. 1 (emphasis added). This clause provides in full:

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 Jurisdiction;—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.

The foregoing provision will be referred to as the "jurisdictional catalogue" throughout this Article.

2 See generally *infra* Part I.A.1.

3 Standing concerns a plaintiff's ability to sue, which hinges on whether she has suffered a concrete injury inflicted by a defendant. Ripeness bars judicial consideration of claims that have not yet matured into full-blown disputes. Mootness precludes adjudication when intervening events have extinguished the controversy that triggered the suit. See generally *infra* Part I.A.1.(b) (analyzing standing, ripeness, and mootness). Justiciability also

federal judge's primary function is to resolve disputes, not to declare the law.

Nearly all scholars have accepted the Court's assumption that the terms "Cases" and "Controversies" are interchangeable, and have instead criticized the justiciability doctrines themselves as incoherent and inconsistent with the Court's role in articulating public values.⁴ Unfortunately, these commentators have replicated the Court's narrow focus on only one of Article III's nine jurisdictional grants—federal question (especially constitutional) "Cases."⁵ But if Article III's reference to "Cases" and "Controversies" creates a constitutional requirement of justiciability, then doctrines like standing, ripeness, and mootness logically should apply to *all* the enumerated "Cases" and "Controversies."⁶

The orthodox judicial and academic treatment of "case or controversy" as a single standard of justiciability relevant only to federal question "Cases" cannot be reconciled with Article III's language, history, and structure.⁷ That evidence indicates that the

includes the political question and advisory opinion doctrines, which are discussed *infra* Part II.E.

⁴ See generally *infra* Part I.A.2. A few commentators have identified possible distinctions between "Cases" and "Controversies," but dismissed them as relatively trivial. See *infra* Part I.B.

⁵ See *infra* notes 67-68 and accompanying text.

⁶ All the Supreme Court's major justiciability cases have involved federal questions. See *infra* Part I.A.1. Although lower federal courts may sometimes dismiss actions based on other heads of Article III jurisdiction on justiciability grounds, the development of standing, ripeness, and mootness has occurred exclusively in the context of federal question "Cases."

⁷ In this Article, I rely extensively on Article III's text, structure, and history. I employ such an interpretivist methodology primarily because most jurists and scholars do likewise in debating the role of federal courts. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207-08 n.7 (1985) [hereinafter Amar, *Neo-Federalist*] (justifying interpretivism on this ground and many others).

Such an approach sometimes leads to the charge that the author has a literalistic concept of the meaning of words and is manipulating the historical evidence to fit modern theories of what the Framers should have done, rather than what they actually did. See, e.g., Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1520. While I do not claim to have achieved perfect historical detachment, I am content to let the sources I have presented speak for themselves. Moreover, historical evidence should not be discounted simply because it is consistent with a theory (for example, the case/controversy distinction) that can also be supported on current policy grounds. Indeed, such modern usefulness would appear to enhance the value of historical study. "We too easily read our history to validate familiar practices we lack sufficient imagination to improve. We should rather explore it to discover whether and how we have misplaced alternatives that might more happily serve us even now." David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 333 (1992) [hereinafter Engdahl, *John Marshall*].

Framers used "case" and "controversy" as distinct terms to convey different meanings.⁸ Textually, the traditional presumption that variations in constitutional language are intentional⁹ applies with peculiar force to Article III because of its repetition of the word "Cases" three times to introduce those jurisdictional grants defined by legal subject matter, followed by its subsequent shift to (and reiteration of) the term "Controversies" to denote the six party-defined jurisdictional classes. Historical evidence reveals a critical—and overlooked—difference between the two words related to judicial functions. This distinction clarifies the usage of "Cases" and "Controversies" in Article III and highlights the structural division of its jurisdictional catalogue into two discrete categories.

In the eighteenth century, "case" referred to a cause of action requesting a remedy for the claimed violation of a legal right, in which a judge's primary role was to answer the legal question presented through "exposition"—the process of ascertaining, applying, and interpreting the law in light of precedent and the facts presented.¹⁰ A dispute between parties was a usual—but not necessary—ingredient of a "case," and resolving any such disagreement was less important than legal exposition.¹¹ Thus, Article III contemplated that the federal courts' main function in federal question, admiralty, and foreign minister "Cases" would be to declare the law in matters of national and international importance.¹²

8 See generally *infra* Part II. This Article uses the phrase "the Framers" to refer primarily to the leading Federalists. I recognize the impossibility of discerning a single "original intent," shared by all those who drafted and ratified the Constitution, as to any of its particular provisions—including those relating to the federal judiciary. My limited purpose is to pinpoint the most plausible meaning of "Cases" and "Controversies" as used in Article III. I am aware that some scholars consider such textual and historical studies to be misguided and/or irrelevant to modern constitutional law. I disagree with that view, for reasons that have been set forth by others. See, e.g., Amar, *Neo-Federalist*, *supra* note 7, at 207-08 n.7.

9 See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816).

10 See generally *infra* Part II.B.2.(a).

11 See generally *infra* Part II.B.2.(a)(ii).

12 See generally *infra* Part II.C.2.(a) and Part II.D.1. I do not mean to imply that the Framers endorsed (or even anticipated) modern Supreme Court law declaration in "Cases," particularly those arising under the Constitution. The 18th century concept of judicial exposition limited courts to finding and pronouncing the existing law, rather than making new law. See *infra* note 150. The Founders apparently foresaw neither the magnitude of difficulty involved in adapting that classic "law-finding" function to a written constitution nor the element of political will that would influence decisions on constitutional questions. See generally Engdahl, *John Marshall*, *supra* note 7, at 289-97.

Nonetheless, the line between declaring and making the law was blurry even two centuries ago. See *infra* notes 146-65 and accompanying text. The Marshall Court arguably

By contrast, "controversy" meant a bilateral dispute wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties.¹³ Hence, the Framers expected federal courts to act chiefly as independent arbitrators in resolving Article III "Controversies," with any legal exposition incidental.¹⁴

This case/controversy distinction warrants a new, bifurcated approach to justiciability. The word "controversy" supplies a textual basis for application of current justiciability doctrines, which concern judicial resolution of bilateral disputes, to Article III "Controversies."¹⁵ However, the term "case" provides no constitutional support for application of standing, ripeness, or mootness to Article III "Cases," because those doctrines ignore the key judicial function of exposition. Therefore, as to federal question, admiralty, and foreign minister "Cases," the justiciability doctrines should be reformulated to focus on judicial law declaration.¹⁶

This functional case/controversy distinction will be explained in a three-part analysis. Part I summarizes current approaches to "Cases" and "Controversies." Part II discusses the historical meaning of those terms. Part III reexamines justiciability and the functions of federal courts in light of the case/controversy bifurcation.

I. CURRENT APPROACHES TO "CASES" AND "CONTROVERSIES"

A. The "Unitary" View

The perception that "Cases" and "Controversies" form a single standard of justiciability derives from relatively recent Supreme Court opinions that generally have been accepted at face value by

crossed that line on several occasions. See *infra* notes 256-67 and accompanying text (analyzing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) and *infra* note 270 (describing *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824)).

13 See generally *infra* Part II.B.2.(b).

14 See generally *infra* Part II.C.2.(b) and Part II.D.2. The proffered case/controversy distinction concerns primary and secondary—rather than exclusive—judicial functions. I readily acknowledge that federal courts always have settled disputes in "Cases" and applied law in "Controversies;" the issue is the relative importance of these roles in each category. In an Article III "Controversy," a federal judge's main function is to resolve a dispute impartially, with a secondary task of declaring the law—usually state law, on which the court's pronouncements are not binding except as to the immediate litigants. By contrast, what is paramount in an Article III "Case" is judicial exposition, especially by the Supreme Court—the only tribunal mandated by the Constitution. A dispute is not necessary and, even where one exists, should not be the Court's central concern.

15 See generally *infra* Part III.A.

16 See generally *infra* Part III.B.

scholars. The following summary traces the evolution of this "unitary" approach and describes its essential features.

1. The Supreme Court's "Case or Controversy" Requirement

(a) *Historical Development.*—During the past half century, the Supreme Court has developed the idea that "case" and "controversy" are equivalent terms that constitutionally restrict federal jurisdiction to live disputes involving an injured party. This modern concept of justiciability has little linguistic or historical basis: From the founding of the republic to the New Deal, the Court never mentioned that Article III's reference to "Cases" and "Controversies" imposed any threshold jurisdictional requirement.¹⁷

In fact, as late as 1936, justiciability was treated not as a constitutional jurisdictional mandate, but rather as a doctrine of discretion and self-restraint. That year, in *Ashwander v. Tennessee Valley Authority*,¹⁸ the Court recognized the standing of stockholders to challenge the United States' constitutional authority to enter a contract under a federal statute,¹⁹ but upheld the government's action.²⁰ In his famous concurrence, Justice Brandeis argued that plaintiffs did not have standing.²¹ Brandeis viewed standing as entirely prudential: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision"²²—for instance, the ban on collusive suits²³ and the refusal to consider "the validity of

17 See generally *infra* Part II.D. and Part II.E. Indeed, the most ardent defender of justiciability, Justice Scalia, has conceded that no 19th century opinion mentions any Article III textual basis for these doctrines. See *Honig v. Doe*, 484 U.S. 305, 339-40 (1988) (Scalia, J., dissenting). He asserts that "[t]he explanation for this ellipsis is that the courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common law courts, rather than referring to Art. III which in turn adopts those limitations through terms ('The judicial Power'; 'Cases'; 'Controversies') that have virtually no meaning except by reference to that tradition." *Id.* at 340. Justice Scalia's "explanation" begs the question—what was the traditional common law meaning of each of those terms? The answer is that "Cases" and "Controversies" were not historically viewed as limitations, but rather as affirmative grants of power to perform specific roles. See generally *infra* Part II.

18 297 U.S. 288 (1936).

19 *Id.* at 315-25.

20 *Id.* at 338-40.

21 Justice Brandeis acknowledged that "[t]he obstacle is *not procedural*. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality of legislation." *Id.* at 341 (emphasis added).

22 *Id.* at 346 (emphasis added).

23 *Id.* Other prudential principles included reaching constitutional questions only

a statute upon complaint of one who fails to show that he is injured by its operation."²⁴ Such self-discipline had become increasingly urgent as federal dockets burgeoned because of expanded federal question jurisdiction and the growth of administrative law.²⁵

To further reduce the workload of the federal judiciary, the Court began to maintain that justiciability was a constitutional barrier, seizing on "Cases" and "Controversies" as textual support. In a 1939 dissent joined by three other Justices, Justice Frankfurter declared:

The Constitution . . . explicitly indicated the limited area [of judicial action] . . . by extending "judicial Power" only to "Cases" and "Controversies." . . . [T]he framers . . . [intended] that [j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."²⁶

One constitutional limit on jurisdiction²⁷ was the "preliminary question[] of legal standing to sue,"²⁸ which required "a concrete, living contest between adversaries"²⁹ with an "individualized

when necessary to decide the case, avoiding constitutional issues if another ground of decision was available, construing statutes to avoid constitutional questions, and narrowly formulating constitutional rules. *Id.* at 346-48.

24 *Id.* at 347. As authority, Brandeis cited *Massachusetts v. Mellon*, 262 U.S. 447 (1923), underscoring that *Mellon's* denial of taxpayer standing was based on equitable considerations, not the Constitution, as has been commonly assumed. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1446-48 (1988). Winter provides a superb analysis of the transformation of standing from a prudential to a constitutional doctrine. See *id.* at 1417-57.

25 See *id.* at 1452-53 (discussing Act of Mar. 3, 1875, 18 Stat. 470, which extended general federal question jurisdiction to lower federal courts and expanded removal jurisdiction); *id.* at 1453 (stressing that growth of modern administrative state in early 20th century increased federal court workload and frequency of government intrusions with citizens). See also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-28 (1988) [hereinafter Fletcher, *Structure*].

26 *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting). A plurality of the Court concluded that state legislators had standing to challenge voting procedures in the ratification of a proposed constitutional amendment, but declined to reach the merits because a political question had been presented. *Id.* at 437-56.

27 *Id.* at 464 (Frankfurter, J., dissenting) ("In the familiar language of *jurisdiction*, . . . [plaintiffs] must have standing.") (emphasis added).

28 *Id.* at 468.

29 *Id.* at 460.

stake"³⁰ in the outcome, as evidenced by "private damage."³¹ Justice Frankfurter refined his Article III standing analysis in a 1951 concurrence,³² and the full Court adopted this theory the following year.³³ The Court extended the "case or controversy" inquiry to mootness in 1964³⁴ and to ripeness in 1974.³⁵

(b) *Justiciability and Dispute Resolution.*—The "case or controversy" standard limits federal court access to plaintiffs who can demonstrate the existence of a live, concrete dispute against an adverse party.³⁶ Hence, the justiciability doctrines—standing, mootness, and ripeness—necessarily rest on a dispute resolution model of adjudication.³⁷

(i) *Standing.*—Standing concerns a particular plaintiff's right to sue in federal court. In *Lujan v. Defenders of Wildlife*,³⁸ Justice Scalia declared:

30 *Id.* at 467; *see also id.* at 464 (Parties must have "some specialized interest of their own to vindicate.").

31 *Id.* at 469-70.

32 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150-60 (1951) (Frankfurter, J., concurring).

33 *See* Doremus v. Board of Educ., 342 U.S. 429 (1952). Justice Frankfurter's justiciability theories (and his underlying vision of federal jurisdiction) gained such rapid and widespread acceptance in part because they were championed by the foremost federal courts scholars of his era (*e.g.*, Henry Hart, Herbert Wechsler, Paul Mishkin, and Paul Freund); their disciples have preserved the Frankfurian vision. *See generally* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691-93, 696-707, 712, 719 (1989) [hereinafter Amar, *Law Story*] (describing relationship between Frankfurter and his academic followers).

34 *See* *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964).

35 *See* *Steffel v. Thompson*, 415 U.S. 452, 458 (1974) (The threshold issue is "whether petitioner presents an 'actual controversy,' a requirement imposed by Art. III of the Constitution."). The progression of justiciability from prudential to constitutional was not linear, however. As late as 1961, the Court suggested that "the restriction of our jurisdiction to cases and controversies within the meaning of Article III" was distinct from justiciability, which concerned *Ashwander*-type prudential considerations. *See* *Poe v. Ullman*, 367 U.S. 497, 502-04 (1961).

36 *See, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 40, 45 (1989).

37 *See supra* notes 29-30, 36 and accompanying text; *infra* notes 39-44, 47-53 and accompanying text. *See also* PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 82 (3d ed. 1988) [hereinafter HART & WECHSLER] (noting Court's adherence to dispute resolution model).

38 112 S. Ct. 2130 (1992). For critical evaluations of *Lujan*, *see* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

One of th[e] landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those *disputes* which are appropriately *resolved* through the judicial process"—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.³⁹

Lujan reiterated the Frankfurtian gospel that standing limits adjudication to actual "cases and controversies" between adverse parties.⁴⁰ Standing focuses on whether the plaintiff has a "personal stake in the outcome of a controversy" sufficient to ensure that she will vigorously represent her interests,⁴¹ as evidenced by an "injury in fact"⁴² caused by the defendant's assertedly illegal conduct that is "likely to be redressed by a favorable decision."⁴³ The requirement of direct, concrete injury assures a traditional ad-

39 112 S. Ct. at 2136 (emphasis added) (citation omitted). Justice Scalia argued that the judiciary was described by "landmarks" like standing that were more certain and narrow than those of the political branches. *Id.* at 2136 (citing THE FEDERALIST No. 48, at 256 (James Madison) (Carey & McClellan eds., 1990)). Contrary to Justice Scalia's implication, Madison there does not say that the words "Cases" and "Controversies" are "landmarks" that narrow federal jurisdiction and support standing.

40 See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490, 498-502, 517-18 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 215, 218 (1974); *Flast v. Cohen*, 392 U.S. 83, 94-95, 96-97, 101, 109, 120 (1968). See also *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982) (asserting that limitation of federal judiciary to resolving disputes in "the last resort" prevents conversion of courts into "college debating forums").

41 See, e.g., *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)) ("Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' This requirement ensures the presence of the 'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'").

42 This term originated in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970). The "injury" consists of "an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.'" See *Lujan*, 112 S. Ct. at 2136 (citations omitted). The plaintiff must show an individual injury, not "a generally available grievance about government." *Id.* at 2143; see also *id.* at 2144-45 (Neither courts nor Congress can ignore the concrete injury requirement without "discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches."). See generally Sunstein, *supra* note 38, at 184-86 (criticizing "injury in fact" requirement).

43 *Whitmore*, 495 U.S. at 155 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

versarial form in which the Court can function as a dispute resolver.⁴⁴

(ii) *Ripeness*.—Ripeness bars premature claims. Traditionally, the Court viewed ripeness as an entirely discretionary doctrine that weighed two major factors—"the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."⁴⁵

In the mid-1970s, however, the Court started to assert that ripeness was based on Article III's "Cases and Controversies" language,⁴⁶ and incorporated into ripeness doctrine terminology bor-

44 See *Valley Forge*, 454 U.S. at 471-72; see also *Schlesinger*, 418 U.S. at 220-21 ("Concrete injury . . . is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution."); *Whitmore*, 495 U.S. at 155 ("[S]tanding serves to identify those disputes which are appropriately resolved through the judicial process."); *Asarco Inc. v. Kadish*, 490 U.S. 605, 618 (1989) ("[T]his dispute now presents a justiciable case or controversy for resolution here."). Surprisingly, liberal Justices have agreed that standing rests on Article III's "Cases and Controversies" language and its underlying dispute resolution model. For example, in *Flast v. Cohen*, 392 U.S. 83 (1968), Chief Justice Warren emphasized that "those two words [Cases and Controversies] have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Id.* at 94. Rather than developing the crucial insight that "Case" and "Controversy" have meanings more complicated than generally supposed, however, Warren simply reiterated that these words are "limitations" that restrict courts to a traditional adversary format and protect separation of powers, and that they support the concept of justiciability. *Id.* at 95. The Chief Justice failed to consider that "Cases" and "Controversies" might not be limitations but rather broad affirmative grants. Cf. *Kansas v. Colorado*, 206 U.S. 46, 82 (1907) (Article III, § 2 "is not a limitation It is a definite declaration, a provision that the judicial power shall extend to . . . the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power.").

Like Chief Justice Warren, Justice Blackmun acknowledged that "cases and controversies" are a "limitation" and that standing involves "judicial resolution of a dispute." *Diamond*, 476 U.S. at 61-62. Similarly, Justice Brennan concluded that "[o]ne could hardly dispute the proposition that Art. III of the Constitution, by limiting the judicial power to 'Cases' or 'Controversies,' promotes separation of powers. *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting). Elsewhere, Justice Brennan accepted the "settled doctrine" of Article III, but argued that the "case and controversy" limitation "overrides no other provision of the Constitution." *Valley Forge*, 454 U.S. at 491-93 (Brennan, J., dissenting). Disagreeing with the Court's holding that taxpayers lacked standing to mount an Establishment Clause challenge to a grant of federal property to a religious college, Justice Brennan stressed that, instead of analyzing the legal rights and interests at stake, the Court clouded those issues with a threshold standing inquiry. *Id.* at 490-91; see also Fletcher, *Structure*, *supra* note 25, at 267-72 (arguing that taxpayer standing cases should focus on whether purpose of constitutional provision like Establishment Clause would be served by allowing suit).

45 See *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). The Court has consistently followed this prudential test, despite its later claim that ripeness has a constitutional component.

46 See Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162-

rowed from standing analysis—for example, the requirement that a plaintiff has suffered (or certainly will suffer) a cognizable “injury.”⁴⁷ Like standing, ripeness assumes that federal courts exist mainly to resolve disputes: The determination that a matter is unripe means it has not yet matured into a full-blown dispute.

(iii) *Mootness*.—Mootness precludes adjudication when the live controversy that triggered the suit has ceased. The judicial focus is on whether the plaintiff has a personal stake in the outcome⁴⁸ under the dispute resolution paradigm.⁴⁹

In 1964, the Court asserted for the first time that its “lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.”⁵⁰ The constitutional root of mootness and its dispute resolution foundation have been consistently reaffirmed,⁵¹ as in the recent case of *Honig v. Doe*.⁵²

Under Article III of the Constitution this Court may only adjudicate actual, ongoing *controversies* That the *dispute* between the parties was very much alive when suit was filed . . . cannot substitute for the actual case or controversy that an exercise of this Court’s jurisdiction requires.⁵³

64 (1987) [hereinafter Nichol, *Ripeness*]; *id.* at 163 n.66 (identifying *Babbitt v. Farm Workers*, 442 U.S. 289, 297 (1979), as first time all ripeness doctrine brought within Article III). Again, all the Justices acquiesced to this constitutionalization, even if they disagreed with its specific application. *See, e.g., O’Shea v. Littleton*, 414 U.S. 488, 509 (1974) (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (rejecting holding of unripeness because allegations “clearly state a case or controversy in the Art. III sense”).

47 *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978). Predictably, the result has been analytical confusion. *See Jonathan D. Varat, Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 298 (1980) (Collapsing ripeness analysis into standing inquiry shifts the focus of ripeness from legal issues to plaintiff’s injury.).

48 *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

49 *See, e.g., United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (“[P]ersonal stake” aspect of mootness “assur[es] that federal courts are presented with disputes they are capable of resolving.”); *id.* at 403 (“The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions.”).

50 *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964).

51 *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (The Court “may adjudicate only actual, ongoing cases or controversies.”); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 316-20 (1974) (per curiam).

52 484 U.S. 305 (1988).

53 *Id.* at 317 (emphasis added). Plaintiff claimed a school district had violated his

In a surprising concurrence in *Honig*, Chief Justice Rehnquist examined the history of mootness and concluded that it had at best "an attenuated connection" to "the case or controversy requirement" and could therefore be overridden for policy reasons.⁵⁴ He deemed it "very doubtful that the earliest case . . . discussing mootness . . . was premised on constitutional constraints . . . [because it] nowhere mentions Art. III."⁵⁵

With the exception of Chief Justice Rehnquist's *Honig* concurrence, no Justice has challenged the proposition that the phrase "case or controversy" supports the justiciability doctrines. The only judicial debate is how strictly they should be applied.

2. Scholarship on "Cases and Controversies"

Scholars generally have accepted the Court's premise that the terms case and controversy "can be used interchangeably,"⁵⁶ and they have employed this phrase to frame their analysis of justiciability.⁵⁷ The voluminous literature on "cases and controversies" usually addresses policy issues and assails the complexity, incoherence, and malleability of the justiciability doctrines.⁵⁸

federal statutory rights by expelling him for misconduct related to his emotional disabilities. Although the plaintiff had moved to a different district and had not attempted to enroll in school, the Court found his claims were not moot because of the "reasonable likelihood" he would again suffer the statutory violations that gave rise to his initial suit. *Id.* at 317-23. Thus, while the original dispute had abated, his claim was "capable of repetition, yet evading review." *Id.* at 318.

⁵⁴ *Id.* at 331 (Rehnquist, C.J., concurring).

⁵⁵ *Id.* at 330 (citing *Mills v. Green*, 159 U.S. 651 (1895)). Justice Scalia denied that mootness was based on prudence rather than a historical understanding of Article III's "cases and controversies" language. *Id.* at 332-41 (Scalia, J., dissenting). He suggested that mootness rested on either the words "cases and controversies" (*id.* at 332-33, 337) or on something "inherent in the understood nature of 'The judicial Power.'" *Id.* at 341.

⁵⁶ CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 53 (4th ed. 1983).

⁵⁷ *Id.* at 53-84 (repeating "Case or Controversy" title four times to introduce discussion of justiciability doctrines). Other major casebooks and treatises follow suit. *See, e.g.*, HART & WECHSLER, *supra* note 37, at 65 (designating Chapter II on justiciability "The Nature of the Federal Judicial Function: Cases and Controversies"); CHARLES T. MCCORMICK ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* 3-77 (9th ed. 1992) (entitling Chapter 1 "Judicial Power" Over "Cases and Controversies"); PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 13-112 (2d ed. 1989) (entitling discussion of justiciability doctrines "Case or Controversy"); CHEMERINSKY, *supra* note 36, at 38 (introducing Chapter 2 on justiciability by summarizing Court's "Cases and Controversies" jurisprudence).

⁵⁸ *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68 n.3 (1984) (listing sources criticizing standing). There are a few exceptions to this negative approach. *See, e.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (endorsing manipulation of justiciability doctrines—the "passive virtues"—where deciding

A few commentators have examined the history of justiciability. For example, Professors Jaffe, Berger, Winter, and Sunstein have argued that the Framers could not have intended Article III to have the meaning suggested by modern standing law because in the eighteenth century citizens who had suffered no personal injury could sue to vindicate public rights.⁵⁹ Similarly, Dean Nichol has concluded that ripeness and mootness have little basis in Article III's history or policy and should be returned to their prudential status.⁶⁰ None of these scholars, however, have questioned the functional equivalence of "case" and "controversy."⁶¹

Finally, justiciability has been cited as an example of the Supreme Court's broader failure to acknowledge that its role is not merely dispute resolution⁶² but rather is "to give concrete mean-

case capable of judicial resolution would threaten Court's authority); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (comparing requirement to class action and arguing that standing furthers policies of restraint, representation, and self-determination).

59 Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1267-75 (1961); Raoul Berger, *Standing to Sue in Public Actions: Is It A Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Winter, *supra* note 24, at 1394-1409; Sunstein, *supra* note 38, at 168-79. See also JOSEPH VINING, *LEGAL IDENTITY* 20-23, 55 (1978).

60 See, e.g., Nichol, *Ripeness*, *supra* note 46; Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court*, 22 CONN. L. REV. 703 (1990). See also Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992).

61 See, e.g., Nichol, *Ripeness*, *supra* note 46, at 153 n.4 (collapsing terms); Lee, *supra* note 60, at 636-37, 639-41 (concluding that "cases" and "controversies" have no clear historical meaning); Winter, *supra* note 24, at 1374 ("I am not so heretical as to suggest that there is no such thing as an article III 'case or controversy' requirement that limits the judicial power to actual disputes.").

Others have recognized that "case" and "controversy" provide a flimsy linguistic basis for justiciability. See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (The extension of judicial power to "cases and controversies" has "little necessary meaning" and "bear[s] several interpretations."); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 6 (1984).

62 Under the dispute resolution model, a passive, impartial judge settles a self-contained contested transaction between two private parties—a plaintiff seeking redress for an injury inflicted by a directly adverse defendant. The discrete violation of the plaintiff's rights is then remedied retrospectively, thereby satisfying the parties and restoring the status quo. Any law declaration is a mere byproduct of resolving the dispute. See, e.g., Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-5 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-84 (1976) [hereinafter Chayes, *Role*]; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17-29 (1979). See also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1981) (emphasizing universality of dispute resolution model); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (Popular consent to dispute resolution supports judicial legitimacy, which is threatened by judges tackling non-legal, "polycentric" tasks outside their area of competence.).

ing and application to our constitutional values,"⁶³ as Owen Fiss,⁶⁴ Abram Chayes,⁶⁵ and others⁶⁶ have maintained. These scholars properly emphasize the expository function of the Court in constitutional cases,⁶⁷ but they ignore other categories of Article III "Cases," such as admiralty. Moreover, because Fiss and his followers associate both "Cases" and "Controversies" with dispute resolution and wholly reject this model of adjudication for federal judges,⁶⁸ they fail to consider whether dispute resolution might retain some utility in deciding other Article III matters—namely, the six "Controversies."

63 Fiss, *supra* note 62, at 9.

64 Fiss argues that the function of adjudication remains constant—giving legal values concrete meaning—but that the form evolves to fulfill changing social needs. He asserts that huge modern bureaucracies pose the greatest threat to constitutional values, and that therefore the federal judiciary must restructure such organizations to protect constitutional rights. Such "structural reform" requires large public actions rather than piecemeal private suits. *See id.* at 1-6, 43-44. Litigation thus increases in complexity. Party structure features not an individual plaintiff and defendant, but rather social groups and institutions requiring multiple outside spokespeople, who are usually pitted against large government defendants. *Id.* at 18-21.

Fiss notes the problems of reconciling justiciability (and its dispute resolution basis) with structural reform. *Id.* at 4 n.13, 20 nn.42-43.

65 Chayes uses justiciability to illustrate his thesis that the private dispute resolution paradigm is inapplicable to modern public law actions, which concern multiple parties and complex legal and policy issues. Chayes, *Role*, *supra* note 62, at 1288-96, 1304-07.

66 Professor Bandes "use[s] the term 'case' as shorthand for the phrase 'case or controversy'." Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227 n.2 (1990). Bandes' thorough analysis of justiciability (*id.* at 230-34, 245-50, 254-70, 279-301, 308-11) illuminates her theme that the Court should define an Article III "case" to fulfill its primary role as guardian of public constitutional values, rather than perpetuating the fiction that constitutional adjudication is a byproduct of the resolution of private disputes. *Id.* at 281-82. *See also* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983) (maintaining that proper adjudicatory model for federal courts should not be dispute resolution but "expository justice"—the identification, exposition, and implementation of basic moral/legal values); Lee, *supra* note 60, at 608-09, 654-56 (advancing thesis that courts should decide moot cases if doing so would help give meaning to our public values). *See generally* HART & WECHSLER, *supra* note 37, at 79-81 (summarizing scholarship in this area).

67 *See, e.g.*, Bandes, *supra* note 66, at 281-82; Fiss, *supra* note 62, at 1-5, 9-17, 34-36, 44, 52-53, 57-58.

68 Fiss, *supra* note 62, at 30-31. One reason for this rejection is the conclusion that "[t]here is nothing in the text of Article III—in the rather incidental use of the words 'cases' or 'controversies'—that constitutionally constricts the federal courts to dispute resolution." *Id.* at 36. Another is historical: Even common law judges did not follow a simple dispute resolution model. *Id.* at 9-17, 35-39. *See also* Bandes, *supra* note 66, at 283 & n.386 (summarizing scholarship on common law adjudication); *id.* at 282-89 (claiming that private rights model of individualized dispute resolution is irrelevant to modern Supreme Court adjudication, which should explicitly adopt public rights approach).

B. Possible Case/Controversy Distinctions

Recently, a few scholars have challenged the unitary view of "Cases" and "Controversies" by suggesting two possible distinctions between these terms, neither of which addresses judicial functions.

1. The Civil/Criminal Distinction

Professors Fletcher, Meltzer, and Pfander have concluded that "Cases" encompass civil and criminal actions, whereas "Controversies" include civil suits only.⁶⁹ While this theory has some historical foundation, it has several flaws. First, had the Framers intended this meaning, they simply could have used "civil cases" instead of "Controversies."⁷⁰ Second, neither eighteenth century legal lexicons⁷¹ nor the Convention and Ratification records mention any civil/criminal distinction.⁷² Conversely, many contemporary legal authorities spoke of criminal "controversies"⁷³—most notably James Wilson, the principal draftsman of Article III,⁷⁴ who referred to the courts' "readiness to determine every controversy, criminal and civil."⁷⁵ Finally, the Judiciary Act of 1789⁷⁶ under-

69 See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265-67 (1990) [hereinafter Fletcher, *Case or Controversy*]; William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 133 (1990) [hereinafter Fletcher, *Exchange*]; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575 (1990); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. Part V.B.1. (forthcoming 1994).

70 See Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1656-57 (1990) [hereinafter Amar, *Reports*]. Indeed, the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77, does exactly that by referring to "civil cases."

71 See *infra* note 104 (listing law dictionaries and abridgements).

72 Professor Meltzer's lone citation is the Antifederalist "Letter of Agrippa to the Massachusetts Convention," reprinted in 4 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 96-97 (1981) [hereinafter ANTI-FEDERALIST]. See Meltzer, *supra* note 69, at 1575 n.19. This letter, however, simply refers to "civil causes" in *diversity*. It does not consider the other five types of "Controversies," nor does Agrippa ever suggest that "Cases" include both civil and criminal matters. See Amar, *Reports*, *supra* note 70, at 1664 n.54.

73 See, e.g., THOMAS HOBBES, *A DIALOGUE BETWEEN A PHILOSOPHER & A STUDENT OF THE COMMON LAWS OF ENGLAND* 78 (Joseph Cropsey ed., Univ. of Chicago Press 1971) (1681) (describing "divers [sic] sorts of Controversies," including "Crimes punishable divers wayes [sic]"); GILES JACOB, *LEX CONSTITUTIONIS* 38 (Garland Pub., 1979) (1719) (discussing "several Courts of Judicature, for Trial of Criminals, and deciding all Matters of Controversy . . ."); ARCHER POLSON, *THE LAW OF NATIONS* 797 (1845) (referring to "criminal controversies").

74 See *infra* Part II.C.1.(b).

75 THE WORKS OF JAMES WILSON 451 (Robert Green McCloskey ed., 1967) [hereinafter WILSON'S WORKS]. Although Wilson was referring to the English royal courts, his

cuts the civil/criminal distinction, as Professor Meltzer himself concedes.⁷⁷

The historical basis for the civil/criminal distinction derives largely from Justice James Iredell's dissent in *Chisholm v. Georgia*.⁷⁸ Iredell argued that section 13 of the Judiciary Act, which gave the Supreme Court original jurisdiction over "all controversies of a civil nature . . . between a state and citizens of other states,"⁷⁹ could not be applied where a state was a defendant⁸⁰ without violating sovereign immunity.⁸¹ Iredell's lengthy opinion contained a brief

statement clearly shows he did not consider the word "controversies" as inherently limited to civil matters. Elsewhere, Wilson distinguished criminal "offences" from "civil causes" or cases. *Id.* at 278.

76 Ch. 20, 1 Stat. 73.

77 Meltzer admits that three of the statute's sections concerning "controversies" could include criminal matters. Meltzer, *supra* note 69, at 1576 n.23 (citing ambiguities in the Judiciary Act of 1789, ch. 20, §§ 9, 11, 12, 1 Stat. 73, 76-81). Indeed, Congress' explicit restriction of Supreme Court jurisdiction in § 13 to "controversies of a civil nature, where a state is a party" and Circuit Court jurisdiction in § 11 to "suits of a civil nature . . . [where] the United States are plaintiffs" (another grant Article III deems a "Controversy") would have been redundant if "controversies" were inherently civil. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* at 92 (Wythe Holt & L.H. LaRue eds., 1990).

In any event, the Act is not authoritative in determining the meaning of Article III because many key Federalists, including Wilson, Morris, and Hamilton, were absent from the first Congress. See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1540 (1990) [hereinafter Amar, *Two-Tiered*]; Meltzer, *supra* note 69, at 1611 (noting that congressmen mixed constitutional interpretation with political arguments). Indeed, the Act was drafted primarily by small-states' advocates like Ellsworth and Paterson and was more pleasing to the Constitution's opponents than to its supporters. See Holt, *supra* note 7, at 1423, 1478-79, 1481-84. For example, Madison found the Act "defective both in its general structure, and many of its particular regulations." *Id.* at 1516-17 (citing source). Similarly, Attorney General Edmund Randolph, a key draftsman of Article III, see *infra* notes 191 and 202-03, criticized the statute for departing from the constitutional language and proposed numerous revisions. See Report of the Attorney-General to the House of Representatives (Dec. 31, 1790), reprinted in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 at 127 (Maeva Marcus ed., 1992) [hereinafter *Randolph's Report*]. Professor Holt argues that Congress did not worry about the Act's nonconformity with Article III because it was a political compromise with pro-debtor forces. Holt, *supra* note 7, at 1477-1517.

Despite its problems, the Act is considered a valuable interpretive source by most legal historians, and therefore I have examined and cited it. Because of the statute's possible unreliability in determining the intended meaning of Article III's provisions, however, I have based my arguments primarily on other sources.

78 2 U.S. (2 Dall.) 419, 431-32 (1793) (separate opinion of Iredell, J.), cited in Meltzer, *supra* note 69, at 1575 n.20, and Fletcher, *Case or Controversy*, *supra* note 69, at 266.

79 *Chisholm*, 2 U.S. (2 Dall.) at 431 (citing statute).

80 The *Chisholm* majority held that states could be sued as defendants. See *infra* note 301 and accompanying text (analyzing majority opinions in *Chisholm*).

81 2 U.S. (2 Dall.) at 429-50.

discussion of "controversies." He noted that (1) the "judicial power of the United States" was limited to the nine grants listed in Article III, section 2, clause 1;⁸² and (2) in the jurisdictional categories defined by party, the only clue as to subject matter was the term "Controversies."⁸³ Iredell then described the Judiciary Act's construction of Article III, section 2, clause 2 on original jurisdiction.⁸⁴ He asserted that Congress, in modifying Article III's reference to "Controversies" with the word "civil," intended to restrict the Court's jurisdiction to non-criminal matters,⁸⁵ thereby promoting federalism.⁸⁶ More broadly, Iredell's reluctance to interpret the Supreme Court's original jurisdiction as including the power to apply state criminal law reflected the established principle that one sovereign (the United States) could not enforce the criminal laws of another (a state).⁸⁷

82 *Id.* at 430-31.

83 *Id.* at 431 ("The constitution is particular in expressing the *parties* who may be the objects of the jurisdiction in any of these cases, but in respect to the subject-matter upon which such jurisdiction is to be exercised, used the word 'controversies' only."). Iredell employed careless language in explaining the configurations giving rise to the Court's original jurisdiction. The Constitution does not "use the word 'controversies' only" to describe all situations when the Court's original jurisdiction may be exercised; in one area—matters "affecting Ambassadors, other public ministers, and consuls"—the Framers chose the term "Cases."

84 *Id.*

85 "The act of congress more particularly mentions *civil* controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which . . . are uniformly considered of a local nature The word 'controversy' indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in congress to guard against the possibility of it." *Id.* at 431-32. Iredell violated a basic canon of interpretation by assuming that Congress used redundant language. See *infra* note 129.

86 Confining "controversies" to the civil sphere would prevent federal court interference with the general jurisdiction of state courts over criminal law, which is "of a local nature." *Chisholm*, 2 U.S. (2 Dall.) at 432.

87 *Id.* at 431-32. See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (stating that federal courts cannot assert original jurisdiction over state criminal law matters); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 403 (3d ed. 1836) (Criminal laws can be enforced only by "the sovereign whose courts sit in judgment upon the offender."). This principle led many state courts to decline to exercise concurrent federal criminal jurisdiction. See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 229 (P.H. Nicklin, 2d ed. 1829) (1825). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816) (declaring that federal criminal jurisdiction cannot be delegated to state courts); but see Amar, *Neo-Federalist*, *supra* note 7, at 212-14 (demonstrating that state courts could hear federal criminal law matters concurrently with federal courts).

Thanks to Professors Amar, Engdahl, and Pfander for providing many of the insights contained in this footnote.

Thus, Iredell did not differentiate "Cases" from "Controversies," as those terms were used by the Framers in Article III, section 2, clause 1. Rather, he merely placed a limiting construction on the word "controversy" as used by Congress in the Judiciary Act of 1789 when it interpreted clause 2;⁸⁸ he did not explore possible meanings embedded in the term "Cases."⁸⁹ Presumably, Iredell's "federalism" rationale would have applied with equal force to the Framers' use of "Cases," which likewise was not intended to encroach upon state jurisdiction over criminal matters.⁹⁰

Similarly misplaced is the scholarly reliance on St. George Tucker,⁹¹ an Antifederalist who used the civil/criminal distinction to bolster his extreme states-rights position that contradicted the views of the Framers.⁹²

88 Admittedly, Iredell's construction of the statutory term "controversies" illuminates his understanding of the identical word in Article III.

89 Professor Fletcher has noted that Iredell construed only the term "controversies." Fletcher, *Case or Controversy*, *supra* note 69, at 266 n.13 and accompanying text. Other scholars and courts have not been as careful. For example, William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMMENTARY 89, 90 n.4 (1990), cites *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937), which in turn relied upon Justice Iredell for the proposition that "[t]he term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *Haworth* cites three opinions: *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (C.C. Cal. 1887); *Muskra v. United States*, 219 U.S. 346, 356-57 (1911); and *Old Colony Trust v. Comm'r*, 279 U.S. 716, 723-24 (1929). Tracing backwards through this string-cite, the apparently wide judicial notice of this distinction is seen to be illusory. For example, *Old Colony*, 279 U.S. at 723-24, refers to *Muskra v. Pacific Railway*, and *Chisholm*. *Muskra*, 219 U.S. at 356-57, cites the latter two decisions. *Pacific Railway*, 32 F. at 255, is supported by *Chisholm* alone. Thus, present understanding of the "civil v. criminal" distinction hinges largely on a circuit court's interpretation of *Chisholm*.

90 Except in the limited instances where conduct was deemed criminal by either the Constitution (*e.g.*, treason, *see* U.S. CONST. art. III, § 3, cl. 1) or by an act of Congress. *See* PETER S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 2-9 (Arno Press, 1972) (1824) (arguing that federal question jurisdiction must extend to enforcement of criminal statutes).

91 *See* Meltzer, *supra* note 69, at 1575 n.18 (citing Fletcher, *Exchange*, *supra* note 69, at 133). Both Meltzer and Fletcher cite 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. E at 420-21 (H. Tucker ed., 1803). Like Iredell, Tucker asserted that "Controversies" related only to civil disputes, but provided no supporting authority—and, significantly, cited nothing in the COMMENTARIES he was purporting to analyze. As Professor Meltzer concedes, Story mentioned Tucker's civil/criminal distinction but did not endorse it. Meltzer, *supra* note 69, at 1575 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1634, 1667-68 (Boston, Hilliard, Gray & Co. 1833)). Indeed, Story apparently rejected it. *See id.* § 1668, at 537 (U.S.-party controversies allowed the national government to sue in federal court to "compel[] the performance, either civilly or criminally, of public duties on the part of the citizens.").

92 *See* Amar, *Reports*, *supra* note 70, at 1666 n.67; *see also* Fletcher, *Case or Controversy*,

Concededly, however, Professors Fletcher, Meltzer, and Pfander have shown that some contemporary figures believed that one purpose of Article III's language was to differentiate civil and criminal "Cases" from civil "Controversies." But this civil/criminal distinction complements, rather than contradicts, my thesis that "Controversies" involve dispute resolution and "Cases" entail legal exposition. The dispute resolution model assumes a civil rather than criminal suit,⁹³ so that limitation of "Controversies" to civil matters would have assured that federal courts would act like private umpires. Moreover, criminal law is quintessentially public law that requires definitive interpretation by courts in "cases."

In sum, the civil/criminal differentiation between Article III "Cases" and "Controversies" apparently arose in the 1790s as a pragmatic construction designed to avoid federal court interference in state criminal law. The existence of this distinction does not foreclose the possibility that others existed—especially those based on common eighteenth century legal usage rather than on practical problems of federalism.

2. The Structural Distinction Affecting Congressional Power to Control Federal Jurisdiction

Akhil Amar has argued that Article III contains two "tiers" of jurisdiction, primarily because the word "all" is repeated before each of the first three jurisdictional grants (the "mandatory" tier of cases to which the federal judicial power "*shall* extend"), but is omitted before the last six party-defined categories (the "permissive" tier which Congress may restrict at its discretion).⁹⁴ In considering the case/controversy terminology, Amar concludes that "the different wording simply represents yet another way—in addition to the selective usage of 'all' and the distinction between party-defined and subject matter-defined jurisdiction—in which the

supra note 69, at 266 (Tucker "argued vigorously against the exercise of national power through the federal courts.").

93 See *supra* note 62.

94 Amar, *Neo-Federalist*, *supra* note 7, at 244 n.128; see also Amar, *Two-Tiered*, *supra* note 77, at 1504-14. Amar revives and refines arguments that appear in several Marshall and Taney Court opinions that he cites, particularly Justice Story's in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Further support for Amar's thesis is found in more recent cases that he omits, such as *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 428-29 (1866) and *Stevenson v. Fain*, 195 U.S. 165, 167 (1904).

first three jurisdictional categories were set off as structurally different from the last six."⁹⁵

However, Amar presents no evidence that "case" and "controversy," in eighteenth century legal parlance, had meanings related to mandatory or permissive jurisdiction. That explains why he discounts the importance of the case/controversy language (terms he deems "legally synonymous"),⁹⁶ and instead premises his textual argument on the word "all." Indeed, Amar admits that any case/controversy distinction is "irrelevant" to his argument, which focuses on Congress' power to control federal jurisdiction,⁹⁷ not on the court's role once it has obtained jurisdiction. Nonetheless, Professor Amar has usefully highlighted Article III's major structural division between "all Cases" and "Controversies."

Overall, the Fletcher/Meltzer/Pfander and Amar theses are helpful in challenging the orthodoxy that "case" and "controversy" are synonymous and in suggesting that these words may have been used to express several distinctions.⁹⁸ However, these commentators have overlooked a critical historical difference between the terms related to the discrete judicial functions of exposition and dispute resolution.⁹⁹

II. THE HISTORICAL MEANING OF "CASE" AND "CONTROVERSY"

Determining the purpose and meaning of Article III's shift from "Cases" to "Controversies" is difficult because it was never directly explained.¹⁰⁰ Nevertheless, the Framers' intent can be illu-

⁹⁵ Amar, *Neo-Federalist*, *supra* note 7, at 244 n.128.

⁹⁶ *Id.*

⁹⁷ See, e.g., Amar, *Reports*, *supra* note 70, at 1657; see also *id.* at 1663-64.

⁹⁸ Certain other differences perceived by contemporary observers seem mistaken. For example, Federalist Congressman Abraham Nott claimed that Article III gave federal courts exclusive jurisdiction over "all Cases," but concurrent jurisdiction with state courts over "Controversies." See 10 ANNALS OF CONG. 894 (1801). Although the historical evidence overwhelmingly demonstrates that Nott's view was incorrect, the fact that he noted a distinction between "all Cases" and "Controversies" is itself significant.

⁹⁹ A few scholars have speculated that the Framers may have intended the term "Cases" to trigger federal jurisdiction because federal law was likely to be construed, whereas the status of adverse parties would create the federal interest in "Controversies." See, e.g., Spann, *supra* note 66, at 607-08 n.83; RITZ, *supra* note 77, at 90 (stating same "hypothesis"); *id.* at 89 ("Whether in the eighteenth century a distinction was drawn between a case and a controversy so as to explain the choice of language in Article III, section 2 is not known. Not enough research has been done on the subject."). This Article fills that void.

¹⁰⁰ This silence could suggest that the Framers shared, and therefore left unarticulated, an understanding about the meaning of "case" and "controversy." Cf. Bandes, *supra*

minated by applying venerable principles of constitutional interpretation to Article III.

First, following Madison's dictum that such interpretation requires an understanding of the "the evils and defects" that the Constitution sought to remedy,¹⁰¹ I will analyze Article III in light of the weak pre-constitutional judiciaries.

Second, because the Framers placed paramount interpretive importance on the Constitution's text, Article III's language will be examined from an eighteenth century perspective. As the Framers were educated in the British legal tradition,¹⁰² their understanding of legal words and concepts of adjudication can be discerned by consulting contemporaneous English¹⁰³ legal dictionaries and abridgements,¹⁰⁴ treatises,¹⁰⁵ and judicial opinions.¹⁰⁶

note 66, at 232.

101 Letter from James Madison to M. L. Hurlbert (May 1830), in 9 THE WRITINGS OF JAMES MADISON 372 (G. Hunt ed., 1910) [hereinafter MADISON'S WRITINGS]; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416-17 (1821) (opining that Article III should be expounded in light of its purpose of strengthening national judiciary).

102 See 11 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 132 (Little, Brown & Co. 1938); 12 *id.* at 712; THEODORE F. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 287 (5th ed. 1956).

103 See Berger, *supra* note 59, at 816 (The Constitution used "familiar English terms, . . . [and] it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation, and so the Supreme Court has often held."). See also RAWLE, *supra* note 87, at 267, 360 ("[T]he common law of England was kept in view . . . by the Framers" and therefore supplies the meaning of common law terms in the Constitution.); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391-92, 396-97 (1798) (examining English common law to determine meaning of Constitution's reference to *ex post facto* laws).

104 The most popular law dictionaries were THOMAS CUNNINGHAM, NEW AND COMPLETE LAW DICTIONARY (1764), GILES JABOB, NEW LAW DICTIONARY (1729), and WILLIAM MARRIOTT, A NEW LAW DICTIONARY (1797). Earlier dictionaries still in widespread use included THOMAS BLOUNT, A LAW-DICTIONARY AND GLOSSARY (3d ed. 1717), JOHN COWELL, THE INTERPRETER (1708), WILLIAM RASTELL, TERMES DE LA LEY (1721), and HENRY SPELMAN, GLOSSARIUM ARCHAIOLÓGICUM (1626). See 12 HOLDSWORTH, *supra* note 102, at 175-78; 5 *id.* at 21-22, 401-02 (discussing law dictionaries).

Abridgements were hybrids of dictionaries and treatises. The most popular was MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW (3d ed. 1768), which succeeded CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY (1741). See also JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND (3d ed. 1785). See 12 HOLDSWORTH, *supra* note 102, at 162-75 (discussing abridgements and digests); see also Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 455 (1954) ("[A] lot of American law came out of Bacon's and Viner's Abridgements.").

Of particular value to the present study is DANIEL WILLIMAN, LEGAL TERMINOLOGY: AN HISTORICAL GUIDE TO THE TECHNICAL LANGUAGE OF LAW (1986). THE OXFORD ENGLISH DICTIONARY (1933, reprint 1961) [hereinafter OED] is similarly helpful because it traces etymology and includes historical references. Moreover, the common usage of "case" and "controversy" is relevant if the Framers of the Constitution are deemed to include "We the People" who ratified it.

105 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (1757) were the first sys-

Of course, the Framers broke with English legal principles in significant ways. Thus, a third set of interpretive documents to be explored are American materials discussing Article III. Madison emphasized two such sources: (1) "the comments prevailing at the time [the Constitution] was adopted,"¹⁰⁷ including the records of the Constitutional Convention¹⁰⁸ and the Ratification Debates;¹⁰⁹

tematic treatment of English law in five centuries, 12 HOLDSWORTH, *supra* note 102, at 3, and the first comprehensive historical analysis. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 35 (1941). The COMMENTARIES "became the bible of American lawyers," had a great influence on the Framers, and remained the most important legal source in America for a century. *Id.* at 1-2. They were cited extensively by Federalists. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 165, 168, 169 (1803).

Other major English sources included EDWARD COKE, *FOURTH INSTITUTE OF THE LAWS OF ENGLAND* (1641) (discussing court history and jurisdiction), MATTHEW HALE, *THE HISTORY OF THE COMMON LAW* (4th ed. 1779) (1713), and THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* (Garland Pub., 1979) (3d ed. 1724).

106 Lord Mansfield, Chief Justice of King's Bench from 1756-1788, was "the greatest legal genius of the eighteenth century." 11 HOLDSWORTH, *supra* note 102, at 20; see also DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 99, 121 (1989). Marshall repeatedly praised Mansfield. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 89 (1809); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168 (1803). Wilson called Mansfield "[t]he great luminary." 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 103 (1911). The leading 18th century Chancery judge was Lord Hardwicke, who developed modern equity principles during his tenure from 1736-1756. See 12 HOLDSWORTH, *supra* note 102, at 253-85; LIEBERMAN, *supra*, at 81-82.

An example of the Supreme Court's reliance on British sources is found in Joseph Story's two seminal admiralty law opinions, which extensively cite English law dictionaries and abridgements (by Cowell, Spelman, Bacon, Viner, and Comyns), commentators (Bracton, Coke, Hale, and Blackstone), and judges (Mansfield and Hardwicke). See *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 364-69 (1815); *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

107 9 MADISON'S WRITINGS, *supra* note 101, at 372; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821) ("Great weight has always been attached . . . to contemporaneous exposition" of the Constitution.).

108 See FARRAND, *supra* note 106. The Convention decided to keep its proceedings secret to encourage frank discussion; the Convention Journal and Papers were not published until 1819. See 1 *id.* at xi-xii; see also *id.* at xv (Madison's notes at Convention published in 1840). This secrecy made Madison ambivalent about the use of Convention materials. In congressional debates over the national bank, Madison invoked the Convention's understanding and asserted that "the meaning of the parties to the instrument . . . is a proper guide." 2 ANNALS OF CONG. 1944, 1946 (1791). Later, however, he deemed Convention records not "authoritative" in explicating the Constitution. See Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 FARRAND, *supra* note 106, at 447 [hereinafter *Ritchie Letter*]. Nonetheless, soon after the records were published, the Court began to rely on them to aid constitutional interpretation. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838).

From a historian's perspective, the records are invaluable because they reveal how the judiciary article evolved and because their very secrecy resulted in reasoned discussion—unlike the Ratification debates, which often featured partisan political speeches that were unfaithful to Article III's language and purpose.

109 See generally JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*

and (2) the "early, deliberate & continued practice under the Constitution."¹¹⁰ Also pertinent are early American legal treatises,¹¹¹ especially the lengthy work by James Wilson,¹¹² who ranks with Madison as the foremost Framers.¹¹³

A. *The Defective Pre-Constitutional Judiciaries*

Article III rectified a glaring defect of America's prior governments—weak judiciaries.¹¹⁴ Limited national jurisdiction had gradually evolved over admiralty cases and interstate controversies.¹¹⁵ England's Privy Council settled disputes between colonies,¹¹⁶ and its Courts of Vice-Admiralty exercised power over maritime cases.¹¹⁷ Similarly, the Continental Congress (1775-1781) had power to resolve interstate quarrels¹¹⁸ and established

ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1901).

110 9 MADISON'S WRITINGS, *supra* note 101, at 372. The earliest Justices were also key Framers—Wilson, Randolph, Rutledge, Ellsworth, Paterson, Blair, and Jay. *See generally* JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971). By contrast, John Marshall played no role in drafting the Constitution. Thus, his federal jurisdiction opinions relied primarily on textual arguments.

111 *See, e.g.*, STORY, *supra* note 91; RAWLE, *supra* note 87; KENT, *supra* note 87.

112 Wilson, the nation's first law professor, prepared a series of lectures in 1791, later published as WILSON'S WORKS, *supra* note 75. Wilson was considered "the most learned and profound legal scholar of his generation." *Id.* at 2 (editor's comment); *id.* at 6 (citing authorities to similar effect).

113 *See, e.g.*, MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197 (1913); GEOFFREY SEED, JAMES WILSON 179 (1978); WILSON'S WORKS, *supra* note 75, at 2, 6, 24 (editor's comments). Wilson and Madison formed a strong alliance in Congress in 1783 which continued at the Convention. *See* CHARLES P. SMITH, JAMES WILSON, FOUNDING FATHER, 1742-1798 at 177, 219 (1956).

114 *See* THE FEDERALIST No. 22, at 143-44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (The Constitution was needed to cure the previous "want of a judiciary power.").

115 *See* Thomas Sergeant, *A Brief Sketch of the National Judiciary Powers Exercised in the United States, From the First Settlement of the Colonies to the Time of the Adoption of the Present Federal Constitution*, in DUPONCEAU, *supra* note 90, at 133-67.

116 *See, e.g.*, 3 STORY, *supra* note 91, § 1675, at 544-45 ("[C]ontroversies between the colonies, concerning the extent of their rights of soil, territory, jurisdiction, and boundary . . . were heard and determined before the king in council"—for example, a 1679 dispute between Massachusetts and New Hampshire and a 1764 dispute between New Hampshire and New York.); 11 HOLDSWORTH, *supra* note 102, at 98 (The Council "by arbitration" settled disputes between Virginia and South Carolina, Rhode Island and Connecticut, Maryland and Pennsylvania, and New York and New Jersey.). The Privy Council could also nullify colonial legislation and review American judicial decisions. *See id.* at 69-71, 94-95; 1 BLACKSTONE, *supra* note 105, at *231. *See generally* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).

117 *See* 11 HOLDSWORTH, *supra* note 102, at 60-61; *DeLovio v. Boit*, 7 F. Cas. 418, 442 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.).

118 Congress, not courts, arbitrated disputes between Virginia and Pennsylvania, New

a "Court of Appeals in Cases of Capture" in 1780 to hear appeals from state admiralty courts.¹¹⁹ Finally, the Articles of Confederation gave Congress exclusive authority to appoint tribunals with limited jurisdiction over certain admiralty cases¹²⁰ and interstate disputes.¹²¹ Confederation tribunals failed because they were dependent, advisory organs. To enforce national laws, the government relied on state courts,¹²² which were usually under legislative control.¹²³

York, New Hampshire and Massachusetts, and Virginia and New Jersey. *See* Sergeant, *supra* note 115, at 147-49.

119 *See* 17 JOURNALS OF THE CONTINENTAL CONGRESS 457-59 (Library of Cong., 1910) [hereinafter JOURNALS]. *See also* HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT* 116-19 (1977); Sergeant, *supra* note 115, at 146-47. Originally, Congress recommended that states empower tribunals to adjudicate cases involving captured English vessels, with a congressional committee appointed in January 1777 to consider appeals. *See* 3 JOURNALS, *supra*, at 371-75; BOURGUIGNON, *supra*, at 44-78; Holt, *supra* note 7, at 1427 (mentioning that 10 of 13 states established admiralty courts). However, this committee lacked enforcement power, and states defied it. *See, e.g.*, BOURGUIGNON, *supra*, at 317-18; 3 STORY, *supra* note 91, at § 1662.

120 Article IX, § 1 authorized Congress to set up tribunals "for the trial of piracies and felonies committed on the high seas" and "for receiving and determining finally appeals in all cases of captures." Congress did so and continued the "Captures" appeals court. However, the jurisdiction of this court was narrowed by questionable state court construction of Article IX, and it was powerless to prevent such usurpation. *See* Sergeant, *supra* note 115, at 151-53.

121 Under Article of Confederation IX, § 2, Congress acted as "the last resort on appeal in all disputes and differences . . . between two or more States," with the power to appoint temporary "commissioners or judges to constitute a court for hearing and determining the matter in question" These judge/commissioners were selected through an unwieldy process: States chose seven judges by mutual consent; failing agreement, Congress would designate three prospective candidates from each state, with the contending states alternately striking names. *Id.* These commissioners had no power to enforce their decisions, but simply reported to Congress. *Id.*; *see also* 3 STORY, *supra* note 91, § 1674, at 544 (Commissioners determined several "irritating and vexatious controversies" between states, but conflict persisted.).

122 *See* THE FEDERALIST No. 21, at 129, 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting "striking absurdity" of "a government destitute even of the shadow of constitutional power to enforce the execution of its own laws"). Reliance on state courts extended even to such delicate issues as violations of international law. *See, e.g.*, HAMPTON L. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 83-86 (1902); Sergeant, *supra* note 115, at 155-58; 1 FARRAND, *supra* note 106, at 18-19, 24-26 (Randolph's comments).

123 The oppression of colonial governors and judges convinced states to vest most power in the legislature. *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* at 154-61 (1969). *See generally* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES (Ben Poore 2d ed., 1878). This structural defect is illustrated in the Pennsylvania and Vermont constitutions, which confer "supreme legislative power" and "supreme executive power" (*see* PA. CONST. of 1776, §§ 2-3; VT. CONST. of 1777, ch. II, §§ II-III), but merely create "Courts of Justice" with no supremacy. *See* PA. CONST., § 4; VT. CONST., ch. II, § IV.

This experience resulted in a suspicion of legislatures and a commitment to bolster the executive and the judiciary.¹²⁴ Thus, in contrast to the Articles of Confederation, the Constitution vested "the judicial Power" in federal courts as a co-equal branch of government,¹²⁵ with final authority to declare the law (including the Constitution)¹²⁶ in "Cases" of national importance and to resolve certain "Controversies."

B. The Meaning of "Case" and "Controversy"

1. The Text of Article III

The text of Article III is the most reliable indicator of its drafters' intent. The decision to keep the Convention proceedings

State judges were dependent on the political branches for appointment, tenure, and salary. See WOOD, *supra*, at 160-61, 407-08, 451-54. Madison emphasized that "the State Tribunals . . . are more or less dependt. [sic] on the Legislatures. In Georgia they are appointed annually by the Legislature. In R. Island the Judges who refused to execute an unconstitutional law were displaced . . ." 2 FARRAND, *supra* note 106, at 27-28. Similarly servile were courts in Pennsylvania and New Jersey. See PA. CONST., § 23 (Assembly may remove judges at any time.); *id.* § 26 (empowering legislature to set judges' salaries); N.J. CONST. of 1776, XII (specifying 5-7 year tenure with reappointment at legislative discretion). Often, appeals courts were composed of members of the political branches. See, e.g., *id.*, IX; DEL. CONST. of 1776, art. 17; N.Y. CONST. of 1777, art. XXXII.

124 See, e.g., 1 FARRAND, *supra* note 106, at 108 (Madison) (America's prior government experience shows the need to check the legislature with a strong judiciary and executive.); 2 *id.* at 74 (Madison) (same); *id.* at 76 (Morris) (same); THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (characterizing federal courts as "bulwarks of a limited constitution against legislative encroachment").

As sovereignty became identified with "the people," courts were seen as guardians of the public against legislative excesses. See WOOD, *supra* note 123, at 344-89, 430-63, 547-53. In England, Parliament was the "sovereign and uncontrollable authority." See 1 BLACKSTONE, *supra* note 105, at *160; *id.* at *44-52, *147-55, *160-62, *185-86. The Founders shifted the locus of sovereignty from the legislature to the people. A leading theorist was Wilson, who strove to create a system of government based on the "vital principle" of the sovereignty of the people, whose consent was the basis of all legal obligation. See WILSON'S WORKS, *supra* note 75, at 73, 77-82, 103, 120-21. He argued that the people could distribute their sovereignty among their representatives in all branches of government—including courts. *Id.* at 73 ("[E]very citizen . . . takes a personal share in the executive and judicial parts of the nation."); see also 2 ELLIOT, *supra* note 109, at 423-24 (Wilson) (noting absence of this principle of representation in Britain).

125 See U.S. CONST. art. III, § 1, cl. 1.

126 See *infra* notes 224-25 (discussing Convention acceptance of judicial review). Judicial review flowed from the idea that courts represented the people. It did not make judicial power superior to legislative, but "confer[red] upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superiour power of the Constitution—the supreme law of the land." See WILSON'S WORKS, *supra* note 75, at 330. Wilson was an ardent and consistent defender of judicial review. See, e.g., *id.* at 186, 300, 328-31, 455-56, 770; *infra* note 224 (Wilson's comments at Convention); 2 ELLIOT, *supra* note 109, at 445-46, 489 (Wilson's remarks during Ratification).

secret¹²⁷ meant that ratification depended primarily on the Constitution's ability to speak for itself.¹²⁸ Not surprisingly, leading Federalists placed principal interpretive stress on the Constitution's language.¹²⁹

On its face, Article III, section 2 extends "the Judicial power"¹³⁰ to "all Cases" (a phrase repeated three times) and, in an

127 See *supra* note 108.

128 See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903, 948 (1985) (The Framers expected "that the Constitution, like any other legal document, would be interpreted in accord with its express language" and with other accepted principles of construction, not according to the Framers' own intent.). See also Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 15-33 (1987) (summarizing scholarship on textualism).

Even with the benefit of Convention records, constitutional language remains critical because the records "cast very little light on the special purposes of particular clauses." See FARRAND, *supra* note 113, at 13; see also *id.* at 152 (The records reveal "surprisingly little" about the judiciary.).

129 See, e.g., Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), reprinted in 3 FARRAND, *supra* note 106, at 419-20 ("Interpreting [the Constitution's] provisions . . . must be done by comparing the plain import of the words, with [its] general tenor and object . . ."); 2 *id.* at 137 (Randolph) (The goal in drafting the Constitution was "[t]o use simple and precise language."); Letter from James Madison to Martin Van Buren (July 5, 1830), reprinted in 9 MADISON'S WRITINGS, *supra* note 101, at 89 ("[T]he document must speak for itself."); *Ritchie Letter*, *supra* note 108, at 447 (Madison) ("[T]he legitimate meaning of the [Constitution] must be derived from the text itself."). Of course, Madison recognized that language was imperfect and that constitutional meaning would ultimately be worked out through practice. See, e.g., *id.*; THE FEDERALIST No. 37, at 236-37 (James Madison) (Jacob E. Cooke ed., 1961).

For further statements of the importance of text in constitutional interpretation, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) (The Framers "must be understood . . . to have intended what they said."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 423 (1821) (Questions about Article III "must depend on the words themselves."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (The Constitution must be given a "reasonable construction, according to the import of its terms The words are to be taken in their natural and obvious sense."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."); RAWLE, *supra* note 87, at 254 (to similar effect).

Justice Frankfurter shared "the assumption that, in dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominantly lawyers, used precise, differentiating and not redundant language." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 364 (1959). Unfortunately, he did not apply this insight to his analysis of "Cases" and "Controversies." See *supra* notes 26-32 and accompanying text.

130 Wilson defined "judicial power" as authority "to administer justice according to the law of the land." See WILSON'S WORKS, *supra* note 75, at 329; see also DUPONCEAU, *supra* note 90, at 21 (same). Judicial power includes not simply declaring legal rights, but also compelling obedience to the court's judgment. See, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 818-19 (1824) ("All governments . . . must possess, within themselves, the means of expounding, as well as enforcing, their own laws [through courts].").

abrupt shift, to six "Controversies." The basic rule of constitutional interpretation that such variations in language are presumptively intentional¹³¹ must be our starting point, not the orthodox view that the use of "Cases" and "Controversies" was accidental and that these terms are interchangeable.¹³²

One clue as to the meaning of this shift is that "Cases" introduced jurisdictional categories defined by legal subject (e.g., federal question and admiralty law), suggesting that the judicial power to be exercised in such cases primarily involved rendering opinions about that law. By contrast, matters labeled "Controversies" were defined solely by party status (e.g., state v. state), indicating that the courts' main focus would be on resolving the designated dispute. This textual reading is supported by in-depth linguistic and historical analysis.

2. The Historical Understanding of "Case" and "Controversy"

(a) *Case*.—As used in Article III,¹³³ "case" most likely referred to a formal cause of action demanding a remedy for the claimed violation of a legal right, wherein a court determined

131 *Martin*, 14 U.S. (1 Wheat.) at 334 ("From this difference of phraseology [the shift from "all Cases" to "Controversies"], 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.").

132 See *supra* Part I.A. If a "case" were a "controversy," the Framers presumably would have streamlined Article III, section 2 by beginning with the term "Cases," then listing all nine heads of jurisdiction.

133 "Case" had several possible legal meanings unrelated to its usage in Article III. First, "case" derives from the Latin *casus* (chance, occurrence), see 2 OED, *supra* note 104, at 144-46, and originally referred to hypothetical legal problems: Medieval law was taught in the context of "cases"—i.e., events that might come before a court. See, e.g., WILLIMAN, *supra* note 104, at 51. Another meaning of "case" was legal arguments. See, e.g., JOHN BARBOUR, 1 THE BRUCE 52 (Matthew P. McDiarmid & James A. C. Stevenson eds., The Scottish Text Society, Edinburgh 1985) (1375) (describing "case" as grounds of a claim before a court); 2 OED, *supra* note 104, at 145 (same); JOHN BURKE, JOWITT'S DICTIONARY OF ENGLISH LAW 291 (2d ed. 1977) (defining "case" as party's summary of facts, evidence, and argument). Finally, "case" was shorthand for "action on the case"—new writs created to permit a plaintiff to sue to remedy injuries not recognized by any of the established forms of action such as trespass. See, e.g., 1 COMYNS, *supra* note 104, at 128-29; COWELL, *supra* note 104, at AC-AD; 1 CUNNINGHAM, *supra* note 104.

legal questions.¹³⁴ A "case" featured three distinct but interrelated components.

First, a "case" arose only if a plaintiff's claim fit within a recognized form of action and the parties complied with procedural rules: "When the subject is submitted . . . by a party who asserts his rights in the form prescribed by law[,] [i]t then becomes a case."¹³⁵ Because procedural rules underwent frequent adaptation, the term "case" was correspondingly flexible, as recognized in both England¹³⁶ and America.¹³⁷

134 See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 819 (describing "case" as a legal question presented in proper procedural form).

A "cause of action" accrued the moment a legal injury occurred, and gave a plaintiff the legal right to sue a defendant within a certain time. See, e.g., 1 COMYNS, *supra* note 104, at 102 ("An Action is a lawful demand of a Man's right."); *id.* at 105 (stating that action lies after cause of action accrues); JACOB, *supra* note 73, at 42; see also GILES JACOB, *THE STUDENT'S COMPANION* 1 (Garland Pub., 1978) (1725) ("An Action is defined to be the Form of a Suit given by Law for Recovery of that which is a Man's due."); CUNNINGHAM, *supra* note 104 (defining "action" as "a legal demand of one's right" which "implies a recovery of, or restitution to something"); COWELL, *supra* note 104, at AC-AD (same); RASTELL, *supra* note 104, at 16 (same); BURKE, *supra* note 133, at 297; 3 BLACKSTONE, *supra* note 105, at *23 ("[W]here there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (citing Blackstone for proposition that suits include "all cases where the party suing claims to obtain something to which he has a right"). See generally 1 VINER, *supra* note 104, at 197-599; 2 *id.* at 1-77 (analyzing cases involving many types of actions).

"Cause of action" was often shortened to "cause" or "action." See, e.g., WOOD, *supra* note 105, at 585. "Action" is a more modern term for "cause." Robert W. Millar, *The Lineage of Some Procedural Words*, 25 A.B.A. J. 1023, 1024 (1939); see also BURKE, *supra* note 133, at 297; JOHN BOUVIER, *LAW DICTIONARY* (8th ed. 1914) (1839) (equating "case" with "cause" and "suit or action").

An action had "two parts, the suit and the judgment." EDMUND WINGATE, *THE BODY OF THE COMMON LAW OF ENGLAND* 38 (Garland Pub., 1979) (1655). After the judgment, the matter was always known as a "case." See 1 CUNNINGHAM, *supra* note 104; 2 OED, *supra* note 104, at 145 (defining "case" as "a cause which has been decided").

135 *Osborn*, 22 U.S. (9 Wheat.) at 819; see also *id.* (explaining that "suit" becomes "case" when submitted according to proper forms and court takes jurisdiction).

136 "From the first the [English] courts of law and equity had been free to fashion their own rules of procedure, and to add to or vary them to meet the needs of litigants and the development of legal principles." 10 HOLDSWORTH, *supra* note 102, at 221. By the mid-18th century, procedure had become needlessly technical, *id.*, prompting reform by Mansfield. 12 *id.* at 493-95, 498-500.

137 See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 7-9, 25 (1825) (stressing that equity and admiralty rules of procedure remained largely within a federal judge's discretion, although "modes of process" in execution of legal actions had to conform to pre-1789 state practice where possible); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) ("[N]or are [federal circuit court] proceedings subject to the scrutiny of those narrow rules, which the caution or jealousy of the courts at Westminster long applied to courts of that denomination . . ."); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 414 (1792) ("The Court considers the practice of the courts of King's Bench and Chancery in Eng-

Second, the substance of a "case" was a legal "question" that had to be answered by a court¹³⁸ through exposition—the process of determining, construing, and applying legal rules.¹³⁹ Echoing English jurists,¹⁴⁰ John Marshall declared:

land, as affording the outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."). See also *Nashville, Chatt., & St. L. Ry. v. Wallace*, 288 U.S. 249, 264 (1933) ("[T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy"). Such precedent contradicts Justice Frankfurter's assertion that the Framers used "cases and controversies" to freeze the "rigid" 18th century English practice rules into American jurisprudence. See *supra* Part I.A.1.(a).

Some scholars have recognized the historical understanding of "case" as tied to dynamic procedural rules, albeit outside the justiciability context. See, e.g., Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1478-90 (1983).

138 See, e.g., *BOUVIER*, *supra* note 134, at 425 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (defining "case" as "[a] question contested before a court of justice")); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821) ("[A] case in law and equity, [is one] in which a right, under [the] law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169 (1803) ("[A] case . . . [is] the assertion, by an individual, of his legal claims in a court of justice").

Wilson contrasted the determination of a pure "question of law . . . belong[ing] exclusively to the judges" with a situation raising "no question concerning the law" where "the controversy between the parties depends entirely upon a matter of fact"—a jury matter. See *WILSON'S WORKS*, *supra* note 75, at 540.

139 See, e.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) ("[W]e must so expound the terms of the law, as to meet the case"); *Martin*, 14 U.S. (1 Wheat.) at 340 (Courts "pronounce the law applicable to the case in judgment"); *Cohens*, 19 U.S. (6 Wheat.) at 388 (The Framers "confer[red] on the judicial department the power of construing the constitution and laws of the Union in every case."); *THE FEDERALIST* No. 22, at 143-44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Laws are a dead letter without courts to expound their true meaning and operation."); *RAWLE*, *supra* note 87, at 199 (The courts' role is to "expound and apply" the law.).

Judicial exposition in "Cases" presupposes that a court has "jurisdiction," a word that literally means "speaking the law." See *THE FEDERALIST* No. 81, at 551 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Each government branch has final jurisdiction (i.e., authority to declare and enforce the law) in certain situations. Judicial jurisdiction may be exercised in the context of a "case."

140 Matthew Hale, the 17th century Chief Justice of King's Bench, stressed that judges in cases "have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is" *HALE*, *supra* note 105, at 68; see also *id.* at 24-25, 30, 37 (emphasizing judge's function as expositor of statutes and common law); see also 5 *HOLDSWORTH*, *supra* note 102, at 502-04 (reprinting Hale's statement that "[t]he Expounder must looke [sic] further than the present Instance, and whether such an Exposition may not introduce a greater inconvenience than it remedies [sic]"); 3 *BLACKSTONE*, *supra* note 105, at *2 (A court's role is "expounding and enforcing those laws, by which rights are defined, and wrongs prohibited."). See also *FRANCIS BACON, EXAMPLES OF A TREATISE OF UNIVERSAL JUSTICE* 103 (Garland Pub., 1978) (1727) (describing "methods of

[I]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.¹⁴¹

Likewise, at the Convention Madison explained that "cases" that were "of a Judiciary Nature" gave a judge "[t]he right of expounding" the law.¹⁴²

Finally, exposition was closely connected with the idea of "case" as precedent.¹⁴³ The concept of *stare decisis*—decided cases as legal authority binding on lower courts¹⁴⁴—had become sub-

expounding law" as including, most importantly, "[j]udgments delivered in the Supreme and Principal Courts on important cases, especially if they be doubtful and contain some difficulty or novelty").

141 *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added). Even Antifederalists held a similar view. See *Essays of Brutus* No. XIII, 2.9.159, in *ANTI-FEDERALIST*, *supra* note 72 ("The proper province of the judicial power, in any government, is . . . to declare what is the law of the land.").

142 2 FARRAND, *supra* note 106, at 430.

143 See, e.g., HALE, *supra* note 105, at 68 (Judicial exposition is especially authoritative when "consonant[t] . . . with . . . decisions of former times."); EDWARD COKE, *SECOND INSTITUTE OF THE LAWS OF ENGLAND* pref. (1641) ("Our Expositions . . . are the resolutions of Judges in Courts of Justice in judicial courses of proceeding" collected in case reports.).

144 Since the 13th century, courts had relied on prior cases to guide decisions in similar cases. See 2 HOLDSWORTH, *supra* note 102, at 242-44; 4 *id.* at 287. Fourteenth century Year Books show "that a considered decision was regarded as laying down a general rule for the future." 2 *id.* at 541.

In the 16th century, the advent of precise written pleadings based on forms of action led reporters to record only the court's decision on the exact point of law at issue, not (as previously) the parties' pleadings and arguments in framing that issue. This resulted in the logical development of the law from case to case. See 5 *id.* at 371-73; 9 *id.* at 330-35; 12 *id.* at 146-49. See also RICHARD HULOET, *ABECEDARIUM ANGLICO-LATIUM* s.v. (Scolar Press, 1970) (1552) (referring to "ruled cases and matters of the lawe [sic]"). Edmund Plowden, "the most learned lawyer" of the 16th century, 5 HOLDSWORTH, *supra* note 102, at 372, prefaced his reports with the statement that "[a]ll the cases here reported . . . are upon points of law . . . [which] the judges . . . studied and considered . . . , and after great and mature Deliberation gave Judgment" *Id.* Similarly, Coke described his reports as recording "cases" judicially argued, debated, resolved, or adjudged in any of the king's courts of justice" *Id.*; see also EDWARD COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* 245(a) (1628) ("[O]ur Booke [sic] cases are the best proofes [sic] what the Law is . . . Book-cases are principally to be cited for deciding of cases in question . . .").

By the 17th century, resort to precedent was common. See 5 HOLDSWORTH, *supra* note 102, at 275-76 (citing cases from 1604, 1626, 1649, and 1650). See also JOHN COWELL, *THE INSTITUTES OF THE LAWS [SIC] OF ENGLAND* 5 (Garland Pub., 1978) (1651) ("[C]ases arise which are neither provided for, by customes [sic] or Statutes sufficiently. And there the Judges do decide by like reasons, proceeding according to former Precedents."); BACON, *supra* note 140, at 90 ("[T]he rule of law is to be drawn from cases similar to them . . ."). By the end of the 17th century, "the authority of decided cases"

stantially established by the late 1700s.¹⁴⁵

(i) *The Judicial Function in "Cases."*¹⁴⁶—In England, extensive exposition in "cases" was necessary because Parliament, though sovereign, exercised its lawmaking power ineffectively.¹⁴⁷ Vast legal subject matter was left to the courts of law, equity, and admiralty,¹⁴⁸ whose decisions were rarely overturned. Furthermore, when Parliament did act, it drafted statutes poorly, thereby requiring substantial judicial construction¹⁴⁹ which often subverted the axiom that a judge's role was merely to "expound"—not

had become "almost as well recognized in the court of Chancery as in the courts of common law." See 7 HOLDSWORTH, *supra* note 102, at 387. Hardwicke embraced the idea that "authorities established are so many laws . . ." Ellis v. Smith, 30 Eng. Rep. 205, 208 (Ch. 1754).

145 See 12 HOLDSWORTH, *supra* note 102, at 146; LIEBERMAN, *supra* note 106, at 79-80. Others contend that *stare decisis* did not become established until the first part of the 19th century, at least in America. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (1988) (citing sources).

146 This section provides a bare summary, because a full account of 18th century English judicial history and theory would require several volumes. Interested readers should consult HOLDSWORTH, *supra* note 102, especially volumes 10-12. Perhaps the best recent treatment of this topic is LIEBERMAN, *supra* note 106.

147 See *supra* note 124; *infra* notes 149-52. Only Parliament could "make" law, which consisted of statutes and, to a lesser extent, royal orders. See 10 HOLDSWORTH, *supra* note 102, at 412-14.

148 See 12 *id.* at 3.

149 Shoddy legislation led to complicated rules of construction. See LIEBERMAN, *supra* note 106, at 18-19 (citing 1 BLACKSTONE, *supra* note 105, at *87-92). One venerable rule gave courts equitable power to interpret statutes according to their reason and spirit. See 1 BLACKSTONE, *supra* note 105, at *62 ("[S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed."); see also 3 *id.* at *430-31 (same); LIEBERMAN, *supra* note 106, at 74 (citing statements of this axiom by Bacon, Hale, and others). Blackstone, however, cautioned that "the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge." 1 BLACKSTONE, *supra* note 105, at *62. In America, Blackstone's rule of equitable construction was widely cited. See, e.g., WILSON'S WORKS, *supra* note 75, at 478, 486; *Essays of Brutus*, in ANTI-FEDERALIST, *supra* note 72, XI at 2.9.137-138, XII at 2.9.153-154, XV at 2.9.193. Jeremy Bentham challenged Blackstone and argued that judicial rules of interpretation would be unnecessary if statutes were reformed and clarified. See LIEBERMAN, *supra* note 106, at 244-45 (citing sources).

"make"—the law.¹⁵⁰ Overall, case law was superior in quality to legislation¹⁵¹ and had greater practical significance.¹⁵²

The preeminence of the independent judiciary¹⁵³ led Blackstone to characterize "the judges in the several courts" as "the depositories of the laws; the living oracles."¹⁵⁴ The judge's task was to ascertain the true "principles and axioms of law, which are general propositions, flowing from abstracted reason."¹⁵⁵ De-

150 See 1 BLACKSTONE, *supra* note 105, at *69; 3 *id.* at *327. Courts could not frustrate the sovereign legislature's will through creative statutory construction. See, e.g., DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 116 (3d ed. 1769) ("[L]et the inconveniences of a statute be what they may, no judge . . . can constitutionally dispose with them; their office is *jus dicere* and not *jus dare*."); Foone v. Blount, 98 Eng. Rep. 1188 (1776) (Mansfield, L.J.) (Statutes had to be construed "according to their true intent and meaning," regardless of their soundness.); LIEBERMAN, *supra* note 106, at 54, 98, 123 (discussing this axiom, but noting that Mansfield often disregarded it).

America adopted this rule. See, e.g., WILSON'S WORKS, *supra* note 75, at 502 ("[E]very prudent and cautious judge . . . will remember, that his duty and his business is, not to make the law, but to interpret and apply it."); Fowler v. Lindsey, 3 U.S. (3 Dall.) 411, 414 (1799) ("[I]t is the duty of judges to declare, and not to make the law."); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796) (Ellsworth, C.J.) (same); 2 FARRAND, *supra* note 106, at 75 (Strong) ("[T]he power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors" cannot participate in framing the laws.). See generally Engdahl, *John Marshall*, *supra* note 7, at 294-96 (America endorsed the concept that judges pronounce existing law rather than make new law.).

151 See LIEBERMAN, *supra* note 106, at 71-72, 179; *id.* at 162-66 (summarizing Lord Kames' argument that common law was superior to legislation because it gradually arrived at a general rule by induction from many particular cases). Cf. 12 HOLDSWORTH, *supra* note 102, at 155 (describing historical understanding that "the determination of . . . [a] case . . . [by] the House of Lords . . . affords evidence of common law, or the exposition of an Act of Parliament, in no way inferior, in point of authenticity, to the express positive text of an Act of Parliament itself").

152 See 11 HOLDSWORTH, *supra* note 102, at 519 ("[E]ighteenth-century legislation upon various branches of the law and legal doctrine, though not negligible in bulk, cover[ed] very little ground."); WILSON'S WORKS, *supra* note 75, at 182 (concluding that common law, not statutes, was principal source of law).

153 See 1 BLACKSTONE, *supra* note 105, at *268 (citing George III) ("[T]he independence and uprightness of the judges [were] . . . essential to the impartial administration of justice . . ."). The Act of Settlement (1701) had given judges secure tenure, thereby promoting government stability by grounding authority in laws that applied equally to everyone, creating respect for the law, and ensuring impartiality in defining and regulating government powers. See 10 HOLDSWORTH, *supra* note 102, at 134, 644-50.

154 1 BLACKSTONE, *supra* note 105, at *69.

155 3 *id.* at *379. These principles reflected the divinely-ordained natural law. 1 *id.* at *40-41. The judge's role was to discover the just, ancient Saxon rule, founded on reason, which had become obscured because of the imperfection of human practice and the needless complexity introduced by the Normans. See *id.* at *10, 66-67, 70; 2 *id.* at *11, 44, 52, 58, 334; 3 *id.* at *60, 325f, 328, 431; 4 *id.* at *408-18; see also BOORSTIN, *supra* note 105, at 40-42. These authentic legal principles "should be deposited in the breasts

spite this lofty judicial role, law was not simply "the private opinions of the judges."¹⁵⁶ Rather, courts were constrained by precedent¹⁵⁷ to ensure continuity and certainty.¹⁵⁸

Nonetheless, judges retained discretion because cases did not make law (as did statutes), but were merely the best evidence of what the law was.¹⁵⁹ Thus, precedent could be disregarded in certain circumstances,¹⁶⁰ thereby allowing the common law to adapt to changing social needs,¹⁶¹ as Lord Mansfield stressed.¹⁶² This

of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established." 3 BLACKSTONE, *supra* note 105, at *380.

156 4 *id.* at *377f ("[I]f judgments were to be the private opinions of the judge, men would then be slaves to their magistrates."); see also 1 *id.* at *71 (same); 3 *id.* at *396 ("The judgment, though pronounced . . . by the judges, is not their determination or sentence, but [that] of the law.").

157 Adherence to judicial decisions was "essential" because the English judge was "only to declare and pronounce, not to make or new-model, the law . . ." See *id.* at *327.

158 Courts had to "abide by former precedents, where the same points come again in litigation" because "the law in that case being solemnly declared and determined . . . [has] now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary . . . he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land . . ." 1 *id.* at *69; see also THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW pref. (1704) ("[A]djudget cases have been preserved for many ages, to direct in the determination of most points; so that an arbitrary judge has less room to exert himself here than in any other Law.").

159 1 BLACKSTONE, *supra* note 105, at *71 ("[T]he decisions of courts of justice are the evidence of what is common law."). See also HALE, *supra* note 105, at 68 (Courts "do not make a Law properly so called, (for that only the King and Parliament can do); . . . [judicial] Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of any private Persons . . .").

160 Blackstone construed these narrowly to include only decisions "contrary to reason . . . [or] the divine law." 1 BLACKSTONE, *supra* note 105, at *69-70; see also *id.* at *70-71 (acknowledging that precedent could be disregarded if "flatly absurd or unjust"); 3 *id.* at *268; 4 *id.* at *442.

161 Blackstone stressed that the common law was continually evolving and improving, and he approved judicial use of fictions to adapt the common law to new circumstances. See 3 *id.* at *267-68. See generally LIEBERMAN, *supra* note 106, at 71-98.

162 "The law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them." *Rust v. Cooper*, 98 Eng. Rep. 1277, 1279 (1777); see also *Rex v. Bembridge*, 99 Eng. Rep. 679, 681 (1783); *Rex v. Clark*, 98 Eng. Rep. 1267, 1268 (1777); *James v. Price*, 98 Eng. Rep. 619, 620 (1773); *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (1762). Hardwicke also recognized that "law or equity does not depend on the particular cases, but on the general reason running through them." *Aston v. Aston*, 27 Eng. Rep. 1021, 1023 (Ch. 1749).

Mansfield appealed to principles to justify revolutionizing the law to meet the rapid social and economic changes of the 18th century, and he disregarded older cases whose rationale he felt was no longer relevant. See, e.g., *Jones v. Randall*, 98 Eng. Rep. 706, 707 (1774) ("The law would be a strange science if it rested solely upon cases; and if after

distinctively English method of developing law through "cases"¹⁶³ combined legal stability with flexibility,¹⁶⁴ and it was generally adopted in America.¹⁶⁵

so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. I to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law itself; much less the whole of the law."); *Barwell v. Brooks*, 99 Eng. Rep. 702, 703 (1784) ("[A]s the usages of society alter, the law must adapt itself to the various situations of mankind."); *Hamilton v. Mendes*, 97 Eng. Rep. 787, 795 (1761); *Taylor v. Horde*, 97 Eng. Rep. 190, 216-17, 220-21 (1757). For Mansfield's legal contributions, see LIEBERMAN, *supra* note 106, at 88-143; 12 HOLDSWORTH, *supra* note 102, at 463, 477-78, 493-560.

But even Mansfield acknowledged the value of precedent, and he often followed prior cases he found distasteful. See, e.g., *Roe v. Griffiths*, 98 Eng. Rep. 17, 21 (1766) (The estate law rule "being now established, must be adhered to: although it is not founded upon truly rational grounds and principles . . ."); *Trinder v. Watson*, 97 Eng. Rep. 984, 985 (1764) ("[W]e must not depart from settled determinations."). See also *Bishop of London v. Fytch*, 99 Eng. Rep. 581, 583 (1782); *Hodgson v. Ambrose*, 99 Eng. Rep. 216 (1780); *Doe v. Watton*, 98 Eng. Rep. 1037, 1038 (1774); *O'Neil v. Marson*, 98 Eng. Rep. 477, 478 (1771); *Burgess v. Wheate*, 28 Eng. Rep. 652, 672-73 (1757-59).

163 See 4 HOLDSWORTH, *supra* note 102, at 220.

164 See 9 *id.* at 331-34; 10 *id.* at 249-51; 12 *id.* at 157-60; see also LIEBERMAN, *supra* note 106, at 71-72, 122-23.

165 See, e.g., THE FEDERALIST No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Unlike state courts, federal courts derived their authority solely from the Constitution and had no residual common law jurisdiction. See, e.g., RAWLE, *supra* note 87, at 360; *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (ruling that Court lacked jurisdiction over claim of libel, a common law matter); *Worrall's Case*, 2 U.S. (2 Dall.) 384 (1798) (similar holding as to bribery). Nonetheless, federal judges employed the traditional form of adjudication based on precedent.

Even James Wilson, who rejected Blackstone's principle of unreviewable legislative sovereignty, see *supra* note 124, praised his conception of adjudication. See WILSON'S WORKS, *supra* note 75, at 502 ("[I]n the cases of others," precedent must "be considered as strong evidence of the law."). Because common law was founded on custom and hence consent, it was particularly appropriate for an American legal system based on popular sovereignty; the common law simply had to be adapted to reflect American customs. *Id.* at 183-84; see also *id.* at 334-68 (summarizing English common law incorporation into America). Furthermore, the common law's ability to accommodate changing social conditions would be ideal for America, which was entering an era of change. See *id.* at 4, 102, 121-22.

Although it is impossible to determine the exact contours of the American view of precedent (either historically or currently), American courts have never adopted the traditional English view that precedent has the same binding force as a statute. See Monaghan, *supra* note 145, at 756-58. Just how flexible the American approach to precedent was in the late 18th and early 19th century is difficult to establish, particularly in constitutional cases. For example, Professor Engdahl recognizes that certain Federalists (like Story) championed *stare decisis* in constitutional cases, but laments "the insinuation into constitutional jurisprudence of the common law lawyers' habit of *stare decisis*," which he finds unwarranted. See David E. Engdahl, *What's In A Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 502 (1991).

(ii) "*Cases*" and *Disputes*.—Although a private law case often involved a bilateral dispute,¹⁶⁶ its distinguishing feature was a legal question that transcended the interests of the immediate litigants,¹⁶⁷ as Mansfield suggested in *Robinson v. Bland*:

Th[e] difference is very small, in the present case, and scarce worth litigating between these parties. But I am glad of the opportunity which this case offers, of discussing the question, and settling the point [on calculation of debt interest], to be a rule for all cases of the same nature that may hereafter arise.¹⁶⁸

Nor did mootness trouble Mansfield. For example, *Perrin v. Blake*,¹⁶⁹ a major case concerning will construction, was decided after the parties had settled their dispute.¹⁷⁰

In public law cases, a controversy was not required.¹⁷¹ A citizen who had suffered no individualized injury could challenge

Regardless of whether prior cases were viewed as *stare decisis* or simply as an important guide, however, the key point is that the word "case," when used in a judicial context (including Article III), imports some notion of precedent. See *supra* notes 143-45 and accompanying text. By contrast, "controversy" does not. See *infra* notes 182-83 and accompanying text.

166 A cause of action arose when the plaintiff claimed—and the defendant denied—that the latter had violated some legal duty. See *supra* note 134; see also Fletcher, *Structure*, *supra* note 25, at 236. The basic principle was that "every right when withheld must have a remedy, and every injury it's [sic] proper redress." See 3 BLACKSTONE, *supra* note 105, at *109; 1 *id.* at *244; 2 *id.* at *86, 115; 3 *id.* at *123, 265-66, 422. This maxim implied that the defendant disputed that he had inflicted a legal injury on the plaintiff.

167 By the 16th century it was recognized that "cases . . . turned, not on an issue of fact, but upon an issue of law." See 5 HOLDSWORTH, *supra* note 102, at 372.

168 97 Eng. Rep. 717, 722 (1760); see also LIEBERMAN, *supra* note 106, at 117 (citing Mansfield's characterization of his early maritime decisions "not as particular rulings on individual disputes, but as systematic formulations of 'the large principles of the Marine Law'"). Mansfield's procedural reforms allowed courts to decide more cases. See *supra* note 136. For example, instead of leaving cases to the jury's general verdict, he urged counsel to state a special case on doubtful points of law and then decided the case. See, e.g., 12 HOLDSWORTH, *supra* note 102, at 495-97 (citing, e.g., *Luke v. Lyde*, 97 Eng. Rep. 614, 617 (1759) (The "case . . . [would] settle the point more deliberately, solemnly, and notoriously . . .")). See also LIEBERMAN, *supra* note 106, at 116-17 (citing *Peacock v. Rhodes*, 99 Eng. Rep. 402, 403 (1781) ("I am glad this question was saved, not from any difficulty there is in the case, but because it is important that general commercial points should be publicly decided.")).

169 99 Eng. Rep. 355, (1770).

170 See LIEBERMAN, *supra* note 106, at 133. But see Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 125 (1946) (describing English antecedents of mootness doctrine).

171 This did not mean that anyone could sue for any reason. Rather, the claim had to fit within the existing writ system or be authorized by statute. See *infra* notes 172-75.

unlawful government action in a variety of ways, most commonly through prerogative writ procedure.¹⁷² Similarly, criminal and regulatory statutes often permitted an informer with no special interest in the case to sue.¹⁷³ Likewise, "relator" actions authorized citizens with no personal stake in a matter of public interest to prosecute as private attorneys general.¹⁷⁴ In Hardwicke's words, "any persons, though the most remote in the contemplation of the [defendant], may be relators in these cases."¹⁷⁵

Finally, "by 1770 the power of English judges to give advisory opinions was well recognized."¹⁷⁶ American courts rendered advisory opinions,¹⁷⁷ and many Convention delegates endorsed this

172 King's Bench issued prerogative writs (prohibition, certiorari, quo warranto, and mandamus) on behalf of the Crown as part of its general power to superintend lower courts and governmental units. The writs enabled King's Bench to define governmental spheres of power and control the exercise of jurisdiction, especially in administrative law matters. The court fixed the boundaries between the central and local government, between the units of local government, between local government and the people, and between the executive and subjects. See 10 HOLDSWORTH, *supra* note 102, at 243-46, 644-45; Jaffe, *supra* note 59, at 1269-75; Berger, *supra* note 59, at 819-27; Winter, *supra* note 24, at 1396-98. Issuance of prerogative writs was left to the court's "exercise [of] a sound discretion." *Rex v. Wardroper*, 98 Eng. Rep. 23 (1766) (Mansfield, L.J.) (quo warranto); see also 4 BACON, *supra* note 104 ("Prohibition") (Courts can "exercise a legal Discretion" in "refusing Prohibitions, where in such like cases they have been granted . . ."). See generally Berger, *supra* note 59, at 837-39.

In contrast to the sovereign prerogative of King's Bench to issue writs, American federal courts had authority to use prerogative writs only to the extent permitted by Congress. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (All Writs Act); see generally Winter, *supra* note 24, at 1405-06.

173 See *id.* at 1406-09 (citing 2 BLACKSTONE, *supra* note 105, at *437; 3 *id.* at *160-62); Sunstein, *supra* note 38, at 172, 174-75 (discussing informer and *qui tam* actions); Berger, *supra* note 59, at 825-26; 4 HOLDSWORTH, *supra* note 102, at 356-57. Informers' statutes were used extensively in the American colonies and in early state and federal practice. See Winter, *supra* note 24, at 1406-08.

174 Where the Attorney General could sue in the King's name, a private party could seek a writ in his own name and then prosecute the case. See *id.* at 1398-99; *id.* at 1401-03 (describing relator actions in American state courts in 19th century); Jaffe, *supra* note 59, at 1275-82 (same). See also 3 BLACKSTONE, *supra* note 105, at *264; 4 *id.* at *308.

175 *Attorney General v. Bucknall*, 26 Eng. Rep. 600 (Ch. 1741).

176 WRIGHT, *supra* note 56, at 57; see also Lee, *supra* note 60, at 639 n.204 ("[T]he advisory opinions practice seems fairly well established as of the early seventeenth century."); but see *Lord Sackville's Case*, 28 Eng. Rep. 940, 941 (1760) (Mansfield, L.J.) (noting examples of courts giving advice, but declining to answer question regarding court-martial because matter might later come before court). However, *Lord Sackville's Case* may have reflected the judiciary's traditional reluctance to interfere with the military. See 10 HOLDSWORTH, *supra* note 102, at 384-86.

177 See, e.g., MASS. CONST. of 1780, pt. 2, ch. III, art. II (directing judges to render advisory opinions on request of political branches); HART & WECHSLER, *supra* note 37, at 70 (citing similar provisions in New Hampshire and Rhode Island constitutions). See also Fletcher, *Case or Controversy*, *supra* note 69, at 267-68 (describing early state advisory opin-

practice.¹⁷⁸ Indeed, Anglo-American judges exercised multiple executive and legislative functions.¹⁷⁹

In sum, a "case" did not necessarily require any controversy. The absence of a dispute requirement in public law cases is especially critical because the most important Article III "Cases" (namely, those raising federal questions) dealt with public law matters.

(b) *Controversy*.—In the eighteenth century, "controversy" meant a dispute¹⁸⁰—for example, a quarrel that adverse parties voluntarily submitted to a neutral "arbitrator" or "umpire" for a final decision¹⁸¹ binding on those parties alone.¹⁸² In the judi-

ion practice, but concluding that such opinions were not considered "judicial" actions).

178 See, e.g., 2 FARRAND, *supra* note 106, at 334, 341 (discussing Pinckney's proposal that Legislature or Executive "shall have authority to require the opinions of the supreme Judicial Court upon important questions of law"); *id.* at 73 (Gorham) ("[I]t would be best to . . . authorize him [the President] to call on Judges for their opinions . . ."). Madison and Wilson championed a Council of Revision as a forum for federal judges to give legal advice to Congress. See *infra* notes 219-22 and accompanying text.

179 In England, functional overlap was inherent because the House of Lords was "a law-maker by two different methods—by the process of passing bills . . . and also by the process of interpreting the laws, as the supreme law court of the land." See 10 HOLDSWORTH, *supra* note 102, at 611 (citation omitted); *id.* at 720-21 (describing English combination of governmental functions). See also Berger, *supra* note 59, at 821-23 (English courts performed "multifarious governmental functions" such as licensing and administering the Poor Laws.) (citation omitted); Spann, *supra* note 66, at 633-35 (same). Similarly, colonial courts "performed innumerable executive, administrative, and even legislative tasks." MARTIN H. REDISH, *FEDERAL COURTS* 14 (2d ed. 1989) (citation omitted). While functions gradually began to separate, *id.*, by the 1780s "departmental duties were jumbled as never before" in America. See WOOD, *supra* note 123, at 154-61.

This overlap explains the Framers' flexible view of "judicial" functions. For example, Morris rejected other delegates' assertions that English practice was "that Expositors of laws [i.e., courts] ought to have no hand in making them," and pointed out that "the Judges in England had a great share in ye Legislation. They are consulted in difficult & doubtful cases. They may be . . . members of the Legislature. They . . . may be members of the privy Council, and can there advise the Executive . . ." See 2 FARRAND, *supra* note 106, at 75-76. Madison agreed. See *id.* at 77; 1 *id.* at 139.

180 See, e.g., 2 OED, *supra* note 104, at 929 (explaining that "controversy" derives from Latin "*controversia*," meaning "disputed"); 3 BLACKSTONE, *supra* note 105, at *327 (equating "controversy" with "dispute"); 4 STROUD'S JUDICIAL DICTIONARY 2225 (John S. James ed., 4th ed., Street & Maxwell 1974) (1890) (citing Altham's Case, 77 Eng. Rep. 701, 706 (1611) ("Quarrels, controversies, and debates, are *synonima*.")).

181 See, e.g., MATTHEW HALE, *THE ANALYSIS OF THE LAW* 145 (Garland Pub., 1978) (1713) (contrasting private consent to "arbitrament" or "umpirage" with "Remedies as the Law provides in the Courts of Justice, settled by Law"); JACOB, *supra* note 73, at 38 (same); WOOD, *supra* note 105, at 530 (same). "Umpirage" referred to a decision by one umpire; "arbitrament" to a panel. *Id.* at 531-32. The procedure required a factual dispute between adverse parties, the "[s]ubmission of the Controversy to Arbitrators"—"private Extraordinary Judges chosen by the Parties to give Judgment between them to end the

cial context, a "controversy" was an adversarial proceeding in which resolution of the dispute between the parties—not the law involved—was critical.¹⁸³ A paradigmatic "controversy" was a dispute between governments.¹⁸⁴ Wilson extensively analyzed the settlement of such controversies throughout history¹⁸⁵ by both republics¹⁸⁶ and confederations,¹⁸⁷ and he argued that Article

Debate," and a decree that was "Certain and Final, and make[s] an End of all Controversies submitted" *Id.*

182 Arbitrators had "Power to pronounce a Sentence betwixt the Parties," which bound only the parties, with no precedential effect. *Id.* at 531.

183 See, e.g., BOUVIER, *supra* note 134, at 667. In ancient times, controversies were resolved according to spiritual, not legal, principles. See, e.g., S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* at x (1969) ("Early law-suits . . . put the unanalysed [sic] dispute to supernatural decision. The blank result settles the dispute, but can make no law."); Henry Spelman, *Of The Ancient Government of England*, in *THE ENGLISH WORKS OF SIR HENRY SPELMAN* 274 (1723) (Ancient Britons "judged all Controversies by their Priests the Druides [sic] . . . once a Year."); WILSON'S WORKS, *supra* note 75, at 274 (Druids were "umpires between nations at war . . ."); HALE, *supra* note 105, at 169. This tradition continued in English equity courts, where "the Chancellor adjudicat[ed] disputes according to 'Conscience'" rather than law even in the 18th century. See LIEBERMAN, *supra* note 106, at 76; see generally *id.* at 75-83. Cf. 3 BLACKSTONE, *supra* note 105, at *326-27 (Some American Indian tribes "refer[red] all disputes to the next man [they met] upon the road, and so put a short end to every controversy.").

A "controversy" resembled a "case" in that it had to be brought according to proper judicial procedure, see *supra* notes 134-37 and accompanying text, but differed fundamentally in that the court's focus was on the parties' factual dispute, not on legal issues. See *supra* notes 180-82; *infra* notes 184-88 and accompanying text.

184 See, e.g., COKE, *supra* note 105, at 71 (contrasting King's Bench's power to correct legal errors in judicial proceedings with its jurisdiction over "errors and misdemeanours extrajudiciall [sic] tending to the . . . raising of faction, controversy, debate, or any other manner of misgovernment . . ."); 10 HOLDSWORTH, *supra* note 102, at 644 (Courts are "impartial umpires between many different governmental authorities and the subject."). Sometimes the phrase "constitutional controversies" was used to describe fundamental constitutional battles over either inter-governmental relations (e.g., between England and her colonies) or individual rights. See, e.g., 11 HOLDSWORTH, *supra* note 102, at 116-24; 1 STORY, *supra* note 91, at 344.

185 Certain nations had "determine[d] controversies" by a three-step process: (1) negotiated agreement; (2) impartial mediation; and (3) entrusting the "matter in dispute to the award of arbitrators." See WILSON'S WORKS, *supra* note 75, at 273. This procedure, however, was "precarious" because it required consent and raised enforcement problems. *Id.* at 280. Therefore, Wilson proposed an international tribunal to resolve such "disputes and differences" according to the law of nations. *Id.* at 280-81; see also *id.* at 281-82 (urging application of similar law to alienage and interstate disputes).

186 In Athens, for example, arbitrators were either "drawn by lot to determine controversies" or chosen by the parties. *Id.* at 470; accord *id.* at 274 ("[U]mpires were chosen to settle their contested claims."). Similarly, the Italian states "submitted their controversies to the Romans." *Id.*

187 See, e.g., *id.* at 251 ("When a dispute happens among the [Swiss] cantons, . . . the parties to that dispute . . . each choose four judges out of the neutral cantons, who, in case of disagreement, choose an umpire. This tribunal, under an oath of impartiality,

III had perfected the peaceful resolution of government-related controversies by impartial judges.¹⁸⁸

The discussion of umpiring "controversies" by Wilson and other leading Federalists,¹⁸⁹ and their recognition of a judicial law declaration function in "cases," suggests the deliberate use of these terms in Article III.

C. *The Convention's Understanding of the Functional Case/Controversy Distinction*

1. The Evolution of the Judiciary Article

The Framers' intent in choosing the case/controversy language can be deduced by tracing the evolution of Article III's jurisdictional catalogue at the Convention.¹⁹⁰

(a) *The Judiciary Articles in the Convention Plans.*—Edmund Randolph's nationalistic plan¹⁹¹ and William Paterson's decentralizing plan¹⁹² described federal judicial authority to "hear and

pronounces definitive sentence."); *id.* at 252 (Netherlands magistrate "has power to settle disputes between the provinces."); *id.* at 250 (Germanic body had tribunals "possessed of supreme jurisdiction in controversies" among its members.).

188 *See, e.g., id.* at 278 ("In Switzerland, controversies depending between citizens of different states must be decided by the magistrates of a state, of which one party, but not the other, is a citizen. But, in the United States, for controversies depending between citizens of two different states, a tribunal is formed and established, impartial, and equally independent of both."); *id.* at 281-83 (Article III establishes independent courts to resolve controversies involving sovereigns.).

189 *See, e.g.,* 3 STORY, *supra* note 91, § 1673 (citing THE FEDERALIST No. 80 (Alexander Hamilton)) (describing history of controversies in confederations); *Randolph's Report, supra* note 77, at 130 (Article III "establish[es] a common arbiter in the federal judiciary" to resolve state-party controversies.).

190 An excellent description of the drafting of the judiciary article is found in 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, 754-98 (1984). Clinton's thesis is that the Framers intended to require Congress to allocate to the federal judiciary every type of case and controversy listed in Article III, except for trivial matters. *See id.* at 749-50. *Cf. Amar, Neo-Federalist, supra* note 7 (concluding that Congress must vest in federal courts jurisdiction over "all Cases," but not all "Controversies").

191 Randolph's Virginia Plan was submitted on May 29. *See* 1 FARRAND, *supra* note 106, at 16, 20-23; 3 *id.* at 593-94 app. C (reprinting full text of Plan). Randolph proposed "that the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony." 1 *id.* at 22.

192 Paterson's New Jersey Plan was submitted on June 15. *See id.* at 242-45; 3 *id.* at 611-16 app. E (reprinting full text of Plan). Paterson proposed that the national judiciary

determine" certain matters not designated by any clear case/controversy terminology.¹⁹³ The plans agreed that federal courts should be independent¹⁹⁴ and that their jurisdiction should extend to maritime captures, piracies, and felonies;¹⁹⁵ foreign ministers;¹⁹⁶ foreigners;¹⁹⁷ treaties;¹⁹⁸ and certain revenue

"shall have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue" 1 *id.* at 244. Paterson's Plan emphasized federal judicial power in international affairs and may fairly be read to restrict federal jurisdiction over treaties and trade/revenue to "cases in which foreigners may be interested," thereby limiting domestic jurisdiction to impeachments. Moreover, except for impeachments, federal jurisdiction was by appeal from state courts. *See id.* at 243-44 (providing for suits to commence in state judiciaries).

Although the Convention discussed only the Virginia and New Jersey Plans, two others deserve mention. First, on May 29, Charles Pinckney submitted a plan, *id.* at 16, 23, an outline of which was found among James Wilson's papers. 2 *id.* at 134-37. Although there are no extant copies of the Pinckney Plan, 1 *id.* at xxii, historians have pieced together its likely provisions. *See* 3 *id.* at 595-609 app. D. Second, Hamilton on June 18 orally made a governmental proposal. *See* 1 *id.* at 291-93. Hamilton later drafted a more elaborate plan, but he did not give it to Madison until the close of the Convention. *See id.* at 291 n.7; 3 *id.* at 617-30 app. F (reprinting full text of Plan).

193 Randolph mentioned "piracies," "felonies," "captures," and "impeachments," then "cases" involving foreigners and out-of-state citizens; then "questions" involving "national peace and harmony." 1 *id.* at 22. Paterson referred to "impeachments," then repeated the phrase "all cases" to denote other jurisdictional bases. *Id.* at 244.

194 The judiciary's guarantees of independence remained constant from the time they were proposed in the Virginia Plan. *See* 1 *id.* at 21-22 (providing federal judges with tenure during "good behavior" and undiminished salary); *see also id.* at 116 (noting Convention's approval of this provision without dissent); *see also id.* at 226, 230 (Convention resolution accepting basic guarantees of independence); *id.* at 244 (Paterson Plan) (duplicating provisions ensuring judicial independence); 2 *id.* at 132 (Convention resolution given to Committee of Detail); *id.* at 660-61 (final Article III).

195 1 *id.* at 22 (Randolph); *id.* at 244 (Paterson). These provisions duplicated Article IX of the Articles of Confederation. Pinckney proposed a broader provision closer to the final words of Article III. *See* 2 *id.* at 136 (authorizing Congress to institute "a Court of Admiralty . . . for all maritime Causes").

196 Paterson predicted Article III's language by recommending jurisdiction "in all cases touching the rights of Ambassadors." 1 *id.* at 244. This protection was implicit in Randolph's "national peace and harmony" clause, *id.* at 22, as his opening remarks to the Convention made clear. *See id.* at 18-19.

197 Both plans conferred jurisdiction in "cases in which foreigners may be interested." *Id.* at 244 (Paterson) (emphasis added); *see also id.* at 22 (citing Randolph's near identical language).

198 In both plans, jurisdiction apparently was limited to the treaty rights of foreigners. *See id.* at 244 (Paterson) (granting federal court authority "in all cases in which foreigners may be interested, in the construction of any treaty"); *id.* at 238 (Randolph) (emphasizing that one of his major objectives was to secure treaty rights of foreigners, implying that such jurisdiction was included in his "national peace and harmony" provision, *id.* at

laws.¹⁹⁹ After debate,²⁰⁰ the Convention resolved that federal jurisdiction "shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony."²⁰¹

22); see also 2 *id.* at 136 (Pinckney) (granting federal jurisdiction "in all Causes wherein Questions shall arise on the Construction of Treaties").

199 See 1 *id.* at 22 (Randolph) (limiting jurisdiction to revenue laws, although "national peace and harmony" implied broader federal question jurisdiction); *id.* at 244 (Paterson) (restricting jurisdiction to trade regulation and revenue collection involving foreigners); 2 *id.* at 136 (Pinckney) (same).

200 The Convention delegates agreed with the provision contained in all of the plans that the judicial power be vested in a Supreme Court. See 1 *id.* at 21 (Randolph); *id.* at 244 (Paterson); 2 *id.* at 136 (Pinckney).

Debate centered on inferior tribunals. The Committee of the Whole initially approved Randolph's resolution creating mandatory lower courts. See 1 *id.* at 104-05. Rutledge urged striking this provision, arguing that inferior tribunals encroached on state jurisdiction. *Id.* at 119, 124. Sherman stressed the added cost. *Id.* at 125. Madison responded that lower courts "with final jurisdiction in many cases" were necessary to avoid flooding the Supreme Court with appeals, and that such appeals might be inadequate because of the harm inflicted by "improper Verdicts in State tribunals under the biased [sic] directions of a dependent Judge." *Id.* at 124.

Wilson and Madison successfully suggested a compromise—granting the national legislature discretion over establishing such tribunals. *Id.* at 125. When Butler and Martin revived the argument that Congress should have no power to appoint inferior tribunals, 2 *id.* at 45-46, Randolph ended the discussion by arguing that "[c]ourts of the States can not be trusted with the administration of the National laws." *Id.* at 46. Had the Framers wanted state courts to adjudicate Article III matters definitively, they would not have given Congress discretion to create inferior courts, which most delegates assumed would inevitably be established (e.g., in admiralty). See *infra* note 273. The Constitution reflects the Madisonian compromise. See U.S. CONST. art. III, § 1 (Federal judicial power shall be vested "in such inferior Courts as the Congress may from time to time ordain and establish."); see also U.S. CONST. art. I, § 8, cl. 9.

Many jurists and scholars have claimed that Article III required Congress to establish some lower federal courts. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-31 (1816); GOEBEL, *supra* note 110, at 247. For the opposing (and more persuasive) view, see MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 29 (2d ed. 1990). In any event, the first Congress did create inferior federal courts. See Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73-74. Failure to do so would have forced all litigants to travel to the capital, thereby centralizing the federal judiciary and overwhelming the Supreme Court. See 3 ELLIOT, *supra* note 109, at 552-53 (Marshall). See also SEED, *supra* note 113, at 72 ("Wilson and Madison were certain that the logic of circumstances would oblige the legislature to create the inferior tribunals they regarded as essential. The stratagem worked; a potentially dangerous issue was bypassed in the convention, and the objective achieved by other means.").

201 2 FARRAND, *supra* note 106, at 46 (Madison's Journal). See also *id.* at 39 (Convention Journal); *id.* at 132-33 (resolution given to Committee of Detail). The Committee of the Whole had earlier resolved "[t]hat the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony." 1 *id.* at 223-24; see also *id.* at 231, 232, 237, 238 (same provision, recorded in various delegates' journals and other Convention records).

(b) *Committee of Detail*.—The Committee of Detail gradually fleshed out this resolution until it had reached near-final Article III form.²⁰² Textual changes in the Committee's drafts are critical because Convention records reveal nothing about its deliberations.

The first draft, prepared by Edmund Randolph, revised his own proposed judiciary article, with editing by John Rutledge (in brackets):

5. The Judiciary

7. The jurisdiction of the supreme tribunal shall extend
 1. 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 the 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>²⁰³

Rutledge's notations are particularly significant. After Randolph had used the term "disputes" four times in succession, Rutledge added the phrase "*Cases of Admiralty Jurisdn*." A difference emerges between "cases" arising under national law, involving the national peace, or concerning admiralty, and "disputes" between parties (states, state citizens, and foreigners).²⁰⁴ Wilson's subsequent

202 See *id.* at 238 (Randolph) ("[I]t will be the business of a sub-committee to detail" the Convention's one-sentence resolution, which merely established the principle of ensuring security to foreigners and preserving harmony among states and citizens.); 2 *id.* at 85-87, 95-97, 117-18, 128 (Convention entrusting matters to Committee of Detail). See also Holt, *supra* note 7, at 1464 ("Wilson and Randolph had strong convictions and apparently matured ideas concerning the judiciary, and with Rutledge's aid they filled out the Convention's resolution in amazing detail.").

203 2 FARRAND, *supra* note 106, at 146-47.

204 Wilson's transformation of Randolph's phrase "cases . . . involving the national peace and harmony . . . in disputes" (*id.* at 147) into the single word "Controversies" (*id.* at 173) suggests that a "controversy" is a particular type of "case"—one defined by the dispute involved.

draft (with Rutledge's emendations) more precisely carved the scope of federal jurisdiction:

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.²⁰⁵

Wilson preserved Randolph's basic two-tiered structure but reorganized the jurisdictional heads under the rubrics "all Cases" and "Controversies."²⁰⁶ Wilson's repetition of these terms—and Rutledge's decision to leave them intact despite numerous other editorial corrections—suggests a deliberate phraseology,²⁰⁷ which is confirmed by Wilson's and Randolph's later care in differentiating "Cases" from "Controversies."²⁰⁸

(c) *Final Revisions of the Judiciary Article.*—The case/controversy language remained in the final version of Article III despite sev-

205 *Id.* at 172-73. In the cited passage, Rutledge's corrections are in brackets; words in parentheses were crossed out by Wilson. *Id.* at 163 n.17.

206 See also *id.* at 186-87 (Wilson's final draft of judiciary article reported out of Committee of Detail). Wilson changed the word "Cases" to "Controversies" in several instances. For example, Randolph's Plan and his initial draft refer to some diversity "cases." See 1 *id.* at 22 (listing jurisdiction over "cases in which . . . citizens of other states applying to such jurisdictions may be interested"); 2 *id.* at 146-47 (referring to "cases" involving "disputes" between citizens of different states). See also *supra* notes 191-92, 197 (major Convention Plans mentioning "cases in which foreigners may be interested"); 2 FARRAND, *supra* note 106, at 146-47 (Randolph/Rutledge draft referring to various "cases involving disputes").

These drafts are also critical to Amar's mandatory/permissive distinction, as evidenced by the selective use of "all" in the Wilson draft. See generally Amar, *Neo-Federalist*, *supra* note 7, at 242-45.

207 Wilson was "a concise thinker not given to tautological expressions" who would not have used two different words unless he intended to convey distinct meanings. See SEED, *supra* note 113, at 95.

208 See WILSON'S WORKS, *supra* note 75, at 454; see also 2 ELLIOT, *supra* note 109, at 486-94 (reprinting Wilson's speech at Pennsylvania ratifying convention). He had one lapse. See *id.* at 489. As Attorney General, Randolph lamented the nonconformity of the Judiciary Act of 1789 with Article III, and his critique of that statute precisely distinguished "Cases" from "Controversies" every time he referred to Article III's jurisdictional catalogue. See Randolph's Report, *supra* note 77, at 127, 129, 140-41, 148.

eral other changes. The Convention agreed to expand the list of "Cases" to include all cases arising under the Constitution and treaties,²⁰⁹ jurisdiction previously considered implicit.²¹⁰ Under the "Controversies" heading, Pinckney successfully moved to insert "United States-party" disputes.²¹¹ Wilson then persuaded the Convention to add two jurisdictional heads: (1) interstate controversies involving territory or jurisdiction;²¹² and (2) land grant controversies between citizens of the same state.²¹³

In polishing the judiciary article, the Committee of Style—which included such masterful writers as Madison, Hamilton, and Morris²¹⁴—retained the case/controversy bifurcation.²¹⁵

2. The Convention's Understanding of Judicial Functions in "Cases" and "Controversies"

Several Convention delegates perceived that federal judges would perform different functions in "Cases" than in "Controversies."

(a) *Exposition of the Law in "Cases."*—The role of courts as expositors of the law in "Cases" is illustrated in the only explicit discussion of that term at the Convention:

Docr. [William] Johnson moved to insert the words "this Constitution and the" before the word "laws" [in Article III, section 2, clause 1.]

Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising

209 See 2 FARRAND, *supra* note 106, at 423-24, 431-32.

210 Long before express jurisdiction over constitutional cases was added, Convention delegates had unanimously expressed their understanding that federal courts had this power. See *supra* note 126; *infra* notes 224-25. Similarly clear was treaty jurisdiction. See 1 FARRAND, *supra* note 106, at 238 (Randolph); see also *supra* note 198 (describing Convention plans proposing treaty jurisdiction).

211 See 2 FARRAND, *supra* note 106, at 340 n.4, 342 (Madison's notes); see also *id.* at 335 (Convention Journal); *id.* at 367 (citing subcommittee's recommendation that such jurisdiction be approved); *id.* at 423-25, 430 (approval by Convention). Pinckney's was the only plan that expressly included jurisdiction over United States-party suits. *Id.* at 136. Significantly, Pinckney's language—"all Causes . . . wherein U.S. shall be a Party"—was changed to "Controversies."

212 See *id.* at 400-01, 425, 431-32.

213 See *id.* at 431-32.

214 The Committee of Style also included Johnson and King. *Id.* at 554, 590 n.8.

215 See *id.* at 575-76, 600-01.

Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

The motion of Doctr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—²¹⁶

Although this passage has often been cited erroneously as a constitutional basis for justiciability,²¹⁷ one of its obvious (and overlooked) meanings is that those "cases" that were "of a Judiciary Nature" gave a judge "[t]he right of expounding the law."²¹⁸

Similarly, debates over a Council of Revision, a judicial-executive panel that would review all legislation,²¹⁹ focused on the ef-

216 *Id.* at 430.

217 See, e.g., *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting); HART & WECHSLER, *supra* note 37, at 8; Clinton, *supra* note 190, at 788-92; Bandes, *supra* note 66, at 231, 279. This conclusion assumes that modern justiciability doctrines correspond to the Framers' understanding of "cases of a judiciary nature," contrary to abundant evidence showing that 18th century courts performed a variety of functions that would be barred under current justiciability rules. See *supra* notes 171-79 and accompanying text; cf. Berger, *supra* note 59, at 829, 832-36 (arguing that reference to "cases of a judiciary nature" cannot be interpreted as abandonment of established judicial remedies (such as prerogative writs) to curb unconstitutional legislative usurpation, a critical concern of Framers). Indeed, Madison himself vigorously argued that the Constitution should provide for a Council of Revision, composed of federal judges and executive officials, to negate or revise legislative bills. See 1 FARRAND, *supra* note 106, at 97-104, 138-40; 2 *id.* at 27-34, 73-80, 299-300. Madison believed that "[t]he Judicial ought to be introduced in the business of Legislation." 1 *id.* at 108. See generally *infra* notes 219-20 and accompanying text.

Neither Madison's statement to Johnson nor any other evidence at the Convention refers to justiciability doctrines. Rather, Madison was expressly focusing on "cases arising under the Constitution." Recognizing the delicacy of judicial review, Madison urged that it be explicitly restricted to cases of a "judiciary" nature, as opposed to cases of a "hypothetical" nature—which Madison presumably knew was one meaning (indeed, the original legal meaning) of the word "case." See *supra* note 133. Similarly, when Johnson became a Justice, he declared that the Court could not "decide on a mere hypothetical case." See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 370 (1816) (separate opinion of Johnson, J.).

Professor Engdahl interprets Madison's statement differently, as meaning that the judiciary sometimes has the last word on a constitutional question because of its fortuitous occurrence in a form contemplated by Article III, not because of the character of the legal question. See Engdahl, *John Marshall*, *supra* note 7, at 302-03; see also *infra* note 267 (discussing Engdahl's theory).

218 Madison's language indicates that some "cases" are judicial in nature, and some are not. While Madison did not offer criteria for determining when a case became "judicial," he obviously viewed judicial "cases" as vehicles for expounding the law. See 2 FARRAND, *supra* note 106, at 430.

219 See *supra* note 217. This idea originated in the Randolph Plan. See 1 FARRAND, *supra* note 106, at 21. Madison and Wilson argued that a Council of Revision was necessary to help the judiciary defend itself against legislative encroachments and to protect

fect participation in the Council would have on judges' legal exposition—which both proponents²²⁰ and opponents²²¹ agreed was the core judicial function. The proposal was eventually rejected on two related separation of powers grounds: (1) Courts should not weaken their expository function by teaming with the executive to engage in policy-making;²²² and (2) Judges could not impartially construe laws they had helped frame.²²³

the public from bad laws. For Madison's arguments, see *id.* at 108, 138-39; 2 *id.* at 74, 298. Wilson wanted "to give the Executive & Judiciary jointly an absolute negative." 1 *id.* at 98. He felt a Council of Revision was needed because the judicial expository power "did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." 2 *id.* at 73; see also *id.* at 78 (Mason) (same). See also Letter from James Madison to James Monroe (Dec. 27, 1817), in 8 MADISON'S WRITINGS, *supra* note 101, at 406-07 (describing Convention attempts to create judicial negative to give "greater stability & system to the rules of expounding the [Constitution]" and to preclude judicial "annulment of Legislative Acts"). Other proposals for judicial/political organs included a Council of State to recommend statutory revisions, see 2 FARRAND, *supra* note 106, at 342 (Morris), and an advisory Privy Council. See *id.* at 328-29 (Ellsworth).

220 1 *id.* at 232-33 (Madison) (referring to judge as "an expositor of the laws"); 2 *id.* at 79 (Gorham) (describing judicial "exposition of the laws"); *id.* at 73 (Wilson) (referring to "Judges, as expositors of the Laws").

221 See, e.g., 1 *id.* at 97 ("Mr. Gerry doubts whether the Judiciary ought to form a part of [the Council of Revision], as they will have a sufficient check . . . agst. encroachments on their own department by their exposition of the laws . . ."); 2 *id.* at 75 (Gerry) (describing judges as "Expositors of the Laws"); 1 *id.* at 98 (King) (observing that "Judges ought to be able to expound the law"); 2 *id.* at 75 (Strong) (referring to "[t]he Judges in exercising the function of expositors" and "the power of . . . expounding [] the laws").

222 John Dickinson opposed "blending the national Judicial with the Executive, because the one is the expounder, and the other the Executor of the Laws." 1 *id.* at 110. Dickinson further argued that "the Judges must interpret the Laws they ought not be legislators." *Id.* at 108. Likewise, Gerry denounced the Council as an "improper coalition between the Executive & Judiciary departments It was making the Expositors of the Laws, the Legislators which ought never to be done." 2 *id.* at 75. See also 1 *id.* at 97-98 (Gerry) (to similar effect); 2 *id.* at 76 (Martin) (rejecting "association of the Judges with the Executive"); *id.* at 300 (Sherman) (disapproving of "Judges meddling in politics and parties"); *id.* at 73 (Gorham) (observing that "Judges . . . are not to be presumed to possess any peculiar knowledge of the mere policy of public measures").

223 See, e.g., 1 *id.* at 98 (King) ("Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."); 2 *id.* at 75 (Strong) ("The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws."); *id.* at 79 (Gorham) ("[T]he Judges ought to carry into the exposition of the laws no prepossessions with regard to them."); *id.* at 80 (Rutledge) ("Judges of all men [are] the most unfit to be concerned in the revisionary Council."); *id.* at 298 (Pinckney "opposed the interference of the Judges in the Legislative business: it will involve them in parties, and give a previous tincture to their opinions."). See also THE FEDERALIST No. 73, at 499 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he Judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary ca-

Thus, the Convention denied political authority to courts precisely to strengthen their exercise of judicial power, which included the right to declare laws unconstitutional—as recognized by both Federalists²²⁴ and Antifederalists.²²⁵ The federal courts' expository function was also critical in cases involving foreign ministers, treaties, and admiralty, which implicated the law of nations.²²⁶

To ensure proper judicial exposition in "Cases," Article III guaranteed all federal judges independence by virtue of their life tenure²²⁷ and fixed salary,²²⁸ while other constitutional provi-

pacities.").

224 See, e.g., 1 FARRAND, *supra* note 106, at 109 (King) ("[T]he Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."); 2 *id.* at 73 (Wilson) ("Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights."); *id.* at 93 (Madison) ("A law violating a constitution . . . would be considered by the Judges as null & void."); *id.* at 74 (Madison) (same); *id.* at 28 (Morris) ("A law that ought to be negated will be set aside in the Judiciary departmt."); *id.* at 299 (Morris) (same); *id.* at 298 (Pinckney) (opposing "interference of the Judges in the Legislative business"). Gerry and Mason, who were "on the dividing line between acceptance and rejection of the Constitution," see Holt, *supra* note 7, at 1463 n.159, also endorsed judicial review. See 1 FARRAND, *supra* note 106, at 97 (Gerry) (The judiciary's "exposition of the laws . . . involved a power of deciding on their Constitutionality."); 2 *id.* at 78 (Mason) (Judges "could declare an unconstitutional law void."). See also THE FEDERALIST No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Courts have the duty "to declare all acts contrary to the manifest tenor of the constitution void.").

225 Luther Martin stated that "as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws." 2 FARRAND, *supra* note 106, at 76; see also *id.* (Judicial review obviates the need for a Council of Revision.). The main challenge to judicial review at the Convention—Mercer's "[disapproval] of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void," *id.* at 298—was refuted by Morris so forcefully that it ended any further discussion: A federal judge could hardly "be bound to say that a direct violation of the Constitution was law." *Id.* at 299. See generally Engdahl, *John Marshall*, *supra* note 7, at 282-85 (describing general understanding that courts could disregard unconstitutional statutes, based on Convention and Ratification statements and established state court practice).

226 See *infra* notes 237, 246, 248, 271, 276-77, 280 and accompanying text (summarizing international law aspects of foreign minister, treaty, and admiralty jurisdiction).

227 See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ."). Madison explicitly connected independence to law declaration: He argued that separation of powers demanded the independence of each branch, and that making judges dependent on the legislature for reappointment would "render the Legislature the virtual expositor, as well the maker of the laws." 2 FARRAND, *supra* note 106, at 34; see also *id.* at 56 (Madison) (stressing "fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised"); *id.* at 77 (same). Likewise, key Framers such as Wilson, Randolph, Morris, and Rutledge denounced Dickinson's suggestion to make judges removable by the executive on petition

sions assured their quality, integrity, and prestige.²²⁹

(b) *Umpiring "Controversies."*—The dispute resolution function in "Controversies" was mentioned only twice at the Convention. During debates over the Committee of Detail's draft judiciary article, Pinckney stressed that independent, qualified judges would "be the Umpires" in United States-party and interstate disputes.²³⁰ Pinckney echoed Gerry's earlier emphasis on the need for "an Umpire to decide controversies."²³¹

The scant mention of umpiring, contrasted with the repeated discussion of exposition, suggests that the delegates considered dispute resolution a secondary judicial function. Indeed, they understood that umpiring need not be done by courts. For example, two of Article III's six Controversies (interstate and land grant) were nearly entrusted to *legislative* resolution.²³² This scheme was

from Congress. See *id.* at 428-29; *id.* at 429 (Wilson) ("The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt").

228 See U.S. CONST. art. III, § 1 ("[Judges] shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). See generally 1 FARRAND, *supra* note 106, at 121; 2 *id.* at 44-45, 428-30.

229 See *id.* at 37-45. For example, the Convention agreed on executive appointment of judges with Senate "Advice and Consent"—a selective process designed to enhance prestige and thus attract qualified candidates. See U.S. CONST. art. II, § 2. See also 1 FARRAND, *supra* note 106, at 233; THE FEDERALIST No. 78, at 529-30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). To ensure that judges would be morally sound and accountable, impeachment for misconduct was included. See U.S. CONST. art. II, § 2, cl. 5; *id.* cl. 6-7. See generally Amar, *Neo-Federalist*, *supra* note 7, at 235-38. Cf. 12 HOLDSWORTH, *supra* note 102, at 158 (England had "an independent bench of judges, sufficiently well paid to secure [their ability] . . . [and with] security of tenure."). Article III's guarantees of independence contrasted with its silence about state judges. Madison argued that "confidence [cannot] be put in the State Tribunals as guardians of the National authority and interests" because they were at the mercy of their legislatures. 2 FARRAND, *supra* note 106, at 27-28; see also 1 *id.* at 317 (Madison); *id.* at 125 (Wilson).

230 2 FARRAND, *supra* note 106, at 248.

231 1 *id.* at 515. Pinckney and Gerry's use of the "Umpire" metaphor contrasts with their other statements that judges should engage in the "exposition of the laws" in cases. See *id.* at 97 (Gerry); 2 *id.* at 75 (Gerry); *id.* at 298 (Pinckney).

232 See, e.g., 1 *id.* at 243 (reaffirming Congressional powers vested by Articles of Confederation); 2 *id.* at 135 (Pinckney Plan outline) (Congress "shall be the last Resort on Appeal in Disputes between two or more States."); *id.* at 144 (Randolph-Rudedge draft in Committee of Detail); *id.* at 170 (Wilson's final draft) ("In all Disputes and Controversies . . . between two or more States [and those involving land grants], the legislature would select a panel of "Commissioners or Judges to hear and finally determine the Controversy."); *id.* at 183-84 (Committee of Detail draft presented to Convention) (same). Thus, Gerry's comment about umpiring (see *supra* note 231) was made at a time when the Convention assumed that the legislature would resolve many disputes (e.g., interstate and land grant). See *supra* note 121; *infra* notes 233-35 and accompanying text.

modeled on the Articles of Confederation,²³³ which made Congress "the last resort on appeal in all disputes and differences" between States and in "[a]ll controversies concerning the private right of soil claimed under different grants of two or more States," and allowed Congress to appoint temporary "commissioners or judges" for assistance.²³⁴ Only towards the end of the Convention did Wilson and Rutledge successfully move such jurisdiction to the judiciary article on the ground that independent federal courts would be better equipped to resolve such disputes.²³⁵

In sum, Convention records indicate that the federal judiciary's primary role was to be exposition in "Cases," with a lesser function of resolving disputes in "Controversies."

3. The Case/Controversy Distinction and the Structure of Article III

The choice of the words "Cases" and "Controversies" reflected not merely verbal precision but also the underlying structural logic of Article III. Specifically, the case/controversy distinction signaled the division of Article III's jurisdictional catalogue into two separate categories based on the different essential function the judiciary was expected to perform in each class. First, the initial three jurisdictional grants all were designated "Cases" and concerned legal topics of national importance that were entrusted to the federal judiciary for definitive exposition. Second, the term "Controversies" introduced the final six jurisdictional heads, which were defined not by legal subject matter but by parties, thereby directing judicial attention to the resolution of disputes between those parties.

The presence in Article III of the words "Cases" and "Controversies," standing alone, might be dismissed as insignificant or accidental. However, the repeated use of these terms in exact correspondence with the distinction between subject matter and party-

233 2 FARRAND, *supra* note 106, at 400 n.6.

234 ARTICLES OF CONFEDERATION art. IX, § 3. The cumbersome process of appointing such commissioners, and their lack of enforcement power (see *supra* note 121) is similar to that of modern labor arbitrators. See Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979). The Confederation judge-commissioners failed to "check the quarrels [sic] between states." 1 FARRAND, *supra* note 106, at 19 (Randolph); see also *id.* at 18 (emphasizing "discord . . . among . . . many states" and "dissentions [sic] between members of the Union").

235 See 2 FARRAND, *supra* note 106, at 401; see also 2 ELLIOT, *supra* note 109, at 490 (Wilson) (stressing that judiciary had enforcement power superior to that of Congress).

defined jurisdictional grants strongly suggests a deliberate decision to highlight the federal courts' different primary role in each category. This conclusion is buttressed by analyzing other evidence from the post-Convention period.

D. The Federalist View of Article III's Two Functional Tiers

Leading Federalists recognized Article III's functional bifurcation. For example, Justice Story explicitly distinguished "all Cases" from "Controversies:"²³⁶ He emphasized the "vital importance of all the cases enumerated in the first class" to America's "national sovereignty" and international interests,²³⁷ but concluded that the matters designated "Controversies" had been included for "[n]o other reason" than to give litigants an impartial tribunal.²³⁸ Similarly, John Marshall repeatedly noted that "[t]he judicial power of the United States, as defined in the constitution, is dependent, 1st. On the nature of the case; and 2d. On the character of the parties."²³⁹ Marshall asserted full judicial power over "Cases" in which he developed federal law expansively,²⁴⁰ whereas he carved many exceptions into jurisdiction based on "the character of the

236 *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333-36, 347-48 (1816). Although Justice Story's main conclusion was that Congress was required to vest in federal courts jurisdiction over "all" cases but not all "controversies," he also implicitly recognized that the courts' role was different in the two jurisdictional tiers.

237 *Id.* at 334-36. See also 3 STORY, *supra* note 91, § 1664, at 531 (noting that "cases," such as those in admiralty, involved public law issues, not mere private claims).

238 *Martin*, 14 U.S. (1 Wheat.) at 347.

239 *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (In the second tier, "the jurisdiction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing."); *id.* at 378 (same); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 809, 812, 818-19 (1824) (same); John Marshall, *A Friend of the Constitution IX*, in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 155, 212-14 (Gerald Gunther ed., 1969) [hereinafter MARSHALL'S DEFENSE] (same).

240 See, e.g., *Cohens*, 19 U.S. (6 Wheat.) at 378 ("This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever"); *Osborn*, 22 U.S. (9 Wheat.) at 821-22 (concluding that first group of cases is "most important class").

parties."²⁴¹ The differing judicial roles in "Cases" and "Controversies" will now be examined.²⁴²

1. Cases

The federal judiciary's principal function in "Cases" was exposition of federal law. The early Supreme Court consistently defined "case" as a cause of action, brought in familiar judicial form, that raised a legal question under one of the Article III jurisdictional grants based on substantive law.²⁴³ "Cases" presented questions

241 See *infra* Part II.D.2. (discussing narrow construction of "Controversies," such as complete diversity requirement). Federalists sometimes referred to Article III "Controversies" as "Cases." See, e.g., *Cohens*, 19 U.S. (6 Wheat.) at 378, 383-84, 390, 393, 398, 405-06; *Deveaux*, 9 U.S. (5 Cranch) at 88, 90; *Martin*, 14 U.S. (1 Wheat.) at 330-31, 333. Nonetheless, the terms were not interchangeable because Article III "Cases" were almost never called "Controversies." The explanation for this seeming anomaly is that "case" was a broader term than "controversy" in two procedural senses. First, both matters were originally submitted as a "cause of action"—often shortened to "cause" or "case." See generally *supra* notes 134 and 183; see also THE FEDERALIST No. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (introducing each jurisdictional category as a "cause"). Second, on appeal a matter was always known as a "case." See *supra* note 134. Compare Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (granting district court jurisdiction over "all civil causes of admiralty and maritime jurisdiction") (emphasis added) with *id.* § 13 (Supreme Court has "appellate jurisdiction . . . in the cases herein after specifically provided for . . .") (emphasis added). See also *Cohens*, 19 U.S. (6 Wheat.) at 409-11 (An appeal to review a "case" is not a "suit" because no claim is asserted.); *Martin*, 14 U.S. (1 Wheat.) at 333 ("[J]udicial power" extends to "cases" in any form, original or appellate.).

242 The ratification debates reveal some awareness that subjects designated "Cases" were categorically different from party-defined "Controversies." See, e.g., 4 ELLIOT, *supra* note 109, at 156-58 (Davie) (distinguishing grants labeled "all Cases" from those designated "Controversies"). While Federalists were unyielding in their defense of "Cases," they admitted that inclusion of "Controversies" was more a policy preference. See, e.g., 3 *id.* at 532-35 (Madison). Of course, in the partisan atmosphere of the ratification debates, precision in expression was often absent. See *supra* note 108. Indeed, even Hamilton used "Cases" and "Controversies" carelessly, except where he quoted directly from Article III. See THE FEDERALIST No. 80 (Alexander Hamilton). Hamilton's sloppy terminology might also reflect reliance on his own Convention judiciary plan, which used various terms like "cases," "causes," "questions," and "controversies." See 3 FARRAND, *supra* note 106, at 625-27. See also 3 ELLIOT, *supra* note 109, at 532 (Madison) (collapsing "Cases" and "Controversies").

For a good summary of the ratification debates, see Clinton, *supra* note 190, at 797-840.

243 See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 819 ("This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . ."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803) (to similar effect); 3 STORY, *supra* note 91, § 1640, at 507 (endorsing form-based definition of case); WILSON'S WORKS, *supra* note 75, at 190 ("The common law furnishes him with forms to suit . . . every case that has been brought before a court of justice.").

crucial to the national interest²⁴⁴—either internally (those arising under the Constitution or federal law)²⁴⁵ or internationally (cases involving admiralty, treaties, or foreign ministers)²⁴⁶—that could be answered with finality only by an independent national court²⁴⁷ with special expertise in federal and international law.²⁴⁸

Admittedly, the form of a "case" appropriate for judicial decision often involved a "controversy" between parties. *See, e.g.*, 10 ANNALS OF CONG. 606 (1800) (Marshall). Such a dispute, however, was not a necessary element of a "case." *See supra* notes 166-79 and accompanying text; *infra* notes 249-51 and accompanying text.

244 *See Martin*, 14 U.S. (1 Wheat.) at 334-35 (emphasizing "vital importance of all the cases enumerated in the first class to the national sovereignty" and their effect on "national policy" and "national rights").

245 *See, e.g., Cohens*, 19 U.S. (6 Wheat.) at 391 (identifying purpose of federal question jurisdiction as "the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority").

246 *See generally supra* note 237; *infra* notes 248, 271, 276, 280 and accompanying text.

247 During ratification, Federalists defended federal court independence as imperative to ensure proper determination of cases of national importance, and they protested entrusting final decisionmaking power to state courts. *See, e.g., THE FEDERALIST* No. 81, at 546-47 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (State courts are "improper channels" to decide Article III cases.); *id.* at 544 (Federal judges were insulated from legislative influence lest "the pestilential breath of faction . . . poison the fountains of justice."); *THE FEDERALIST* No. 79, at 531-33 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (same); 2 ELLIOT, *supra* note 109, at 480 (Wilson) (noting "servile dependence of [state] judges"); 4 *id.* at 139-40, 172 (MacLaine) (emphasizing financial dependence of state judges); *id.* at 141-42 (Johnston); 3 *id.* at 553-54 (Marshall); *id.* at 548 (Pendleton).

This theme recurred during debates over the Judiciary Act. *See, e.g., 1 ANNALS OF CONG.* 844 (1789) (Madison) (delegating execution of federal laws to state courts would revive "embarrassments" of Articles of Confederation); *id.* at 831-32 (William Smith) (urging assignment of judicial power to federal rather than state courts because of former's tenure and salary guarantees); *id.* at 853 (Vining) (same). The Act itself ensured Supreme Court review of all state court decisions defeating federal rights arising under the Constitution, laws, and treaties of the United States. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

Early Supreme Court decisions stressed the weakness of state judges. *See, e.g., Cohens*, 19 U.S. (6 Wheat.) at 387 (The Constitution attached such "importance . . . to the independence of judges" that it would not have left "constitutional questions to tribunals where this independence may not exist."); *Martin*, 14 U.S. (1 Wheat.) at 347 (expressing fear that local prejudices would endanger administration of federal law).

Many scholars have emphasized the parity of all federal judges and their structural superiority to state judges. *See, e.g., Amar, Neo-Federalist, supra* note 7, at 221-22, 233-38; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 45-68 (1981). For an opposing view, see Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1643-47 (1990).

248 *See, e.g., 2 FARRAND, supra* note 106, at 73-74 (Ellsworth) (Federal courts "will possess a systematic and accurate knowledge of the Laws The law of Nations also will frequently come into question. Of this the Judges alone will have competent informa-

Such important legal questions could be decided even where the dispute between the parties was trivial or nonexistent.²⁴⁹ For example, the Court decided "Cases" in traditional public law actions brought by informers²⁵⁰ and by petitioners for prerogative writs,²⁵¹ despite the lack of any individualized injury. The judicial focus on legal subject matter becomes clear when each type of Article III "Case" is examined.

(a) *Federal Question*.—Federal question jurisdiction "stood first in the mind of the framers."²⁵² A national judiciary was needed

tion."); *Martin*, 14 U.S. (1 Wheat.) at 335 (pointing out that admiralty and foreign minister cases involved questions arising under "law of nations"). Article III's general language conferred broad "judicial power" in the first tier to decide "all Cases" in categories both specific (Admiralty and Ambassador) and general ("arising under"). See DUPONCEAU, *supra* note 90, at 1-2. Indeed, even Antifederalists recognized the need for federal judicial power over federal question, admiralty, and foreign minister cases. See *Essays of Brutus XIII*, in *ANTI-FEDERALIST*, *supra* note 72, at 2.9.159-160. This explains why Congress entrusted to the federal judiciary final jurisdiction, in original or appellate form, over "all Cases" listed in Article III; any omissions were incidental and posed no threat to realizing the goals of Article III. See Amar, *Neo-Federalist*, *supra* note 7, at 260-65. See also *id.* at 233 ("[T]he 'judicial Power' subsumes the substantive power to decide cases falling in certain defined categories. But the 'judicial Power of the United States' goes beyond mere subject matter jurisdiction; it encompasses the power to speak in the name of the nation, to speak definitively and finally.").

249 See, e.g., Amar, *Two-Tiered*, *supra* note 77, at 1520 (citing Paterson's statement that even a trivial dispute could "involve a Question of Law of great Importance"); Holt, *supra* note 7, at 1515 n.346 (citing Madison's letter describing Senate's refusal "to concur in the limitation on the value of appeals to the Supreme Court, which they say . . . might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount"). Moreover, the Court often decided cases where the "dispute" was the result of collusion. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). The ban on such suits began only with *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850).

250 See, e.g., *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805).

251 See, e.g., *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838); *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829) (allowing writ of prohibition). See generally Winter, *supra* note 24, at 1405.

252 MARSHALL'S DEFENSE, *supra* note 239, at 204. The Convention and Ratification records generally support Marshall's view of the primacy of such jurisdiction. Nonetheless, a contrary inference might be drawn from the Judiciary Act of 1789, which has always been interpreted as not conferring general federal question jurisdiction. This conventional wisdom has been challenged by Professor Engdahl, who has shown that the Act did provide for all cases that could have been contemplated as within such jurisdiction. See David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521 (1989) [hereinafter Engdahl, *Federal Question*]; see also RITZ, *supra* note 77, at 58-60 (The Act does not deny federal question jurisdiction, and it is nearly inconceivable that Congress would have withheld this one basis of jurisdiction that everyone expected federal courts to have.). Most importantly, § 25 of the Act provided for Supreme Court review of any state court judgment deciding a federal question adversely. See Engdahl, *Federal Question*, *supra*, at 529-32. This scheme ensured that the Court would retain final

to adjudicate "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties"—horizontally, to preserve uniformity in federal law,²⁵³ and vertically, to ensure federal supremacy.²⁵⁴ Federal question jurisdiction featured a court's classic expository function—construing a particular legal text (i.e., the Constitution, a statute, or a treaty).

First, constitutional law declaration was critical.²⁵⁵ In *Marbury v. Madison*, Chief Justice Marshall rejected as absurd the assertion "[t]hat a case arising under the constitution should be decided without examining the instrument under which it arises."²⁵⁶ In holding section 13 of the Judiciary Act of 1789 unconstitutional,²⁵⁷ he reasoned that because "written constitutions . . . form[] the fundamental and paramount law,"²⁵⁸ "a legislative act con-

expository authority over federal law. See Amar, *Neo-Federalist*, *supra* note 7, at 259-64. Moreover, the Act gave federal courts original jurisdiction over cases arising under federal patent, revenue, and commercial laws, and over private claims based on federal statutes providing for penalties and forfeitures. See Engdahl, *Federal Question*, *supra*, at 532-34 (citing sources); see also *id.* at 530-32 (describing jurisdiction over federal law claims against government officials through mandamus writs and *habeas corpus* proceedings).

253 See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) ("[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (emphasizing "necessity of uniformity of decisions throughout the whole United States" on federal questions); WILSON'S WORKS, *supra* note 75, at 495-96 (explaining that pyramidal judicial structure with final Supreme Court authority "preserves a uniformity of decision").

254 See THE FEDERALIST No. 80, at 534-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (assigning top priority to cases arising under Constitution and federal laws because of "necessity of uniformity in the interpretation of the national laws" and need for federal supremacy); THE FEDERALIST No. 22, at 143-44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (same).

255 See, e.g., 1 STORY, *supra* note 91, § 387, at 360 ("[T]he judicial department of the United States is . . . the final expositor of the constitution, as to all questions of a judicial nature."); 4 ELLIOT, *supra* note 109, at 156 (Davie) ("Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened.").

256 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). See also *id.* at 179-80 ("[T]he framers of the constitution contemplated that instrument as a rule for the government of courts . . .").

257 The Court first ruled that Secretary of State Madison had violated Marbury's vested legal right to his commission as a justice of the peace, and declared that ordinarily mandamus would have been the appropriate remedy to compel Madison to deliver the commission. *Id.* at 162-73. The Court held, however, that § 13 of the Act, which granted the Supreme Court original jurisdiction to issue writs of mandamus, violated Article III's provision limiting such original jurisdiction to foreign minister cases and interstate controversies. *Id.* at 173-76.

258 *Id.* at 177; see also *id.* (The Constitution is "superior paramount law."); *id.* at 176

trary to the constitution is not law."²⁵⁹ Echoing the Convention delegates,²⁶⁰ Marshall treated judicial review as part of the Court's expository function in deciding a "case" pursuant to a written constitution:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each

*If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.*²⁶¹

Marshall's extensive (and perhaps unnecessary)²⁶² discussion of judicial review as part of the Court's law declaration function in "cases" undercuts the popular notion that he viewed constitutional exposition as incidental to dispute resolution.²⁶³ Indeed, the Court conceded that the matter at issue was "trivial,"²⁶⁴ never

(The Constitution is the "supreme" authority, establishing "principles . . . deemed fundamental.").

259 *Id.* at 177; *see also id.* ("[A]n act of the legislature, repugnant to the constitution is void."); *id.* at 180 (same).

260 *See supra* notes 224-25.

261 *Marbury*, 5 U.S. (1 Cranch) at 177-78 (emphasis added). *See also id.* ("[I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

262 The Court could have avoided constitutional questions by construing § 13 as conferring authority to issue writs of mandamus only when the Court already had jurisdiction. *See* Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 456-59 (1989).

263 *See, e.g.,* Younger v. Harris, 401 U.S. 37, 52 (1971) (citing *Marbury* for proposition that "[t]he power and duty of the judiciary to declare laws unconstitutional is . . . derived from its responsibility for resolving concrete disputes"); Chayes, *Role, supra* note 62, at 1285 (*Marbury* illustrates that constitutional law was "an outgrowth of the judicial duty to decide . . . private disputes."). Professor Spann persuasively challenges the prevailing view. *See* Spann, *supra* note 66, at 589-92.

264 *See Marbury*, 5 U.S. (1 Cranch) at 152 ("This cause may seem trivial at first view . . ."). There was technically a "dispute" in that *Marbury* claimed Madison had violated his right to the commission—a legal "injury" requiring a judicial remedy. *See id.* at 163-66, 171. But because the office of justice of the peace was "a sorry little thing," the claimants "acknowledged that if not for principle, they would hardly be interested in the job." *See* James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 241-42 (1992). In short, the Court viewed its primary function not as resolving the dispute, but rather as declaring important principles of federal law. Nor did Marshall seem concerned with concrete dis-

mentioned the words "dispute" or "controversy," and did not dismiss for lack of an adverse, sharply-presented controversy even though Madison refused to appear.²⁶⁵ Furthermore, *Marbury* involved mandamus, a public law action requiring no dispute.²⁶⁶ In short, *Marbury* illustrates the Court's expository role in constitutional "Cases."²⁶⁷

Another vital function of federal courts was interpreting federal statutes.²⁶⁸ Indeed, the Federalists' axiom that judicial power must be commensurate with that of the political branches²⁶⁹

putes elsewhere. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377 (1821) ("These abstract propositions are to be determined . . .").

265 See O'Fallon, *supra* note 264, at 242-44 (noting that Madison did not appear either personally or through counsel).

266 See *supra* note 172 (discussing English prerogative writ practice). See also Winter, *supra* note 24, at 1416 (arguing that *Marbury* focused on key public rights issue—judicial power to require executive compliance with the law through mandamus—not private rights); O'Fallon, *supra* note 264, at 249 (to similar effect).

267 Professor Engdahl's novel reinterpretation of *Marbury* conflicts with my analysis and conclusion. See Engdahl, *John Marshall*, *supra* note 7. Engdahl contends that Marshall articulated a "Jeffersonian" concept of judicial review, whereby the Supreme Court's independent determination of a constitutional "question" in a particular judicial "case" governed that case alone and bound only the immediate parties—not the coordinate government branches, which had the right to decide any constitutional question (including one already resolved by federal courts) that arose in the course of their work. See *id.* at 279-82, 324-33. Thus, Engdahl challenges the orthodoxy that *Marbury* endorsed the Federalist "judicial supremacy" theory of judicial review, which held that because of the Supreme Court's unique competence in constitutional interpretation, its decisions on constitutional questions were generally authoritative and binding. *Id.*

Although Professor Engdahl's ingenious argument has given me pause, I have nonetheless concluded that Marshall in *Marbury* did not intend simply to resolve a legal question in a way that bound only the parties to the dispute, but rather consciously established general constitutional principles. Furthermore, even assuming Engdahl were correct, he carefully limits his arguments to Marshall's views from around 1800 to 1803. See *id.* at 280, 304-33; see also *id.* at 331 n.171 (conceding that Marshall later may have adopted Federalist "judicial supremacy" position). Engdahl acknowledges that the Federalist conception dominated in the late 1780s and the early 1790s, and he suggests that Marshall during this period shared that view. See *id.* at 282-97 (describing general Federalist position); *id.* at 284 n.10 (citing Marshall's arguments about judicial review during ratification). It is the time closest to the Framing that is most critical in pinpointing the meaning of "Cases" and "Controversies" in Article III.

268 Indeed, jurisdiction over "all cases arising under the Natl. laws" was the only head of jurisdiction specified by the Convention in its resolution given to the Committee of Detail. See 2 FARRAND, *supra* note 106, at 46.

269 See, e.g., 1 *id.* at 147 (Wilson) ("[T]he Judicial, Legislative, and Executive departments ought to be commensurate."); *id.* at 237 n.18 (Wilson's notation appearing opposite Committee of the Whole's resolution on federal jurisdiction) ("N.B. the Judicial should be commensurate to the legislative and executive Authority."); *id.* at 124 (Madison) ("An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."); *Osborn v. Bank of the United States*,

makes no sense unless they viewed federal courts as final expositors of federal law, not mere dispute resolvers.²⁷⁰ Finally, only federal judges had the competence to interpret treaties definitively in light of the law of nations.²⁷¹

(b) *Admiralty/Maritime*.—As admiralty had been one of the few areas of national judicial concern during colonial, revolutionary, and Confederation times,²⁷² Article III's extension of judicial power to "all Cases of admiralty and maritime Jurisdiction" generated virtually no opposition.²⁷³ Federal courts have always con-

22 U.S. (9 Wheat.) 738, 809 (1824) (The aim of the judiciary article in extending jurisdiction over *all* cases was to "make it co-extensive with the power of legislation . . . not to limit and restrain."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) ("[T]he judicial power . . . must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."). See also Amar, *Neo-Federalist*, *supra* note 7, at 231-34, 251-52 (discussing coextensiveness principle). Numerous members of the First Congress endorsed this principle in debates over the Judiciary Act of 1789. See Amar, *Two-Tiered*, *supra* note 77, at 1563-64 (citing sources).

270 Marshall's broad vision of judicial power over statutory federal question cases was illustrated in *Osborn*, which upheld "arising under" jurisdiction where federal law could "form[] an ingredient of the original cause" because federal power to execute contracts might become an issue, even though the case actually involved only state contract law. 22 U.S. (9 Wheat.) at 823. See generally HART & WECHSLER, *supra* note 37, at 983-84 (*Osborn*, while perhaps necessary at the time to vindicate federal authority, should be sharply restricted because it involves federal courts in purely state law questions.).

271 See, e.g., THE FEDERALIST No. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (maintaining that America's international honor demands "uniformity" in judicial interpretation of treaties); WILSON'S WORKS, *supra* note 75, at 166 (emphasizing that treaties must be honored along with rest of law of nations). See also Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809) (Marshall, C.J.) (defining "all cases arising under treaties" to mean those cases growing out of assertion of treaty rights conferred on citizens of two nations); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Wilson, J.) (holding that treaty was supreme law and prevailed over contrary state law).

Indeed, creating federal jurisdiction over treaty cases was a major goal of the Framers. See *supra* note 198; see also 2 ELLIOT, *supra* note 109, at 490 (Wilson) (Treaty jurisdiction "show[s] the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect . . .").

"Cases" arising under treaties, which primarily involved law declaration, must be distinguished from "Controversies" concerning foreign countries or citizens, which covered ordinary state law actions that happened to involve foreigners—for example, British merchants bringing contract actions. See *infra* notes 291-95. Absent such a distinction, treaty jurisdiction (which invariably involves a foreign party) would have been redundant.

272 See *supra* notes 115, 119-20 and accompanying text.

273 See, e.g., 2 FARRAND, *supra* note 106, at 186 (reprinting Committee of Detail's report including plenary admiralty/maritime jurisdiction, which was left unchanged in final judiciary article); THE FEDERALIST No. 80, at 538 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The most bigotted [sic] idolizers of State authority have not . . . shewn [sic] a disposition to deny the national judiciary the cognizance of maritime causes."). Even Antifederalists acknowledged this need and sought to limit inferior court jurisdiction to

strued this broad jurisdictional grant as authority to develop substantive admiralty law.²⁷⁴ A uniform judicial approach²⁷⁵ was especially critical because admiralty was considered a branch of the law of nations²⁷⁶—a subject within the competence of federal rather than state courts.²⁷⁷

(c) *Foreign Minister*.—The Convention unanimously approved judicial power over “all Cases affecting Ambassadors, other public

admiralty. See, e.g., Letter from George Mason to Samuel Griffin (Sept. 8, 1789), in 3 PAPERS OF GEORGE MASON 1170 (Robert A. Rutland ed., 1970); Holt, *supra* note 7, at 1490-91 (citing proposal to Senate modeled on Mason's idea); 1 ANNALS OF CONG. 791-92 (1789); *id.* at 807 (noting defeat of Tucker's motions to limit lower court jurisdiction to admiralty); *id.* at 827-28 (Livermore) (same). See generally Meltzer, *supra* note 69, at 1578 (describing consensus that federal courts must have admiralty jurisdiction).

274 See DAVID CURRIE, FEDERAL COURTS 334, 364 (4th ed. 1990). See also *id.* at 213-14 (citing *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776), as foundation of federal admiralty law). In *DeLovio*, Justice Story declared: “The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to . . . embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.” *Id.* at 443. See also *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (“These cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise.”). See generally HART & WECHSLER, *supra* note 37, at 892 (summarizing scholarship on development of admiralty law).

275 See 3 STORY, *supra* note 91, § 1664, at 532 (stressing need to entrust admiralty cases “to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication”); 3 ELLIOT, *supra* note 109, at 532 (Madison); *id.* at 571 (Randolph). See generally CURRIE, *supra* note 274, at 211-12 (summarizing federal interest in uniform admiralty law).

276 See *Luke v. Lyde*, 97 Eng. Rep. 614, 617 (1759) (Mansfield, L.J.) (“[M]aritime law is not the law of a particular country, but the general law of nations.”); 12 HOLDSWORTH, *supra* note 102, at 626-27 (English law considers admiralty as raising issues of international law.); THE FEDERALIST No. 80, at 538 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[M]aritime causes . . . generally depend upon the laws of nations.”); WILSON'S WORKS, *supra* note 75, at 279 (“Another branch of the law of nations, which has also become peculiarly important by the extension of commerce, is the law maritime.”); 3 STORY, *supra* note 91, § 1664, at 531 (Admiralty cases “raise many questions of international law”); *id.* § 1666 (stressing that admiralty jurisdiction was given to federal courts because it relates to law of nations and affects diplomacy and foreign commerce); HART & WECHSLER, *supra* note 37, at 752, 1076 (Admiralty was considered “a distinct body of law, quasi-international in character,” therefore, it required uniform development by federal courts.).

277 See 1 FARRAND, *supra* note 106, at 124 (Wilson) (“[A]dmiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states.”). The First Congress granted federal courts exclusive jurisdiction in admiralty cases. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. See also DUPONCEAU, *supra* note 90, at 9-12 (claiming that Article III created self-executing federal admiralty jurisdiction).

Ministers and Consuls."²⁷⁸ This jurisdiction was defined by subject matter: Any case "affecting" a foreign minister was covered, regardless of whether that minister was a party,²⁷⁹ because such cases raised issues of international law²⁸⁰ so delicate that their determination could be entrusted only to the Supreme Court.²⁸¹

2. Controversies

Federalists understood that federal jurisdiction over Article III "Controversies" turned solely on the presence of one of six party configurations listed, regardless of the law involved.²⁸² Indeed, such controversies were usually governed by *state* law. For example, section 34 of the Judiciary Act of 1789 provided that "the laws of the several states, except where the constitution, treaties, or stat-

278 See 2 FARRAND, *supra* note 106, at 186 (Committee of Detail); *id.* at 431 (citing Convention's approval of such jurisdiction). See also 2 ELLIOT, *supra* note 109, at 490 (Wilson) (Foreign minister jurisdiction was "proper and unexceptionable.").

279 See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 855 (1824) ("This court can take Cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected."); *cf.* *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826) (ruling that threat of violence against foreign minister was not case "affecting" minister, because only defendant and United States had interest in prosecution and costs of suit). Indeed, unless this jurisdictional grant was inserted because of its important subject matter, it would have been unnecessary since Article III also provided for jurisdiction where foreigners were parties.

280 English law recognized diplomatic immunity based on international law, which was part of the law of England. See, e.g., *Triquet v. Bath*, 97 Eng. Rep. 936, 937-38 (1764) (Mansfield, L.J.); *Heathfield v. Chilton*, 98 Eng. Rep. 50, 50-51 (1767) (Mansfield, L.J.). See also 1 BLACKSTONE, *supra* note 105, at *253 (describing ambassadorial immunity); 4 *id.* at *67 (noting that English law adopted law of nations); 10 HOLDSWORTH, *supra* note 102, at 368-72 (tracing development of diplomatic immunity in international law).

281 See, e.g., 3 STORY, *supra* note 91, § 1652, at 521 (The rights of foreign dignitaries are determined by the "law of nations" and involve delicate questions of diplomacy and peace that would be "unsafe" to submit "to any other, than the highest judicature of the nation."); Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (granting Supreme Court exclusive jurisdiction over all "suits and proceedings" against Ambassadors "not inconsistent with the law of nations").

282 See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821) ("In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States,' 'between a State and citizens of another State,' and 'between a State and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 9 (1799) ("In the second section of the third article, the constitution contemplates the parties to the controversy, as alone raising the question of jurisdiction."); *id.* at 11 (ruling that where federal jurisdiction depends on alienage or parties' citizenship, it must be set forth in record).

utes of the United States shall otherwise require or provide, shall be regarded as rules of decision"²⁸³ This scheme promoted federalism by protecting state power over its law against federal judicial interference.

Thus, the federal courts' primary role in "Controversies" could not have been legal exposition (indeed, its determinations on state law did not bind state courts), but rather was to serve as an independent umpire in resolving a dispute.²⁸⁴ To ensure that the quarrel was substantial enough to warrant federal judicial intervention, "controversy" jurisdiction was restricted. For example, Congress imposed minimum dollar thresholds.²⁸⁵ Likewise, courts cre-

283 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (commonly known as the Rules of Decision Act). Section 34 was not limited by its terms to diversity jurisdiction, but rather seemed to mandate application of state law whenever federal law did not "otherwise require or provide." See REDISH, *supra* note 200, at 121; see also *id.* at 121-22 (arguing that substantive federal common law violates the Act). In certain "Controversies," however, the Act may have permitted recourse to non-state law in appropriate circumstances. See *infra* note 305 (describing application of either federal or state law in interstate controversies, depending on whether a public or private right was at issue); *infra* notes 293-94 (summarizing scholarly debate over whether § 34 always required application of state law in diversity).

284 See, e.g., *Randolph's Report*, *supra* note 77, at 130 (characterizing federal judiciary as "common arbiter" of disputes involving state defendants). As Justice Story explained: "The constitution has presumed . . . 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." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). See also *Cohens*, 19 U.S. (6 Wheat.) at 383-84 (In state-party controversies, "the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided.").

The Constitution's guarantees of independence, which were essential for proper law declaration, also ensured impartiality in deciding "Controversies." Nonetheless, this goal could have been achieved by other means—for example, by authorizing Congress to appoint prominent legal figures (e.g., former Presidents or Cabinet members) for a certain term to resolve controversies, except those in which the jurist had a personal interest. For instance, assuming Madison had served in such capacity in the 1820s, he would have been permitted to resolve a border dispute between Massachusetts and New Hampshire, but not between Virginia and Maryland. Such non-Article III arbitrators could have neutrally resolved the controversies listed; any declaration of (state) law would have been incidental and not binding on state courts anyway.

285 For instance, a \$500 jurisdictional minimum was set for diversity disputes, which could only be prosecuted by or against citizens of the state where the suit was brought and which could be concurrently adjudicated by state courts (with no appeal to the federal judiciary). See Judiciary Act of 1789; ch. 20, §§ 11-12, 1 Stat. 73, 78-80. The lack of an appeal reflects that federal trial courts have the same independence as the Supreme

ated special qualifications (e.g., the requirement of "complete diversity")²⁸⁶ and applied a standing-like analysis to certain "Controversies."²⁸⁷ The limitations placed on all Article III "Controversies" illustrate the secondary importance attached to resolving these disputes.

(a) *United States-Party*.—Jurisdiction over "Controversies to which the United States shall be a Party" clarified that the national government could sue in its own courts in actions governed by state law,²⁸⁸ thereby assuring an independent forum.²⁸⁹ Such jurisdiction was construed narrowly to exclude disputes in which the United States was a party-defendant.²⁹⁰

(b) *Diversity and Alienage*.—Jurisdiction over Controversies "between Citizens of different States" (diversity) and "between a State,

Court and thus can resolve the dispute just as well. *See also Martin*, 14 U.S. (1 Wheat.) at 336 (Congress distinguished between "first class of cases, [wherein] the jurisdiction is not limited except by the subject matter" and the second tier, which was "made materially to depend upon the value in controversy.").

286 *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). No similar limitations were carved into "Cases" jurisdiction until over a century later. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908) (establishing "well-pleaded complaint" rule for federal question jurisdiction).

287 *See Winter*, *supra* note 24, at 1420. Winter cites *Livingston v. Story*, 36 U.S. (11 Pet.) 351, 414 (1837) (Baldwin, J., dissenting) (referring to "plaintiff's standing" in dissenting from dismissal based on plaintiff's failure to plead parties' citizenship to establish diversity jurisdiction), and *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 73-74 (1867), which construed *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), as ruling that an Indian tribe was not a "foreign nation" within the jurisdictional statute and that "therefore, they had no standing in court."

288 *See, e.g.*, Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (giving federal district courts jurisdiction over "suits at common law" [*i.e.*, state law] wherein the United States "shall sue"); *id.* § 11 (granting circuit courts jurisdiction over "all suits of a civil nature at common law or in equity, where . . . the United States are plaintiffs"); RAWLE, *supra* note 87, at 200-04, 254. *See also* 3 STORY, *supra* note 91, § 1668, at 537 (The United States as plaintiff can enforce its rights, powers, and contracts in its sovereign capacity, matters that cannot be left "at the mercy of the states."); 2 ELLIOT, *supra* note 109, at 490 (Wilson) (Any nation "unavoidably must have" power to sue in its own courts.). Many scholars have recognized that this grant enabled the United States to sue in federal court over state law matters. *See, e.g.*, CURRIE, *supra* note 274, at 359; Meltzer, *supra* note 69, at 1583-84 n.49; HART & WECHSLER, *supra* note 37, at 863. Indeed, such jurisdiction could not have been intended to trigger application of federal law, or else jurisdiction in "Cases arising under" federal laws would have been superfluous.

289 *See, e.g.*, THE FEDERALIST No. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals.").

290 *See, e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336 (1816).

or the Citizens thereof, and foreign States, Citizens or Subjects" (alienage) ensured that an impartial federal court—rather than a dependent, possibly biased state court—would resolve disputes involving out-of-state or foreign parties,²⁹¹ particularly creditors.²⁹² In these Controversies, federal courts were to apply state law,²⁹³ with a few possible exceptions.²⁹⁴ The relative unim-

291 See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) ("However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923) (concluding that sole reason for diversity was to provide impartial tribunal for non-citizens and foreigners).

292 2 ELLIOT, *supra* note 109, at 491 (Wilson) ("[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?"); 3 STORY, *supra* note 91, § 1685, at 564 (stressing "the value, in promoting credit, of the belief of there being a prompt, efficient, and impartial administration of justice . . ."); 3 ELLIOT, *supra* note 109, at 533-35 (Madison) (emphasizing that diversity jurisdiction in impartial national tribunal secures commercial transactions against "local prejudices"). Of particular concern was the unfair treatment of foreign (especially British) creditors in state courts. See, e.g., *id.* at 583 (Madison) ("[F]oreigners cannot get justice done them in [American] courts, and this has prevented many wealthy gentlemen from trading or residing among us."). See generally Holt, *supra* note 7, at 1473-75 (summarizing goal of diversity and alienage to protect creditors); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22 (1948).

293 See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (Rules of decision are "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide . . ."); see also 3 ELLIOT, *supra* note 109, at 556-57 (Marshall) (stating that federal courts in diversity must apply only state contract law). Professor Warren's pathbreaking historical study concluded that § 34 required federal courts sitting in diversity to apply state statutory and common law. See Warren, *supra* note 291, at 81-88; see also *id.* at 88-89 n.85 (citing *Brown v. Van Bramer*, 3 U.S. (3 Dall.) 344, 352-56 (1797) (applying Rhode Island law on judgment interest in diversity) and *Sims's Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 456-57 (1799) (applying Pennsylvania real property law in diversity)). The Supreme Court adopted Warren's view in *Erie R.R. v. Tompkins*, 304 U.S. 64, 72-73 (1938), and has followed it ever since.

The Act apparently directed application of state law regardless of whether the controversy involved an American or foreign party, unless a treaty provided otherwise. Thus, an ordinary "controversy" governed by state law that happened to involve a foreigner must be distinguished from a "case" arising under a treaty that would entail application of federal or international law. See, e.g., 3 ELLIOT, *supra* note 109, at 478 (Randolph) ("The British debts, which are withheld contrary to treaty, ought to be paid. Not only the law of nations, but justice and honor, require that they be punctually discharged."). As a practical matter, however, an unjust sentence under state law against a foreigner might implicate international law or treaty rights, so Article III took the safest course by entrusting all actions involving foreigners to the national tribunals. See THE FEDERALIST No. 80, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Act reflected

portance of such jurisdiction is reflected in the Framers' tepid defense of it²⁹⁵ and the many judicial restrictions placed on it.²⁹⁶

the same conservative approach.

294 See, e.g., *supra* note 293 (Controversies involving foreign parties might implicate international law.). Indeed, a few scholars have questioned the Warren/*Erie* historical account. For example, Professor Fletcher acknowledges that § 34 directed federal courts to apply state ("local") law in certain cases (e.g., real property) and federal law where it so required or provided, but he argues that § 34 did not bar application of a third type of law—a "general" common law shared by all the states and developed by both the state and federal courts—where appropriate, particularly in commercial matters. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514-25, 1527-29, 1531-38 (1984). See also Patrick J. Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 86-115 (1993) (Because one aim of diversity jurisdiction was to protect against discriminatory state laws, federal courts had power to substitute substantive rules in general areas like commercial law.). Professor Ritz goes much further. He contends that § 34's phrase "laws of the several states" referred to the states collectively rather than individually and was probably intended to allow federal courts to apply an American (as opposed to English) common law of crimes until Congress had time to enact a criminal code. See RITZ, *supra* note 77, at 10-11, 25, 78-79, 126-48.

This scholarship indicates that, at least in certain diversity controversies (such as those involving commercial transactions), federal courts had some law declaration role. Nonetheless, it still seems that their primary purpose was neutral dispute resolution. See *supra* notes 291-92. For example, in defending diversity and alienage jurisdiction, James Wilson first emphasized that such controversies could be brought in state court (presumably under state law), but gave parties the option of choosing a federal court where necessary to ensure a "just and impartial tribunal." 2 ELLIOT, *supra* note 109, at 491. Next, anticipating § 34's language that state law would not apply where federal law so required or provided, Wilson noted that the new Constitution would prohibit many state debtor relief laws. *Id.* at 491-92. (Presumably, he was referring to the Privileges and Immunities Clause (U.S. CONST. art. IV, § 2, cl. 1) and the Contracts Clause (U.S. CONST. art. I, § 10, cl. 1)). Finally, Wilson implied that federal courts could decline to apply state laws that were unfair but not unconstitutional. 2 ELLIOT, *supra* note 109, at 492.

On balance, the evidence suggests that in diversity controversies federal courts would act principally as neutral dispute resolvers and would apply state law as determined by state courts, but with some discretion to fashion federal rules in commercial matters.

295 See, e.g., 2 ELLIOT, *supra* note 109, at 491 (Wilson) ("This part of the jurisdiction [i.e., diversity and alienage], I presume, will occasion more doubt than any other part . . ."); *id.* at 533 (Madison) ("As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance."); *id.* at 549 (Pendleton) ("[J]urisdiction . . . in disputes between citizens of different states . . . might be left to the state tribunals . . ."); 3 STORY, *supra* note 91, § 1684, at 561 ("[T]he necessity of this power may not stand upon grounds quite as strong" as other bases of jurisdiction.).

Furthermore, the provision allowing foreign states to be parties in "Controversies" was construed narrowly as allowing them to sue in federal court, but not to be sued as defendants absent their consent. See, e.g., 3 ELLIOT, *supra* note 109, at 533 (Madison); *id.* at 557 (Marshall); 3 STORY, *supra* note 91, § 1693, at 570.

296 For limitations on diversity, see *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (holding that diversity of citizenship must be "complete"); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809) (A bank corporation chartered by

(c) *State and Citizens of Another State*.—This jurisdictional grant appeared to be an afterthought²⁹⁷ and was inserted to protect states from bias by courts of other states.²⁹⁸ Such "Controversies"

Congress was not a "citizen" entitled to sue in diversity.); *Shedden v. Custis*, 21 F. Cas. 1218 (C.C.D. Va. 1793) (No. 12,736) (Jay, C.J.) (The Court lacked jurisdiction "on account of the disability of the person" because plaintiff failed to plead that he was a citizen of a different state.). For restrictions on alienage jurisdiction, see *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809) (ruling that alienage provision does not include jurisdiction based solely on foreign status of one party); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) ("Neither the constitution, nor the act of congress, regard, on this point [i.e., alienage jurisdiction], the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction. There is here no such description . . ."; therefore, the Court dismissed for lack of jurisdiction.).

These judicial restrictions on diversity and alienage jurisdiction, coupled with the Federalists' weak defense of it during Ratification, undercut Professor Holt's argument that contemporary figures considered these two heads of jurisdiction to be the most important. See Holt, *supra* note 7, at 1425-26, 1458. Although Holt's exhaustive research establishes that diversity and alienage were more significant in 1789 than they are today, it does not necessarily follow that the Framers regarded such jurisdiction as more critical than all the other types listed in Article III. As a textual matter, the judiciary article places diversity and alienage at the end of its jurisdictional catalogue, and it extends jurisdiction only to some of these "Controversies"—as opposed to "all" federal question, admiralty, and foreign minister "Cases." Furthermore, the Convention records do not indicate the primacy of these two grants. For example, diversity jurisdiction was mentioned in Randolph's Plan alone, and only incompletely, see 1 FARRAND, *supra* note 106, at 22, and neither diversity nor alienage were major topics of debate, except insofar as they related to the more general discussion of state court bias. Moreover, Congress contemplated deleting such jurisdiction by constitutional amendment. See Warren, *supra* note 291, at 119-20. Finally, none of the major early Supreme Court jurisdictional decisions—*Chisholm*, *Marbury*, *Cohens*, *Martin*, or *Osborn*—dealt with diversity or alienage, and the Court nowhere else indicated that they were of special importance.

Admittedly, a contrary conclusion might be drawn from the Judiciary Act of 1789, which seemingly vested federal courts with general diversity jurisdiction but not plenary federal question jurisdiction. See Holt, *supra* note 7, at 1423. Recent scholarship, however, suggests that the statute did in fact confer the latter jurisdiction. See Engdahl, *Federal Question*, *supra* note 252. Moreover, as described above, the Act placed pecuniary limits on diversity and alienage controversies, but not on federal question "Cases," thereby suggesting the lesser importance of the former. In any event, as Professor Holt concedes (indeed, emphasizes), the Act did not faithfully track Article III's language, so it may not have accurately reflected the Framers' design. See generally *supra* note 77 (citing Holt and other sources).

Finally, my thesis ultimately does not depend on the relative importance of the individual bases of jurisdiction in Article III. Rather, it rests on the premise that the primary federal judicial function in "Cases" was different from that in "Controversies."

297 No Convention plan mentioned this jurisdiction. Randolph referred to "cases in which . . . citizens of other States applying to such jurisdictions may be interested." See 1 FARRAND, *supra* note 106, at 22. That provision, however, did not include suits brought by states as plaintiffs. This category was first mentioned in the Randolph/Rutledge draft in the Committee of Detail. See 2 *id.* at 147.

298 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793) (Jay, C.J.).

required neutral dispute resolution,²⁹⁹ not federal law exposition, because they primarily involved state law issues. For example, *Chisholm v. Georgia*³⁰⁰ upheld federal jurisdiction over a state contract law suit by South Carolina citizens against Georgia on the ground that Article III applied to the controversy because it was "between a State and Citizens of another State."³⁰¹ Although the Eleventh Amendment overruled *Chisholm* by barring such suits where states were defendants (yet another limitation on "Controversies" jurisdiction),³⁰² it left unchanged the federal courts' key role as neutral umpires in claims brought by states.

299 See, e.g., 2 ELLIOT, *supra* note 109, at 491 (Wilson) ("Impartiality is the leading feature in this Constitution When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."); 3 STORY, *supra* note 91, § 1690, at 567 (Neutrality explains "designating the federal courts, as the proper tribunals for the determination of controversies between different states and their citizens.").

300 2 U.S. (2 Dall.) 419 (1793).

301 *Id.* at 466 (Wilson, J.) (ruling that jurisdiction rested on "explicit declaration of the Constitution"); see also *id.* at 466-67 (Cushing, J.); *id.* at 450 (Blair, J.). See also 3 ELLIOT, *supra* note 109, at 573 (Randolph) (same).

302 The Eleventh Amendment provides, in pertinent part, that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State" U.S. CONST. amend. XI.

Professor Amar's reading of *Chisholm* and the Eleventh Amendment reinforces my theme that "Controversies" principally involved state law matters. Amar argues that the key issue in *Chisholm* was not Georgia's amenability to suit in a jurisdictional sense, but rather the substantive law applicable in a controversy "between a State and Citizens of another State" that arose entirely under state contract law. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1467-73 (1987). According to Amar, the *Chisholm* majority held that the jurisdictional grant over state-citizen controversies implied the power to develop a federal common law of contracts, and the Court fashioned a rule of assumpsit liability against states. *Id.* at 1469-71. In contrast, Justice Iredell's dissent reflected his conviction that the Court should have applied Georgia's substantive common law, which included state immunity from contract actions. *Id.* at 1471-73.

Amar further contends that the Eleventh Amendment simply eliminated from Article III's jurisdictional menu "Controversies" between non-citizen (and foreign) plaintiffs and state defendants; the presence of such a party alignment, however, would not deprive a federal court of jurisdiction based on an independent Article III grant (e.g., federal question jurisdiction). *Id.* at 1474-75. Perhaps the most direct support for Amar's view is Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383-84, 406 (1821). Nonetheless, the Court in *Hans v. Louisiana*, 134 U.S. 1 (1890) and its progeny has interpreted the Eleventh Amendment as establishing absolute state sovereign immunity in federal courts, a position that has become increasingly indefensible as a textual and historical matter. See, e.g., Amar, *supra*, at 1473-81 (criticizing *Hans* line of cases); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1262 and nn.7-9 (1989) (citing voluminous recent scholarship rejecting traditional view of Eleventh Amendment). Professor Fletcher succinctly summarizes the current debate over the Eleventh Amendment, which I do not purport to enter here.

(d) *State v. State and Land Grant*.—Controversies “between two or more States” and “between Citizens of the same State claiming Lands under Grants of different States” involved little significant judicial exposition, as evidenced by the Framers’ near-decision to entrust these two jurisdictional areas to legislative resolution.³⁰³ Jurisdiction was eventually vested in federal courts because their independence ensured the most neutral arbitration.³⁰⁴ Both jurisdictional grants apparently contemplated that federal courts would apply state law to some disputes and federal law to others.³⁰⁵

In sum, jurisdiction over “Controversies” potentially existed whenever the parties fit one of the six configurations listed in Article III. Nonetheless, such jurisdiction was restricted by every conceivable means—statute, judicial interpretation, and constitutional amendment—thereby suggesting its secondary importance. Federal courts also served a less significant function in “Controversies” as impartial umpires, with a very limited (and often nonexistent) role as expositors of federal law.

303 See *supra* notes 232-34 and accompanying text.

304 See *supra* note 235 and accompanying text. Land grant jurisdiction was “intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed, that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign.” *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 322 (1815); see also 3 STORRY, *supra* note 91, § 1690, at 567-68 (same). Inclusion of interstate controversies ensured that “the decision will be impartially made according to the principles of justice, and all the usual and most effectual precautions are taken to secure this impartiality, by confiding it to the highest judicial tribunal.” See *id.* § 1675, at 545 (citing THE FEDERALIST No. 39 (James Madison)); cf. *United States v. Texas*, 143 U.S. 621, 639 (1892) (“At the time of the adoption of the Constitution, there existed . . . controversies between eleven States . . . [This situation resulted in] [t]he necessity for the creation of some tribunal for the settlement of these and like controversies that might arise . . .”).

305 See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737 (1838) (Federal courts have the power to act according to “national or municipal jurisprudence” in interstate and land grant controversies.). Interstate controversies often involve private law issues governed by state contract, tort, and estate law. See, e.g., HART & WECHSLER, *supra* note 37, at 318. Nonetheless, in public law actions (e.g., water law under interstate compacts), federal courts have developed federal common law out of state common law, federal law, and international law. See *id.* at 318-22, 884.

Professor Pfander argues that the Supreme Court’s original jurisdiction includes all federal question “Cases” to which a state is a party. Pfander, *supra* note 69; see also *infra* note 334 (examining this thesis in detail). If so, then an interstate dispute involving a federal question is really an Article III “Case” in which federal judicial exposition is unexceptionable.

*E. What "Cases" and "Controversies" Did Not Mean:
The Federalist Approach to "Justiciability"*

The foregoing analysis of eighteenth and nineteenth century sources reveals that "case" and "controversy" had different meanings related to judicial functions. Interestingly, no contemporary American legal figure ever suggested that Article III's reference to "Cases" and "Controversies" was intended as a constitutional limitation on federal jurisdiction. Most importantly, the early Supreme Court never interpreted Article III's language that way in its discussions of "justiciability" concepts.

Although the Court broadly construed its "judicial Power" to declare and enforce national law in "all Cases,"³⁰⁶ it recognized that certain legal questions were inappropriate for judicial resolution. This determination was not, however, a threshold Article III jurisdictional inquiry dictated by the words "Cases" and "Controversies." Rather, the Court could decline to exercise jurisdiction it admittedly possessed if, after examining the merits, it concluded that rendering a decision would not be a proper exercise of "judicial" power in a system of separated powers because doing so would encroach upon the constitutional rights and duties of the legislative and/or executive branches. This prudential balancing of competing constitutional considerations characterized the Court's treatment of political questions and advisory opinions, the two original justiciability doctrines.

The bar against deciding political questions, first articulated in *Marbury v. Madison*,³⁰⁷ has always rested squarely on separation of

306 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."); MARSHALL'S DEFENSE, *supra* note 239, at 210 ("On a judicial question, then, the judicial department is the government, and can alone exercise the judicial power of the United States.").

307 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions in their nature political . . . can never be made in this court."). Chief Justice Marshall acknowledged that the Court could not investigate the President's exercise of political powers committed to his sole discretion by the Constitution. *Id.*; see also *id.* at 165-66. While Marshall recognized the "difficulty" in distinguishing such political questions from judicially examinable matters involving ministerial executive functions, he asserted that a judicial remedy was always available to a person whose rights had been violated by an executive official's refusal to perform a duty directed by the legislature. *Id.* at 164-65.

Although full analysis of the vision of separation of powers held by Marshall and other Federalists would be impossible here, a few basic points are helpful. The Constitutional Convention shifted the introduction in Article III, sections 1 and 2 from "the Juris-

powers.³⁰⁸ Of greater immediate significance, however, are the Jay Court's "advisory opinion" decisions, which Justice Frankfurter seized upon as the primary historical basis for the constitutional "case or controversy" requirement.³⁰⁹ Contrary to current understanding, the early Supreme Court never decisively rejected the prevailing eighteenth century view that "Cases" included advisory opinions—i.e., answers to legal questions submitted to the Court by the government in a non-adversarial setting.³¹⁰ Rather, the Jus-

dition of the Supreme Court" to "the Judicial Power of the United States." 2 FARRAND, *supra* note 106, at 425. This change meant that, like the "Legislative Power" (U.S. CONST. art. 1, § 1) and the "Executive Power" (*id.* art. 2, § 1), the "judicial Power" came directly from the Constitution and was commensurate with political branch power. In Hamilton's classic description, the legislature "prescribes the rules by which the duties and rights of every citizen are to be regulated;" the president is "the sword of the community;" while the judiciary "from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them The judiciary . . . has no influence over either the sword or the purse . . . and can take no active resolution whatever . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." See THE FEDERALIST No. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also THE FEDERALIST No. 51 (James Madison) (restricting each branch to area of functional specialization prevents any department from amassing excessive power). The Framers envisioned a law declaring role for federal courts, but warned against a potentially "oppressive" judiciary exercising legislative and executive functions. See, e.g., THE FEDERALIST No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961).

As total separation was impossible, however, the Framers' goal was to give each branch the constitutional independence, tools, and motives to prevent encroachments. See, e.g., THE FEDERALIST Nos. 36, 46 (James Madison), No. 50 (James Madison or Alexander Hamilton). The constitutional system of checks and balances presupposed certain sharing of functions and depicted federal courts as mediators between the people and the political branches. See generally Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 681-706 (1978).

308 See, e.g., *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). Although *Baker* greatly expanded *Marbury's* political question doctrine, it retained the idea that political questions were not a threshold jurisdictional barrier, but rather a basis for federal courts to decline to exercise jurisdiction they otherwise had if they determined that a legal issue should be resolved by the political branches. Cf. HART & WECHSLER, *supra* note 37, at 293-94 (arguing that political question doctrine gives Court discretion to avoid issues within its jurisdiction).

Unfortunately, the "Cases" and "Controversies" language has gradually crept in, thereby clouding analysis. See, e.g., *Department of Commerce v. Montana*, 112 S. Ct. 1415, 1424-26 (1992). Since 1962, the Court has shown a greater inclination to resolve seemingly "political" questions if necessary to fulfill its role as the ultimate constitutional interpreter. See, e.g., *id.* at 1425 (holding that federal statute apportioning congressional representatives is not a "political question"); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *United States v. Nixon*, 418 U.S. 683 (1974).

309 See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 541-46.

310 See *supra* notes 176-78 and accompanying text.

tices merely clarified that a "judicial" opinion in a "case" had to be both final (i.e., non-reviewable by the political branches) and public.

The finality requirement was established in *Hayburn's Case*,³¹¹ which involved an Act of Congress that required federal circuit court judges to serve as commissioners in determining veterans' pension applications and permitted the Secretary of War and Congress to revise such decisions.³¹² Five Justices, sitting on three different circuit courts, informed President Washington³¹³ that the statute offended separation of powers³¹⁴ by subjecting federal court decisions to political branch revision, thereby violating Article III's limitation that such courts must independently exercise "judicial" power—the essence of which was the authority to render final judgments.³¹⁵ Nonetheless, two circuit courts suggested that they could act as "commissioners" rather than "judges."³¹⁶ Howev-

311 2 U.S. (2 Dall.) 409 (1792).

312 See Act of March 23, 1792, ch. 11, 1 Stat. 243. By passing this statute, Congress and President Washington manifested their understanding that federal courts could constitutionally serve in such an advisory capacity. See RITZ, *supra* note 77, at 90-91.

313 The judges' letters to Washington were reprinted in footnote (a) to the Court's opinion. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.(a).

314 All three opinions were based explicitly on separation of powers. The United States Circuit Court for the District of New York, consisting of Chief Justice Jay, Justice Cushing, and District Judge Duane, began its opinion by emphasizing "[t]hat by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.(a). Similarly, the Circuit Court for the District of North Carolina, composed of Justice Iredell and District Judge Sitgreaves, initially observed "[t]hat the legislative, executive and judicial departments are each formed in a separate and independent manner; and that the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority." *Id.* at 412 n.(a). Finally, the Pennsylvania circuit court, consisting of Justices Wilson and Blair and District Judge Peters, stressed that "the judicial should be distinct from, and independent of, the legislative department." *Id.* at 411 n.(a).

315 The Pennsylvania circuit court, emphasizing that Article III granted only "judicial power" and vested that power solely in federal "courts," concluded that the statute unconstitutionally required non-judicial activities; the court rejected political branch "revision and control" of its judgments as "radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411 n.(a). Likewise, the North Carolina circuit court found that the act was contrary to Article III's grant of "judicial power" because "the decision of the court [was] not made final." *Id.* at 412-13 n.(a). See also *id.* at 410 n.(a) (opinion of New York circuit court) (The Act assigns courts non-judicial duties because it subjects their decisions to political branch revision.).

316 Justice Iredell expressed "some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us," but was willing to make "an exception to the general rule" because of possible hardship to veterans. *Id.* at 414 n.(a) (emphasis added); see also *id.* at 410 n.(a) (opinion of New York circuit court) (to

er, the Pennsylvania circuit court, which included Justice James Wilson, refused to proceed as either judges or commissioners on the pension application of Hayburn, a veteran.³¹⁷

Attorney General Randolph thereupon petitioned the Supreme Court to issue a writ of mandamus directing the Pennsylvania court to act.³¹⁸ Mandamus was denied because the Court deadlocked three to three on the narrow procedural issue of whether, as Randolph asserted, he had the right to file the petition *ex officio* (i.e., in his capacity as Attorney General) without the President's specific approval.³¹⁹ If Washington had given Randolph such express authorization, the Court apparently would have allowed Randolph to go forward, even though he had no personal interest in the case, either as an individual or as a representative of the United States (which was not a party).³²⁰ Instead of seeking such approval, however, Randolph immediately changed his approach and asserted he was proceeding on behalf of Hayburn.³²¹ Rather than dismissing Randolph's action as nonjusticiable,³²² however, the Court considered "the merits of the case," then held it "under advisement, until the next term."³²³ The Court never issued a decision because Congress swiftly passed a new veterans' pension act that did not require federal court determinations.³²⁴

In short, the Court indicated that an Article III "Case" could include a legal question raised by the Attorney General on behalf of either the government (with presidential approval) or a third

similar effect). Such willingness to serve as commissioners demonstrated a broad conception of the possible functions that judges could perform. That these two circuit courts wrote opinion letters before receiving any veterans' petitions also shows a flexible view of appropriate contexts for rendering opinions. See Marcus & Teir, *supra* note 309, at 534. But see Engdahl, *John Marshall*, *supra* note 7, at 288 n.18 (noting that Supreme Court, in unpublished 1794 decisions, reversed judgments of circuit courts sitting as commissioners).

317 See Marcus & Teir, *supra* note 309, at 533.

318 Hayburn's Case, 2 U.S. (2 Dall.) at 409.

319 See *id.* Based on their examination of voluminous (and often overlooked) historical evidence, Marcus and Teir have argued persuasively that this was the sole issue actually decided. See Marcus & Teir, *supra* note 309, at 534-39.

320 *Id.* at 540; see also *id.* at 544 (The Court "seemed willing to hear cases in which there were not two well-defined adverse parties, so long as the President wanted the Court to decide an issue.").

321 Hayburn's Case, 2 U.S. (2 Dall.) at 409.

322 See Winter, *supra* note 24, at 1400-01.

323 Hayburn's Case, 2 U.S. (2 Dall.) at 409.

324 *Id.* at 409-10. See Act of Feb. 28, 1793, ch. 17, 1 Stat. 324. See generally Marcus & Teir, *supra* note 309, at 539.

party (Hayburn), despite Randolph's lack of an individualized injury and the absence of a dispute between adverse parties. Randolph's remarkably flexible understanding of what constituted a "case" is especially critical because he was a key draftsman of Article III.³²⁵ Properly understood, *Hayburn's Case* contradicts rather than supports the modern Supreme Court's "case or controversy" requirement.³²⁶

Equally misguided is the frequent citation of *Hayburn's Case* as banning advisory opinions, because all the Justices rendered such opinions in their purest form—advice on a legal issue (the constitutionality of a federal statute) in private letters to the President.³²⁷ Nonetheless, this early practice³²⁸ was soon abandoned. In 1793, the Court decided against privately advising the President on legal questions related to a treaty because of the

lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.³²⁹

In other words, under the Constitution's allocation of governmental power, the Court could not issue a decision on legal questions "*extra-judicially*" (i.e., in the form of a private opinion letter to the President);³³⁰ only the executive branch "heads of departments" could give such private advice. The Court was limited to "judicial" determinations on legal issues: The expository function could be

325 See *supra* notes 191 and 202-03 and accompanying text.

326 See Marcus & Teir, *supra* note 309, at 539-46 (discussing Court's reliance on *Hayburn's Case* as historical support for justiciability).

327 See *id.* at 534.

328 The Court apparently had written such opinion letters before. See HART & WECHSLER, *supra* note 37, at 69 (In 1790, Chief Justice Jay and other Justices advised Washington in writing that the statute requiring the Justices to ride circuit was unconstitutional, although it is unknown if this letter was ever sent.).

329 Letter from Chief Justice Jay and Associate Justices to President Washington (August 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., 1890-93). My analysis of this Letter reflects the keen insights of Akhil Amar.

330 Cf. Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 158 (The Justices' Letter reflects their attempt "to deemphasize the obligatory extrajudicial service concept, so widely held in the early period.").

exercised solely in a public judicial proceeding, culminating in a published opinion.³³¹ The Court nowhere indicated any constitutional problem with traditional advisory opinions—judicial declarations made in open court on legal questions submitted by the government even though no private bilateral dispute existed.³³²

In sum, neither *Hayburn's Case* nor the "Letter from the Justices" established a ban on advisory opinions. The limitations on federal judicial power identified in the early advisory opinion and political question decisions rested explicitly on separation of powers grounds, not on any notion that Article III's "Cases" and "Controversies" language imposed a jurisdictional barrier.³³³

331 In the words of Francis Bacon: "[L]et the judges give the reasons of their decision, and that openly and in full court; so that what is free in point of power may yet be restrained by regard to character and reputation." BACON, *supra* note 140, at 95. See also 12 HOLDSWORTH, *supra* note 102, at 250 (requiring judges to state reasons for decisions publicly ensures judicial honesty).

332 See *supra* notes 176-78 and accompanying text. This interpretation is strengthened by the fact that in *Hayburn's Case*, "not one of the justices doubted the executive branch's power to bring before the Court a question of concern to the government." See Marcus & Teir, *supra* note 309, at 545 n.114. Therefore, the questions about the treaty provisions might have been decided if Washington had docketed the case in the Supreme Court. Such a filing might have made the matter a "case," especially if accompanied by notice to interested parties and opportunities for competing legal arguments to be made. Alternatively, however, the Justices' reference to "our being judges of a court in the last resort" might be construed as an attempt to strengthen the expository function by prohibiting federal courts from interpreting a law or treaty that might later come before them. Indeed, this is precisely why the Convention (whose delegates included most of the original Justices) had rejected a proposed Council of Revision. See *supra* notes 221-23 and accompanying text.

333 The longevity of the Court's traditional approach is illustrated by two aspects of Justice Brandeis' jurisprudence. First, he endorsed John Marshall's definition of "case" as a legal question presented in proper form. See, e.g., *Tutun v. United States*, 270 U.S. 568, 577 (1926). See generally Winter, *supra* note 24, at 1395 (citing Supreme Court cases to similar effect from 1887, 1911, and 1923). See also *supra* notes 134-35 and accompanying text. Second, Brandeis characterized justiciability as a matter of judicial prudence in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-48 (1936) (Brandeis, J., concurring).

The Court historically viewed its primary function in "Cases" as exposition of federal law, and it often adjudicated cases involving no individualized dispute. For example, from the beginning Congress has enacted many "informer" statutes, which the Court has routinely upheld without mentioning any jurisdictional problem. See Winter, *supra* note 24, at 1407-09. Similarly, citizens who had suffered no private injury could enforce public duties through mandamus. See *id.* at 1404-05.

III. THE CASE/CONTROVERSY DISTINCTION AND THE DUAL FUNCTIONS OF FEDERAL COURTS: A BIFURCATED APPROACH TO JUSTICIABILITY

Although the case/controversy distinction has many possible implications for federal jurisdiction,³³⁴ the most important is that

334 For example, the case/controversy distinction may affect pendent jurisdiction and abstention. I hope to analyze such issues in future essays.

Nonetheless, I feel obligated to address here certain ramifications of the distinction for the Supreme Court's jurisdiction. Article III, section 2, clause 2 (the so-called "distribution" clause) provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a 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.

At first glance, this provision appears to reflect a careless omission of any mention of the "Controversies" listed in section 2, clause 1 (the jurisdictional catalogue). See Redish, *supra* note 247, at 1640 n.28. Assuming such linguistic imprecision exists, the meaning of clause 1 would have to be determined by analyzing its language and structure (especially its specific and repeated distinction between "Cases" and "Controversies"), which cannot be ignored because of an inconsistent cross-reference in the distribution clause. Closer analysis, however, reveals that the two provisions may be reconciled.

Under a strict application of my theory, the first sentence of the distribution clause would mean that the Supreme Court has original jurisdiction over foreign minister "Cases" and "those [Controversies] in which a State shall be a party." Indeed, that is precisely how many Federalists, the first Congress, the early Court, and nearly all succeeding jurists and scholars have interpreted the original jurisdiction clause, limiting its scope to those state-party "Controversies" listed in the previous jurisdictional menu. See, e.g., 3 ELLIOT, *supra* note 109, at 549 (Pendleton) (The Supreme Court is vested with jurisdiction over "controversies to which a state shall be a party."); Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (providing that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party," with certain exceptions); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (Marshall, C.J.); HART & WECHSLER, *supra* note 37, at 303-04 (describing orthodox view).

This traditional construction, however, appears to conflict with the most natural grammatical reading of the clause, which is that "those" refers to the antecedent noun "Cases." This linguistic puzzle is neatly explained by Professor Pfander, who argues that the Framers used the word "Cases" deliberately to encompass those matters so designated in the jurisdictional menu—federal question and admiralty "Cases." See Pfander, *supra* note 69, ch. V. This textual argument supports Pfander's theme that the Framers intended to confer on the Supreme Court original jurisdiction over all federal question and admiralty "Cases" in which a state was a party-defendant to assure state compliance with federal law. Pfander also contends that the original jurisdiction clause included clause 1 "Controversies" in which a state was a party. He maintains that "Cases" was used as shorthand for both "Cases" and "Controversies" because the word "Cases" was more inclusive than "Controversies," which was limited to civil matters. See *id.* ch. V.B.1.; see generally *supra* note 69 and accompanying text. Another possible explanation for the broader meaning of "Cases" is that, in the 18th century, both "Cases" and "Controversies" were brought originally in a "cause of action," a phrase sometimes shortened to "cause" or

it suggests the need for a fresh, two-tiered approach to justiciability.³³⁵ The phrase "Cases and Controversies" provides little constitutional support for the justiciability doctrines as currently formulated. The Court's basic problem lies in applying these doctrines—and their underlying dispute resolution model of adjudication—exclusively to "Cases" (especially those arising under the Constitution),³³⁶ which primarily involve federal law declaration. Conversely, justiciability doctrines are not used where they would make the most sense: to limit the "Controversies" (i.e., disputes) federal courts must resolve.

Therefore, as to Article III "Cases," the law of standing, ripeness, and mootness must be radically reoriented to account for the federal judiciary's expository function. It does not necessarily follow, however, that justiciability and dispute resolution must be rejected wholesale as inappropriate for federal judges, as many critics have urged.³³⁷ Rather, federal courts may legitimately apply justiciability and related concepts to "Controversies."

A. "*Controversies*," *Justiciability*, and *Other Limitations*

Article III's extension of judicial power to "Controversies" provides two textual bases for employing justiciability and other restrictive rules. First, because "Controversies" are disputes, federal courts may appropriately apply to them the justiciability doctrines, which focus on the existence of a live, concrete dispute requiring judicial resolution.³³⁸ Moreover, as "Controversies" jurisdiction is based solely on party status, courts can insist that the parties be truly adverse—a key concern of justiciability.³³⁹ Second, Article III extends judicial power to "*all Cases*" but not all "*Controversies*."

"case." See *supra* notes 134, 183, and 241.

As to the appellate jurisdiction clause, Professor Redish has argued that its reference to "all other *Cases* before mentioned" is careless in light of the jurisdictional catalogue's reference to both "*Cases*" and "*Controversies*." See Redish, *supra* note 247, at 1640 n.28. Again, another plausible explanation is that "*Cases*" was a broader term than "*Controversies*," either because of the civil/criminal distinction or because a matter on appeal was always called a "case." See *supra* notes 134 and 241.

335 In this Part, my modest purpose is to sketch in broad outline a bifurcated approach to justiciability. I am fully aware that many of the ideas presented conflict with much current Supreme Court doctrine and legal scholarship, which would require thousands of pages to summarize and analyze completely.

336 See *supra* Part I.A.1.(b).

337 See *supra* note 68 and accompanying text.

338 See *supra* notes 3, 29-31, 36-53 and accompanying text.

339 See *id.* Such concerns also underlie the ban on collusive suits. See *supra* note 249.

The Framers' omission of the word "all" to modify "Controversies" can be read as giving federal judges discretion as to which "Controversies" they will decide.³⁴⁰

Exercise of such discretion must be guided by the recognition that "Controversies" fundamentally involve umpiring. Justiciability standards are merely a starting point to determine whether *any* tribunal should intervene: If a court ascertains that there is no live dispute between genuinely adverse parties, the matter should be dismissed.³⁴¹ Even if a real controversy does exist, however, it may not absolutely require resolution by an Article III court. Rather, a federal judge might conclude that another decisionmaker would provide the requisite neutrality, at least in the first instance³⁴²—for example, a federal magistrate or a court-appointed arbitrator.³⁴³

Indeed, for certain "Controversies" that initial alternative forum might even be a state court,³⁴⁴ if the federal court deter-

340 The omission of "all" may also mean that Congress has discretion as to which "Controversies" it will assign to federal jurisdiction. See generally Amar, *Neo-Federalist*, *supra* note 7. But while such assignment would appear to compel federal adjudication of any controversy that falls within the specified statutory/Article III party configurations, the Court has always felt free to decline to exercise fully its jurisdiction over "Controversies" (e.g., through the requirement of complete diversity). See *supra* Part II.D.2.

341 Although I am not familiar with any Supreme Court decisions that address the applicability of justiciability to "Controversies," I assume that lower federal courts sometimes dismiss such disputes (e.g., those based on diversity jurisdiction) on justiciability grounds. See *supra* note 6.

342 Such initial deferral, with federal court retention of jurisdiction to review the decision and grant a trial de novo in appropriate circumstances, would minimize constitutional problems related to a party's right to an Article III tribunal. Admittedly, few judges would be bold enough to order such deferral as a matter of inherent discretion over "Controversies." See *supra* note 340 and accompanying text (noting that Article III does not extend to "all" Controversies). Therefore, such a scheme would almost certainly require Congressional authorization. See *infra* note 343 (describing legislative movement in this direction).

343 Although this suggestion may appear radical, the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 1988 U.S.C.A.N. (102 Stat.) 4642 (codified as amended in scattered sections of 28 U.S.C.), permits mandatory court-annexed arbitration of many claims. While the arbitrator's decision is non-binding, a court may make it final and non-appealable (or impose other sanctions) against a party who fails to participate in good faith. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2182-83 (1993) (describing various local court rules). Furthermore, a trial de novo must be requested within 30 days of the arbitration decision or it becomes the final, non-appealable judgment of the court. *Id.* at 2183-85 (citations omitted). Finally, requests for trial are discouraged by the requirement of posting a bond, which is forfeited if the requesting party fails to improve his position at trial. *Id.* at 2183-84 (citations omitted).

344 Again, I realize that a federal judge would be unlikely to refer a "Controversy" to a state court where Congress has given plaintiffs the right to choose a federal forum.

mines that such deferral would be warranted after evaluating three factors: the strength of the federal interest; the probable bias of the state tribunal; and the number of such "Controversies" on the docket. The first factor provided the rationale in *Ohio v. Wyandotte Chemical Corporation*,³⁴⁵ which involved a controversy "between a State and Citizens of another State." The Court held that, although it had jurisdiction over Ohio's tort law suit against out-of-state citizens, it would decline to exercise this jurisdiction:

[T]he evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising . . . jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.³⁴⁶

In no "Controversy" is the federal interest more attenuated than diversity,³⁴⁷ wherein federal courts act as arbitrators whose decisions bind only the immediate parties and whose exposition of state law has no precedential effect.³⁴⁸ The weakness of the fed-

Thus, statutory reform would be the preferable course. See *supra* note 342. But the conclusion that federal courts lack any discretion to decline to exercise jurisdiction over "Controversies" cannot be squared with *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971), discussed *infra* notes 345-46 and accompanying text.

345 401 U.S. 493 (1971).

346 *Id.* at 497-98. Similar logic supports many modern proposals to redistribute federal jurisdiction by "increas[ing] the capacity of the federal judicial system for definitive adjudication of issues of national law." See HART & WECHSLER, *supra* note 37, at 43-44; see also REDISH, *supra* note 200, at 3 (It is "appropriate to provide federal courts the primary responsibility for adjudicating federal law, and leave as the primary function of state courts the defining and expounding of state policies and principles."); Bandes, *supra* note 66, at 281-82, 297 (to similar effect).

347 Although full consideration of diversity jurisdiction and the impact of *Erie* would exceed the scope of this Article, *Erie* is consistent with my overall thesis: In diversity "Controversies" raising only state law questions, federal courts should yield to state courts as the primary law declarers. See Amar, *Law Story*, *supra* note 33, at 717-18 (citing unpublished manuscript of this Article). But see *supra* note 294 (challenging orthodox view that federal courts must always apply state law in diversity).

348 See, e.g., Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 104; Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945); Richardson v. Commissioner, 126 F.2d 562, 567 (2nd Cir. 1942) (A federal court in diversity is a "ventriloquist's dummy to the

eral stake in diversity jurisdiction supports drastically curtailing it, as do the "bias" and "numerosity" factors. First, as the danger of state court prejudice is far less today than it was in 1789,³⁴⁹ federal judges may justifiably limit diversity jurisdiction to parties who can show actual bias by the state tribunal.³⁵⁰ Second, diversity comprises a quarter of the federal docket,³⁵¹ a percentage grossly disproportionate to its federal significance.³⁵²

In contrast to "state v. non-citizen" and diversity jurisdiction, other "Controversies" should almost always be decided by federal judges. For example, in "state v. state" and land grant disputes, the national interest in interstate harmony is great, the danger of state court prejudice is patent, and the number of such suits is minimal.³⁵³

courts of some particular state.").

349 Many Framers predicted this development. See Amar, *Two-Tiered*, *supra* note 77, at 1555 (citing Paterson's insight that need for diversity jurisdiction would decrease as interstate commerce increased and national identity developed).

350 See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 238-39 (1948) ("What is needed is a total reconsideration of the jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of those interests which . . . have become the subject of the federal substantive law There is . . . a solid case for preservation of the jurisdiction in any instance where a concrete showing of state prejudice can be established."). Wechsler pointed out, however, that possible state bias did not require diversity jurisdiction; rather, state appellate courts could address this problem, with Supreme Court review if a party claimed denial of due process. *Id.* at 235-36. See also *Finley v. United States*, 490 U.S. 545, 577 n.34 (1989) (Stevens, J., dissenting) ("The continued need for exercise of diversity jurisdiction, at least where a showing of prejudice is not made, has been challenged by respected authorities.") (citation omitted). Another possible restriction would be to limit diversity and alienage jurisdiction to their original intended beneficiaries, out-of-state and foreign creditors. See *supra* note 292.

351 See HART & WECHSLER, *supra* note 37, at 52 (citing 1986 statistics). Recent statistics show a decline to about 23%. See Annual Report of the Director of the Administrative Office of the United States Courts, Table C, at 32 (1991).

352 The foregoing concerns have led Chief Justices Warren and Burger, among others, to recommend abolishing diversity jurisdiction. See CHEMERINSKY, *supra* note 36, at 243 (citing sources); see also Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 1011 (1979) (arguing that elimination of diversity would reduce complex problems in federal practice); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 348-50 (1977). The American Law Institute has made many proposals to severely restrict diversity jurisdiction, one of which Congress nearly adopted. See HART & WECHSLER, *supra* note 37, at 43. The Report of the Federal Courts Study Committee (April 2, 1990), issued pursuant to the Federal Courts Study Act, 28 U.S.C. § 331 note, recommended limiting diversity to suits involving aliens, complex multistate litigation, and interpleader actions. *Id.* at 38.

353 For example, in 1986 there was only one controversy within the Supreme Court's original jurisdiction, which includes disputes involving states. See HART & WECHSLER, *supra* note 37, at 58. Research has revealed no recent land grant controversies.

In sum, federal courts have an Article III basis for applying justiciability and other rules of limitation and deferral to "Controversies." By encouraging or requiring that certain "Controversies" be resolved in other fora (at least in the first instance), federal judges can conserve their resources and thereby discharge more effectively their paramount role of law declaration in "Cases."

B. Judicial Power Over Cases, Exposition, and Justiciability

1. "Judicial Power" Over "All Cases" in a Constitutional System of Separated Powers

Article III provides that "[t]he judicial Power *shall* extend to *all* Cases" involving federal questions, admiralty, and foreign ministers. Although this language seemingly compels federal courts to decide every such "Case,"³⁵⁴ they have always reserved the right to decline jurisdiction upon concluding that other constitutional provisions require abstention.³⁵⁵ This historical separation of powers approach, which balanced the judicial duty to declare the law in Article III "Cases" against competing constitutional considerations, is the true constitutional basis of justiciability.³⁵⁶

"United States-party" Controversies raise unique problems. This jurisdiction was originally intended to permit the national government to sue in its own courts in state law matters. *See supra* notes 288-90 and accompanying text. State court bias against the federal government has decreased, thereby lessening the need for such protection. Nonetheless, if the United States chooses to invoke this jurisdiction, the federal court would seem to have no discretion to force the federal government to go to state court. In any event, the number of classic United States-party "Controversies" is relatively small. Today, the principal reason the United States appears as a party is because federal statutes so provide. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C, at 32-33 (1991). Such matters are not really "Controversies" but rather are "Cases" arising under federal law that require federal court exposition.

354 *See supra* note 306.

355 *See supra* Part II.E. Such abstention is "discretionary" not as a matter of intrinsic equitable power, but only in the sense that it involves weighing conflicting constitutional dictates. *Cf.* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (Reasoned judicial discretion is an inherent aspect of jurisdiction (including federal jurisdiction), and federal courts should exercise their discretion according to principles of equity, federalism, separation of powers, and sound judicial administration.).

356 This historical approach is a far cry from the modern vision that separation of powers confines federal courts to dispute resolution and prevents citizens from suing to remedy political branch violations of federal law. *See, e.g.,* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)) (claiming that Court's role is to decide rights of individual disputants, not to vindicate public interest in government compliance with the law, which is province of political branches). In fact, *Marbury* articulated precisely the opposite view, asserting federal judicial authority to enforce the executive branch's obedience to the law. *See supra*

The classic model of justiciability thus focused on the proper exercise of federal "judicial power,"³⁵⁷ and the appropriate occasions for legal exposition, in our tripartite governmental system.³⁵⁸ The fundamental limitation on federal courts has always been that they exercise "strictly and exclusively *judicial*" functions,³⁵⁹ which demands adherence to three restrictions that are pertinent here.³⁶⁰ First, exposition must be based on the construction of a specific legal text (e.g., a constitutional, statutory, or treaty provision) to ensure judicial—rather than legislative—functioning.³⁶¹ Second, consistent with the idea of "case" as a written decision serving as precedent,³⁶² judicial exposition must be set forth in an opinion that persuasively justifies the result³⁶³ in light of prior cases or explains convincingly why the established rule should be modified or discarded.³⁶⁴ Third, al-

note 307; see also *Marbury*, 5 U.S. (1 Cranch) at 176 (Government powers "are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52 (1985) (Citizens should have standing to sue over the government's violation of constitutional rights that are held collectively.).

357 See Fletcher, *Case or Controversy*, *supra* note 69, at 267 (contending that Article III's phrase "judicial power" imposes justiciability requirements on federal courts more directly than "Cases" and "Controversies" language).

358 Admittedly, some early Court opinions (e.g., *Marbury*; *Osborn*) can be read as exceeding those limits.

359 See, e.g., 3 STORY, *supra* note 91, § 1777, at 657.

360 I will simply list three traditional restraints on judicial law declaration in cases, without attempting to grapple fully with their implications for much modern Supreme Court jurisprudence and legal commentary.

361 This is especially true in constitutional law. There is a difference between interpreting a general provision (e.g., the Equal Protection Clause) and a nonexistent one (e.g., "penumbral" rights). See, e.g., Fiss, *supra* note 62, at 11 (As judges move further away from textually specific constitutional provisions (e.g., free speech), the risk of enacting personal preferences into law grows.). This problem also occurs in other areas, such as statutory interpretation. See *supra* notes 149-50 and accompanying text (discussing axiom that judges cannot make law through creative statutory construction).

362 See *supra* notes 143-45 and accompanying text. *Stare decisis* facilitates principled and consistent lawmaking. See Spann, *supra* note 66, at 600, 635-36 (maintaining that federal judges must render decisions through analysis of statutory or constitutional text according to precedent).

363 See *supra* note 331. See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959) (emphasizing that essential feature of "judicial" action is that judges give reasoned explanations); Fuller, *supra* note 62, at 365-72 (same).

364 Prior cases that include judicial exposition not based on a specific legal text, or based on a misunderstanding of the Constitution's text (e.g., the words "Cases" and "Controversies") deserve little respect as precedent. Cf. Monaghan, *supra* note 145, at 762 (The Court should be open to correcting constitutional mistakes because they are so hard to rectify through constitutional amendment.).

though judicial "power" includes remedying the declared violation of a federal right, that remedy cannot exceed "judicial" bounds.³⁶⁵

Fidelity to these limits on "judicial power" and to the traditional separation of powers model of justiciability would be clearer analytically than the current paradigm,³⁶⁶ which disguises substantive legal and prudential judgments by characterizing justiciability as an Article III jurisdictional barrier requiring dismissal of cases that lack a sufficient dispute.³⁶⁷ A more candid, useful, and historically based approach would be to reformulate the justiciability doctrines to focus on judicial exposition rather than dispute resolution.

365 Professor Fiss advocates "structural reform," arguing that federal judges have power to fashion remedies as radical as necessary to vindicate constitutional rights. Fiss, *supra* note 62, at 51-52. Although Fiss acknowledges that broad institutional remedies require courts to assume extensive executive and legislative duties, he accepts this because the alternative—having judges declare rights and rely on political branch cooperation for enforcement—is so slow that it perpetuates constitutional injustice. *Id.* at 57-58.

But judges cannot, in effectuating constitutional values contained in the Amendments (e.g., equality and liberty), ignore the rest of the Constitution—the Article III duty to exercise "judicial" power only and the structural principle of separation of powers. Institutional remedies must be implemented primarily by the policymaking branches. Therefore, decrees that entail judicial exercise of uncontrolled legislative, executive, and administrative powers should be regarded as presumptively illegitimate. See, e.g., William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637-49 (1982); Nagel, *supra* note 307, at 718-23 (Judges must redress constitutional violations with the least possible encroachment into non-judicial areas by deferring to the political branches where possible, seeking cooperation from the President and Congress against recalcitrant states, and limiting the duties of appointed "executive" officers to correcting the violation in cooperation with true executive branch officials.); Spann, *supra* note 66, at 647-60 (arguing that court should avoid decision if textual provision is so vague as not to justify expansive interpretations with specific remedial consequences or if remedy involves deep intrusions into legislative or executive spheres).

Structural reform also weakens the essential judicial function of exposition. To achieve realistic remedial goals that will meet less political resistance, federal judges often define constitutional rights more narrowly than they otherwise would. See, e.g., Fletcher, *supra*, at 679-91 (describing illustrative cases).

Remedial self-discipline is needed not just in constitutional law, but in all Article III "Cases." For example, in a case affecting a foreign minister or arising under a treaty, a court cannot impose a remedy that encroaches on the political branches' constitutional control over foreign policy.

366 Cf. Winter, *supra* note 24, at 1511-12 (concluding that traditional political question and advisory opinion doctrines would cover same issues inadequately addressed by standing).

367 See generally *supra* Part I.A.

2. Shifting the Justiciability Inquiry from Dispute Resolution to Legal Exposition

(a) *Problems with the Dispute Standard.*—All the justiciability doctrines confine federal courts to the resolution of live, concrete disputes between adverse parties.³⁶⁸ But Article III extends “judicial power” to “Cases,” not “Cases involving disputes.” Nor is there persuasive evidence that any such constructive limitation was intended. Although many eighteenth century “cases” did feature disputes, others—particularly public law “Cases” such as those listed in Article III—did not require a controversy.³⁶⁹ Furthermore, for over a century the Supreme Court never intimated that a bilateral dispute was a prerequisite to federal jurisdiction, and it decided many important cases involving no real quarrel (e.g., *Dred Scott*).³⁷⁰

Besides being historically questionable, the dispute standard has three additional flaws. First, it has been applied erratically. Federal courts often decide cases involving no live controversy between adverse parties (e.g., antitrust consent decrees;³⁷¹ *Roe v. Wade*³⁷²) or trivial injuries,³⁷³ while denying jurisdiction where a major dispute seemingly exists.³⁷⁴ Second, the assumption that a concrete, personalized dispute between adverse parties assures

368 See *supra* notes 3, 29-31, 36-53 and accompanying text.

369 See *supra* notes 167-79 and accompanying text.

370 “[S]ome of the most famous constitutional decisions have come in what now seem to have been collusive cases.” See WRIGHT, *supra* note 56, at 56 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)). See generally *supra* note 249 (discussing early collusive suits).

371 See 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 118-19 (1958) (giving as other examples bankruptcy cases where all parties agree and criminal guilty pleas); WRIGHT, *supra* note 56, at 56 (noting federal jurisdiction to render judgment by default, or in naturalization case where no one challenges alien’s petition).

372 410 U.S. 113, 124-25 (1973) (deciding moot case because it was “capable of repetition, yet evading review”). See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (holding that black plaintiff given false information about housing had standing even though he was a “tester” with no personal interest in obtaining the housing and therefore had no dispute with defendant); *Buckley v. Valeo*, 424 U.S. 1 (1976) (allowing constitutional attack on Federal Election Campaign Act, which had not yet been directly applied to harm any plaintiffs).

373 See, e.g., *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (“We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote; a \$5 fine and costs; and a \$1.50 poll tax.”) (citations omitted).

374 See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (denying black parents’ standing to challenge IRS exemption for segregated private schools).

better presentation of legal issues,³⁷⁵ while often correct, is sometimes demonstrably false.³⁷⁶ Third, even where a genuine conflict does exist (e.g., Brown's fight with the Board of Education), settling that dispute is incidental to the Court's essential role of expounding federal law.³⁷⁷

In short, the Court should deemphasize the dispute requirement, which has little basis in Article III's text, history, or policy, and instead concentrate directly on exposition.³⁷⁸

(b) *Justiciability and Exposition of Federal Law.*—Current justiciability doctrines should be reformulated to acknowledge that the federal courts' primary function in "Cases" is the exposition of constitutional, statutory, admiralty, and international law. The original definition of "case"³⁷⁹ provides a useful test for justiciability: Has a legal question been appropriately presented, and does it require federal court determination in a decision that will serve as precedent? First, a legal issue must be framed clearly enough to ensure proper exposition. This requires quality lawyering³⁸⁰ and, usually, a well-developed factual record.³⁸¹ Second, the legal

375 See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962).

376 See generally CHEMERINSKY, *supra* note 36, at 50-51; Bandes, *supra* note 66, at 249-50 n.146, 256 n.188. For example, a *pro se* inmate involved in an individualized dispute with prison officials is unlikely to present legal issues better than a prisoner without standing who is represented by Alan Dershowitz.

377 See, e.g., Spann, *supra* note 66, at 600 ("The judgment disposes of the case before the court by resolving the dispute between the parties, but it is the exposition of the opinion that increases society's understanding of the principles involved."). The expository function is most obviously exercised by the Supreme Court, whose decisions invariably explicate thorny issues of federal law. The Framers contemplated this role: Article III requires only one tribunal, the Supreme Court, and its jurisdiction is almost entirely appellate. Similarly, federal circuit courts exist primarily to declare federal law. By contrast, federal district courts probably have at least as important a role in settling disputes as they do in interpreting federal law. Thus, my analysis principally applies to federal appellate courts.

378 There is no evidence that discarding the dispute requirement would flood federal courts with litigation. Cf. CHEMERINSKY, *supra* note 36, at 50 ("[I]n light of the high costs of litigation, one must wonder how large the burden really would be without the current standing restrictions."). Even if the number of federal question "Cases" did increase, that could be offset by decreasing the number of "Controversies" heard. See *supra* Part III.A.

379 See *supra* Part II.B.2.(a). One element of the traditional definition of "case"—whether the question had been presented in proper procedural form—should be treated as a separate matter under the Federal Rules of Civil Procedure, not as part of justiciability.

380 Federal courts (particularly the Supreme Court) should encourage all interested parties to participate (e.g., through amicus briefs) to assure that the legal issues are clearly and fully presented and that the importance of the questions involved can be evaluated.

381 See *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting) (Dis-

question should be of sufficient importance that federal judicial exposition—and the corresponding establishment of precedent—is warranted. Priority should be given to deciding cases that involve laws with an especially significant impact³⁸² or that raise peculiarly difficult legal problems. This two-part test should be applied to mootness, ripeness, and standing.³⁸³

(i) *Mootness*.—In *Honig*, the Court reaffirmed the constitutional basis of mootness,³⁸⁴ then held it would decide the admittedly moot case because it was “capable of repetition, yet evading review.”³⁸⁵ Chief Justice Rehnquist, concurring, rejected the premise that mootness was based on Article III’s “case or controversy” requirement.³⁸⁶ He argued that if mootness were a *constitutional* limit on the exercise of judicial power, then the Court would lack authority to decide any moot case. Thus, only “pragmatic considerations” could explain the exceptions allowing adjudication of certain moot cases (e.g., those “capable of repetition, yet evading review”).³⁸⁷ The Chief Justice proposed a new exception where the events mooted the case had occurred after the Court granted certiorari or noted probable jurisdiction,³⁸⁸ based on this policy rationale:

[T]he roughly 150 or 160 cases which we decide each year on the merits are less than the number of cases warranting review by us if we are to remain, as Chief Justice Taft said many years ago, “the last word on every important issue under the Constitution and the statutes of the United States.” But these unique resources—the time spent preparing to decide the case by

missal for mootness was unjustified where there was a “fully developed factual record with sharply defined and fully canvassed legal issues.”). The nature of the factual dispute between the parties may be one factor relevant to determining whether the legal question has been clearly and adequately presented. However, it should not be the sole or dispositive consideration. In certain instances, the state of the record (and the factual dispute) is unimportant—for example, a facial challenge to the constitutionality of a statute.

382 For example, those that significantly alter the status quo. See *DeFunis*, 416 U.S. at 350 (Brennan, J., dissenting) (Dismissal was unwarranted because “very important constitutional questions” were presented which “concern[ed] vast numbers of people [and] organizations” and which would “inevitably return to the federal courts . . .”).

383 This test highlights important factors related to legal exposition that federal courts should consider even in “Cases” where a private dispute exists.

384 *Honig v. Doe*, 484 U.S. 305, 317 (1988).

385 *Id.* at 318-20. This exception originated in *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515-16 (1911).

386 *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring).

387 *Id.* at 330-31. Another long-standing exception applies where a defendant has voluntarily ceased the objectionable activities. *Id.* at 331.

388 *Id.* at 331-32.

reading briefs, hearing oral argument, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case—we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts—is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine³⁸⁹

Chief Justice Rehnquist's emphasis on the Court's role as definitive expositor of federal law³⁹⁰ and on the presentation of legal issues is the sort of two-pronged analysis that should be applied to all the justiciability doctrines.³⁹¹

(ii) *Ripeness*.—Until its constitutionalization in the mid-seventies,³⁹² ripeness doctrine permitted a discretionary determination based on the fitness of the issues for judicial disposition and the hardship to the parties of delaying a decision.³⁹³ As Dean Nichol argues, the “case or controversy” requirement—a jurisdictional barrier that avoids examining the merits—cannot meaningfully be applied to ripeness, which demands a prudential evaluation of the substantive legal claim (for example, whether the legal issues have matured and the factual record has been fully developed).³⁹⁴ Federal courts should return to the traditional

389 *Id.* at 332.

390 *Cf.* HART & WECHSLER, *supra* note 37, at 208 (contending that “capable of repetition” exception developed as way to allow Court to declare federal law on important national legal questions). Historically, courts apparently had some equitable discretion to decide moot cases if the legal issues raised were of great public interest. *See* Diamond, *supra* note 170, at 138. Recent commentators have recommended a similar approach. *See, e.g.,* Bandes, *supra* note 66, at 308-10 (The Court should adjudicate moot cases to the extent necessary to fulfill its primary function as constitutional guardian, considering factors such as whether the issue is likely to recur generally.); Lee, *supra* note 60, at 655-57 (suggesting that moot cases should be decided if doing so would give meaning to public values; determination depends on state of facts and whether lawyers are sophisticated and willing enough to make full presentation of issues).

391 Justice Scalia recognized that Chief Justice Rehnquist's opinion had implications for other justiciability doctrines. *See Honig*, 484 U.S. at 339 (Scalia, J., dissenting) (“There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is.”).

392 *See supra* notes 46-47 and accompanying text.

393 *See* *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-56 (1967).

394 *See* Nichol, *Ripeness*, *supra* note 46, at 155, 158-62, 167-82. Ripeness serves the policy of avoiding premature judicial intervention into administrative processes, which inherently requires a discretionary judicial determination. *Id.* *See also* HART & WECHSLER, *supra*

approach,³⁹⁵ evaluating whether the legal question has been clearly presented and whether immediate judicial exposition is required.

(iii) *Standing*.—While standing purports to be a threshold jurisdictional inquiry required by the “case or controversy” language, it inevitably involves examination of a plaintiff’s legal claim. Accordingly, Professor Fletcher has argued that standing should turn on whether the substantive law (e.g., a constitutional or statutory provision) gives the plaintiff a right to a judicial remedy for the violation of a legal duty,³⁹⁶ not on whether the plaintiff can show an “injury in fact” as evidence of a real dispute.³⁹⁷ The personal injury requirement is especially inappropriate in public law “Cases,” which traditionally could be brought by any citizen;³⁹⁸ in such cases, standing should depend on the magnitude of the public interest in challenging illegal action by government officials.³⁹⁹

note 37, at 252 (asserting that ripeness really depends on judge’s view of merits; therefore, judges who have few doubts about merits often decide legal question on abstract record); Amar, *Law Story*, *supra* note 33, at 718 n.155 (“[R]ipeness obviously turns on one’s conception not of article III, but of the substantive interests asserted.”).

395 See Nichol, *Ripeness*, *supra* note 46, at 183.

396 See Fletcher, *Structure*, *supra* note 25, at 223-24, 229, 234-39, 249. See also Sunstein, *supra* note 38, at 166-67; Winter, *supra* note 24, at 1392-93, 1470, 1507. Fletcher argues that standing should depend on careful analysis of the meaning of the particular statutory or constitutional provision at issue. Fletcher, *Structure*, *supra* note 25, at 223-39. If a legal duty is statutory, courts should look to the statute to determine whether the plaintiff has standing to enforce the duty. *Id.* at 223-24, 251-65. See also Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461 (1988) (arguing that standing should focus on whether Congress has created cause of action). If a legal duty is constitutional, the relevant constitutional provision should be seen as both the source of the duty and the definition of those entitled to enforce it. Fletcher, *Structure*, *supra* note 25, at 223-24, 251. See also Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 697 (1990) (pointing out that justiciability should depend partly on whether claim based on constitutional provision should be enforced judicially).

397 See Fletcher, *Structure*, *supra* note 25, at 229-33. One may suffer an actual injury that does not invade a legal right; conversely, a person who has experienced no personal injury may have a legal right to sue, if a law grants that right. *Id.* at 249; see also Winter, *supra* note 24, at 1453-54 (discussing *damnum absque injuria*—damage without cognizable injury). Indeed, the Court’s “injury in fact” language is historically oxymoronic: “injuria” means “against legal rights.” See HALE, *supra* note 105, at 75 (Violations of “rights or jura” are “wrongs or injuriae.”).

398 See *supra* notes 171-79 and accompanying text.

399 See generally Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

C. Summary

Although the idea of justiciability has both a historical lineage and current utility, its modern incarnation as a jurisdictional test mandated by Article III's reference to "Cases" and "Controversies" has created two serious problems. First, the Court has been trying to fit a square peg—justiciability and dispute resolution—into a round hole ("Cases") instead of a square one ("Controversies"). Rigorous application of justiciability and other limitations to "Controversies" would reflect the federal courts' core function of umpiring such disputes. Second, the constitutionalization of justiciability has obscured the Court's proper role in "Cases." The justiciability doctrines should be revised and returned to their former prudential status, which would sharpen the judicial focus on exposition of important public law principles in "Cases."

IV. CONCLUSION

The justiciability doctrines illustrate Justice Cardozo's observation that "[t]he repetition of a catchword can hold analysis in fetters for fifty years or more."⁴⁰⁰ Over half a century has passed since Justice Frankfurter uttered the magic words "Cases and Controversies" and pulled constitutional justiciability out of his hat. Since then, the Supreme Court has simply reiterated that catchphrase instead of examining the true meaning of "Cases" and "Controversies."

These words have different connotations that explain their specific usage in Article III. The federal courts' primary function in "Cases" is exposition, whereas in "Controversies" it is dispute resolution. Confusion of these distinct judicial roles has beclouded justiciability and resulted in irrational allocation of federal judicial resources: Citizens claiming violations of federal law are denied a federal forum because of the absence of a dispute, while individuals with garden-variety state law claims gain access. Federal judicial resources should be shifted from "Controversies" (which usually involve state law issues that can be left to state courts) to "Cases," which raise federal law questions that can be answered definitively only by federal courts.

400 See Engdahl, *supra* note 165, at 462 n.19 (citing Cardozo).

The case/controversy distinction is a useful starting point in clarifying justiciability. More importantly, it sheds new light on the continuing debate over the proper role of Article III courts in a constitutional system based on separation of powers and federalism.