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The Extension Clause and the Supreme Court's Jurisdictional Independence

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THE EXTENSION CLAUSE AND
THE SUPREME COURT’S JURISDICTIONAL INDEPENDENCE

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This Article challenges the prevailing doctrinal, political, and academic view that the Extension Clause—which provides that “[t]he judicial Power shall extend” to nine types of cases and controversies—justifies legislative attempts to strip the Supreme Court of appellate jurisdiction. Legislators have repeatedly introduced bills seeking to prevent the Court from hearing cases on politically charged topics such as marriage, religion, and abortion. Scholars have relied on the Extension Clause to advance three arguments in support of such jurisdiction-stripping: (1) that “judicial Power” is not jurisdiction, and thus jurisdiction is not constitutionally protected; (2) that “shall” is not mandatory, and thus the clause need not be obeyed; and (3) that to “extend” a power is not to grant it but merely to define its potential outer reaches, and thus Congress is responsible for deciding what to allow the Court to hear. As the Article explains, however, the text, context, and drafting history of the Extension Clause reveal the fallacy of those conventional justifications. Just as other constitutional provisions guarantee the jurisprudential independence of federal judges so that they can do their jobs without fear of reprisal, the Extension Clause prevents Congress from taking certain cases away from the Supreme Court and thus secures the Court’s jurisdictional independence.

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INTRODUCTION

Addressing Parliament in an October 1775 speech that unwittingly galvanized Americans’ resolve, George III lamented that the rebels had “assumed to themselves legislative, executive, and judicial powers, which they already exercise in the most arbitrary manner.”¹ The next July, in his condemnation of British “Tyranny” over the colonies, Thomas Jefferson in turn charged that the king had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.”² Little could either foresee that after the Revolution was won and “[t]he judicial Power of the United States” constitutionally vested in “one supreme Court,”³ the power would again be unjustly obstructed—this time by the U.S. Congress. In countless bills through the years, including a string of recent ones on hot-button issues, American legislators have refused to assent to the full establishment of the Supreme Court’s appellate jurisdiction.⁴

A single month in 2011 is illustrative. On March 2, a group of fourteen representatives introduced the “Marriage Protection Act,” whose sole operative provision sought to prevent judicial review of the federal statute shielding states from having to recognize same-sex marriages: “[T]he Supreme Court shall have no appellate jurisdiction . . . to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of [the Defense of Marriage Act].”⁵ Six days later brought the “We the People Act,” an attempt to bar the Court from adjudicating “any claim involving . . . the free

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² THE DECLARATION OF INDEPENDENCE (U.S. 1776).

³ U.S. CONST. art. III, § 1.

⁴ See Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 HARV. L. REV. 869, 872 (2011) (referring to “[c]ountless bills” in the past century that would have stripped the Supreme Court of jurisdiction in cases about issues “ranging from reapportionment to the use of ‘under God’ in the Pledge of Allegiance”). Professor Grove has exhaustively grouped jurisdiction-stripping attempts by era, id. at 888-916, and analyzed the political and constitutional reasons that most such efforts fail, id. at 916-932 (concluding that “structural safeguards” in Article I were designed to, and have in fact served to, protect the Supreme Court’s power). For other historical overviews of jurisdiction-stripping bills, see Dawn M. Chutkow, Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of Courts, 70 J. OF POLITICS 1053, 1061-63 (2008) (empirically analyzing hundreds of enacted bills and concluding that Congress restricts federal jurisdiction for reasons of efficiency rather than ideology); Alex Glashausser, A Return to Form for the Exceptions Clause, 51 B.C. L. REV. 1383, 1386-87 (2010) (briefly recounting trends); Helen Norton, Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review, 41 WAKE FOREST L. REV. 1003, 1007-10 (2006) (summarizing bills since the 1820s).

exercise or establishment of religion: . . . the right of privacy, including . . . reproduction: or . . . the right to marry without regard to sex or sexual orientation.” A week after that came the “Sanctity of Life Act,” aiming to stop the Court from reviewing any laws or practices regulating abortion.7

Though most jurisdiction-stripping bills fail,8 their recurring threats are Damoclean, and sometimes one of the bills becomes law. For example, the Detainee Treatment Act of 2005 barred federal courts from exercising “jurisdiction to hear or consider” habeas corpus petitions filed by “enemy combatant[s].”9 Three years after its enactment, that statute was struck on the specific ground that it violated Article I’s Suspension Clause (protecting the writ of habeas corpus),10 but the more general issue of congressional control of the Supreme Court’s jurisdiction is timeless.11 Given that the jurisdiction and even existence of inferior courts are constitutionally precarious,12 the stripping of jurisdiction from the Supreme Court could leave state courts as the protectors of federal rights. Thus, even beyond the evident separation-of-powers implications of one branch’s control of another, the issue is also one of federalism.

Article III of the Constitution provides that “[t]he judicial Power shall extend” to various types of cases and controversies.13 Despite the revolutionary resonance of the “judicial Power,” however, that phrase has supplied one of the chief academic justifications for the usurpatory bills. Scholars have argued that the “judicial Power” is not coextensive with “jurisdiction” and thus that although the Court’s judicial power per se is inviolate, its jurisdiction may be stripped.14 Such disingenuous differentiation would have confounded Jefferson, who objected not only to the denial of “Judiciary Powers” to the colonies but also to Britain’s attempts to “extend an unwarrantable jurisdiction over us.”15

The verb in that accusation—“extend”—has been coopted for a second defense of the bills. The “extent” of the judicial power, some scholars insist, merely sets a ceiling that limits the potential reach of the power. Under that view, the decision about the “extent”

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7 H.R. 1096, 112th Cong. § 3(a) (2011).
8 See Grove, supra note 4, at 871-83 (sketching political dynamics that defeat most such bills).
10 Boumediene v. Bush, 553 U.S. 723, 732 (2008); see infra text accompanying notes 61-64 (discussing context of Court’s decision).
11 The question of the extent to which extent Congress may restrict the Court’s jurisdiction has been called “one of the most difficult in the law of the federal courts.” Mark Tushnet, “The King of France with Forty Thousand Men”: Felker v Turpin and the Supreme Court’s Deliberative Processes, 1996 SUP. CT. REV. 163, 164.
12 U.S. Const. art. III, § 1 (giving Congress discretion about whether to “ordain and establish” inferior courts); see also infra note 117 (speculating about whether congressional control over existence of inferior courts includes complete control of their jurisdiction).
13 U.S. CONST. art. III, § 2.
15 THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added).
to which the Supreme Court should be entrusted with the judicial power, up to that limit, is left to Congress.\textsuperscript{16}

A third pillar of scholarly support has been the common contention that the constitutional “shall” (in “[t]he judicial Power shall extend”) is not mandatory and allows room for legislative discretion about how much jurisdiction the Court should have.\textsuperscript{17} Thomas Paine might have seen the lack of sense in that claim. His 1776 rejection of monarchical rule relied on the biblical verse “The Lord shall rule over you,” explicated by his own apt commentary: “Words need not be more explicit . . . .”\textsuperscript{18}

The explicit words of Article III, along with their context and history, show that the truth of the three apologies for legislative arrogation is far from self-evident. As bills aimed at shielding sensitive statutes from judicial review proliferate, the time has come for the Supreme Court to reject congressional tyranny and declare jurisdictional independence.

After an overview of the relevant constitutional provisions in Part I, Part II of this Article recognizes the semantic space between the terms “judicial Power” and “jurisdiction” but denies that jurisdiction is thus vulnerable. Acknowledging the slipperiness of the word “shall,” Part III explains that regardless of whether it is read as a mandate or as a statement about the future, the word leaves no discretion for Congress to withhold constitutionally granted jurisdiction. Part IV rejects the premise that “extend[ed]” power is merely potential, subject to a legislative trigger; it argues instead that an extension of power is the functional equivalent of a grant of power. The Article concludes by noting the widespread acceptance of the importance of judges’ jurisprudential independence in the constitutional design and urging similar recognition for the Supreme Court’s jurisdictional independence.

\section*{I. One Flawed Theory, Two Clauses of Article III}

At the time delegates gathered in Philadelphia to write a Constitution, the United States had but a scintilla of a national court system. Under the Articles of Confederation, the Continental Congress had established the Court of Appeals in Prize Cases to exercise jurisdiction in cases of capture.\textsuperscript{19} Congress was also authorized to appoint courts to try piracies and felonies committed on the high seas, but instead it had delegated such matters

\footnotesize
\textsuperscript{16} E.g., Liebman & Ryan, supra note 14, at 721-23, 753 (arguing that editing of clause about cases and controversies from “shall be” to “shall extend” changed jurisdictional floor to ceiling); Velasco, supra note 14, at 703-04 (citing dictionary definition of “extend” to support claim that Congress’s right to control jurisdiction stems from a “natural reading of the text of the Constitution”); John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. CHI. L. REV. 203, 212 (1997) (defending traditional view based on paraphrasing of Extension Clause as “The judicial power may be used to decide . . . .” or “The judicial power shall be capable of deciding . . . .”).

\textsuperscript{17} E.g., MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 37-38 (2d ed. 1990) (casting doubt on whether “shall” implies a mandate as opposed to future tense); Harrison, supra note 16, at 212, 217 (deriding notion that Extension Clause’s “shall” means “must” and paraphrasing clause as “The judicial power may be used to decide . . . .”); Velasco, supra note 14, at 702-04 (arguing that “shall” is not mandatory and concluding that “the words ‘shall extend’ are more permissive than mandatory: they are better interpreted as ‘can include’ rather than as ‘must include’”); cf. Daniel J. Meltzer, supra note 14, at 1573 n.14 (suggesting that even if “shall” is mandatory, mandate is only that when the judicial power is exercised, “the exercise must be by article III courts”).

\textsuperscript{18} THOMAS PAINE, COMMON SENSE ch. 2 (1776) (emphasis added).

\textsuperscript{19} Articles of Confederation art. IX (1781); see also ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 8-10 (1987) (detailing court’s origins and modest caseload).
to state judges.\textsuperscript{20} Land disputes between states, or between people claiming rights under the grants of different states, were resolved through a procedure superintended by Congress.\textsuperscript{21} In the states, appellate reviews of trial judgments were often performed by legislative and executive officials, as well as judges.\textsuperscript{22} In Great Britain, the nation Americans most often looked to as a model, the House of Lords acted, according to Blackstone, as “the supreme court of judicature.”\textsuperscript{23} Federalists who gathered in Philadelphia envisioned a robust national judiciary as a crucial element of a stronger general government.\textsuperscript{24}

In Article III of the new Constitution, their vision took hold. It was particularly important for the Federalists to clarify that judicial power lay with courts rather than with a legislature.\textsuperscript{25} And they did. “The judicial Power of the United States” was to be vested not in any legislative or executive body but only in “one supreme Court” and, potentially, in “inferior Courts.”\textsuperscript{26} That power would extend to nine categories of cases and controversies.\textsuperscript{27} Congress would decide whether to establish inferior courts, a prerogative that might entail full control over their jurisdiction.\textsuperscript{28} But legislative control over the jurisdiction of the Supreme Court would be limited to relatively minor details such as timing rules for litigants or allowing the Court to hear certain cases as original matters rather than waiting for appeals.\textsuperscript{29}

Today, however, the picture drawn at the Federal Convention hangs upside-down. The prevailing theory holds that the appellate jurisdiction of the Supreme Court is largely at the mercy of Congress.\textsuperscript{30} Scholars disagree about the restraints, if any, on legislative

\textsuperscript{20} Articles of Confederation art. IX (1781); see also Surrency, supra note 19, at 7 (noting that such courts never materialized).

\textsuperscript{21} See Articles of Confederation art. IX (1781) (setting out precise procedure for resolving such disputes); Surrency, supra note 19, at 7-8 (noting rarity of use of that procedure).

\textsuperscript{22} Michael L. Wells & Edward J. Larson, Original Intent and Article III, 70 Tulane L. Rev. 75, 105 (1995) (quoting Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789, at 36 (Wythe Holt & L.H. LaRue eds., 1990) (“The ultimate reviewing authority of judicial proceeding was not vested exclusively in the judiciary in any state.”)).

\textsuperscript{23} William Blackstone, 3 Commentaries *56, quoted in Wells & Larson, supra note 22, at 103-04. At the Convention, Madison referred to the House of Lords as “the supreme tribunal of Justice.” 1 The Records of the Federal Convention of 1787, at 130 (June 6), 139 (Madison’s notes) (Max Farrand ed., 1966) [hereinafter Records]. In each citation of Farrand’s Records, to orient the reader, I have included the page number for the start of the day in question followed by the page number for the specifically relevant material, along with a parenthetical indication of the source. The most common sources are the official but somewhat sparse journal kept by the Convention’s secretary, William Jackson, and the thorough notes of James Madison. When applicable, I have cited multiple sources within Records.


\textsuperscript{25} See, e.g., 1 Records, supra note 23, at 130 (June 6), 134 (Madison’s notes) (recording Madison’s comment that need to establish unelected body to secure private rights and dispense justice may have been prime motivation for Convention).

\textsuperscript{26} U.S. Const. art. III, § 1.

\textsuperscript{27} Id. art. III, § 2.

\textsuperscript{28} The extent of legislative control over the jurisdiction of inferior courts is beyond the scope of this Article. See infra note 117 (citing authority for view that Congress’s power with respect to existence of inferior courts implies power over jurisdiction).

\textsuperscript{29} See Glashausser, supra note 4, at 1443 (discussing permissible scope of regulations of Supreme Court’s jurisdiction).

\textsuperscript{30} See William R. Casto, An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction, 7 Const. Commentary 94 (1990) (defending theory of “plenary power”); Gerald Gunther,
control. But the basic premise of the judiciary’s dependence on the legislature for jurisdiction has gone almost unchallenged. In fact, the Court itself has been complicit in its own subservience.

No practical pathogen has caused this disorder. With apologies to Chief Justice Marshall’s famous overheated dictum about judicial obligation, the power to exercise jurisdiction is not a duty to do so in every case: for most of the past century, the Supreme Court has largely controlled its own workload, hearing most “appeal” (in the constitutional sense) cases via the discretionary writ of certiorari rather than “appeals” per se. There is thus no basis for concern that allowing the full constitutional complement of

 Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 896, 908 (1984) (finding “compelling” reasons to conclude that “there are no substantial internal limits on Congress’ article III power to limit the Court’s appellate jurisdiction”); Harrison, supra note 16, at 206 (“The textual reading . . . according to which Article III grants Congress broad power over the Supreme Court’s appellate jurisdiction . . . has come to be referred to as the orthodox, or traditional, interpretation.”); Ralph A. Rossum, Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause, 24 WM. & MARY L. REV. 385, 423 (1983) (calling congressional power over Court’s appellate jurisdiction “plenary” and dismissing contrary arguments); Peter J. Smith, Textualism and Jurisdiction, 108 COLUM. L. REV. 1883, 1894 (2008) (“Under the traditional view, . . . Congress has considerable—if not unlimited—power . . . to strip the Supreme Court of appellate jurisdiction.”); Velasco, supra note 14, at 763 (defending “the orthodox position that Congress possesses nearly plenary authority to regulate the jurisdiction of the federal courts”); Herbert Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1005 (1965) (defending position that “Congress has the power . . . to strike at what it deems judicial excess by delimitations of the jurisdiction . . . of the Supreme Court’s appellate jurisdiction” and finding “no basis” for limits on that power within Article III).


Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 COLUM. L. REV. 1515, 1561 (1986) (“Ironically, the federal judiciary itself created the jurisdictional insecurity that continues to plague it.”); see infra notes 59-60 (citing cases in which Supreme Court has acquiesced to congressional control of its jurisdiction).

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.”).

Since 1925, and even more so since 1988, most cases have arrived at the Supreme Court through the discretionary writ of certiorari. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 10.3.2, at 672-73 (5th ed. 2007) (tracing history of distinction between appeal and certiorari). Exercising its “judicial discretion,” the Court
appellate jurisdiction, including even cases of incomplete diversity, would overwhelm the Court.

The orthodox understanding of congressional control rests on two provisions in section 2 of Article III of the Constitution, namely, the Extension Clause and the Exceptions Clause:

The judicial Power shall extend to [nine types of cases and controversies]. In [two types of cases], 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.

One of the standard arguments advanced by proponents of the conventional view is that the “Exceptions” permit Congress to strip appellate jurisdiction from the Supreme Court. That interpretation may have superficial appeal, as well as the imprimatur of practice and precedent. But as I have explained in detail in an earlier article, the Exceptions Clause, properly understood, allows Congress merely to shift cases from the Court’s appellate jurisdiction to its original jurisdiction, so that the Court can hear the cases earlier—not, as most insist, to shield cases from its review altogether. In short, the grants that writ only for “compelling reasons.” Sup. Ct. R. 10. Even when hearing cases on appeal (as opposed to certiorari), the Court has on occasion declined to exercise its jurisdiction. See Zucht v. King, 260 U.S. 174, 176 (1922) (citing “duty to decline jurisdiction” when question presented is not “substantial”). It also remains free to apply precedents about justiciability and fashion doctrines of abstention for itself much like those invoked, with the Court’s approval, by inferior courts.

As it is, though permitted by 28 U.S.C. § 1254, the Supreme Court rarely chooses to hear cases whose only basis for federal jurisdiction is complete diversity. See Gary T. Schwartz, Considering the Proper Federal Role in American Tort Law, 38 ARIZ. L. REV. 917, 946 (1996) (noting that Court “routinely” denies certiorari in such cases).

The question of what types of substance-neutral jurisdictional limitations would be constitutionally appropriate regulations is beyond the scope of this Article. See Glashausser, note 4, at 1441-43 (probing that issue).

U.S. CONST. art. III, § 2 (emphasis added).


See Ex parte Mccardle, 74 U.S. (7 Wall.) 506, 514 (1869) (citing “express words” of Exceptions Clause and dismissing appeal for lack of jurisdiction on ground that Congress had, during pendency of appeal, repealed jurisdictional statutory provision relied on by habeas corpus petitioner). One of the three recent bills described above, supra text accompanying notes 5-7, the “We the People Act,” cites the Exceptions Clause as its constitutional basis. H.R. 958, 112th Cong. § 2 (2011). The other two are silent on that issue.

Glashausser, supra note 4 passim. Some other scholars have embraced this minority interpretation of the Exceptions Clause. Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia, 107 COLUM. L. REV. 1002, 1006, 1013, 1037 (2007); Laurence Claus, The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III, 96 GEO. L.J. 59 (2007) [hereinafter Claus, One Court]; Laurence Claus, Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond, 54 AM. J. COMP. L. SUPP. 459 (2006) [hereinafter Claus,
word “Exceptions” applies to the “appellate” form of the Court’s jurisdiction, rather than to the existence of “Jurisdiction.” Though the bare text of the Exceptions Clause may be somewhat ambiguous and thus open to various potential interpretations, its drafting history confirms that it was designed to expedite cases, not to eliminate them. A thorough explication of the Exceptions Clause is beyond the scope of this Article, but this basic background may help illuminate the broader debate.

The orthodoxy’s other constitutional argument—the one addressed here—relies on the Extension Clause. If my previous article about the Exceptions Clause substantially disarmed the orthodoxy, the current one about the Extension Clause aims to leave it defenseless, revealing the theory of congressional control to be wholly untenable. Absent an analysis of the Extension Clause, the propriety of stripping the Supreme Court of jurisdiction would still be debatable; even if one acknowledges that congressional “Exceptions” transform appellate jurisdiction into original jurisdiction rather than eliminating it, one could cling to the contention that Congress need not “extend” the full range of appellate jurisdiction in the first place. If one recognizes, however, that the Extension Clause sets not just the ceiling but also the floor of the Court’s jurisdiction, the conventional account loses its last leg to stand on.

As sketched above, scholars seeking to prop up the orthodox interpretation have attacked the three terms at the front of the Extension Clause: “judicial Power,” “shall,” and “extend.” Each of the three lines of attack purports to explain how it is that calibrating the scope of the Supreme Court’s appellate jurisdiction rests with Congress, a body mentioned nowhere in the clause. As discussed below, each of the three is flawed. And thus so is the theory of the Court’s jurisdictional dependency.

II. THE JURISDICTIONAL PAST (AND PRESENT) OF THE “JUDICIAL POWER”

To justify the stripping of the Supreme Court’s appellate jurisdiction, some scholars have emphasized that the subject of the Extension Clause is the “judicial Power,” not

Constitutional Guarantees]. As a doctrinal matter, of course, Justice Marshall’s opinion in Marbury v. Madison rejected the notion that Congress could expand the Court’s original jurisdiction. 5 U.S. (1 Cranch) 137, 174-75 (1803). The etymology of how the conventional view developed will be the subject of a future article.

42 Glashausser, supra note 4, at 1400-02.
43 Id. at 1403-34.
44 If one was to acknowledge the Extension Clause’s guarantee of jurisdiction but insist that the Exceptions Clause allows Congress to take it away, one would embrace an awkward, if not wholly unimaginable, posture in which one constitutional provision is an unqualified grant to the judiciary but another is a legislative license to undo that grant. See 1 William Winslow Crosskey, Politics and the Constitution in the History of the United States 616 (1953) (criticizing view that exceptions power is “unconditioned by the earlier absolute provisions of Article III”); Akhil Reed Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U. Pa. L. Rev. 1651, 1654 (1990) (calling such interpretation “awkward”); Amar, supra note 32, at 241 n.120 (opining that such interpretation “should not be lightly indulged if an alternative reading is possible”); cf. Calabresi & Rhodes, supra note 24, at 1163 (observing that advocates of mandatory jurisdiction maintain that for jurisdiction-stripping power to be textually explicit, either Vesting Clause or Extension Clause would need to refer to superseding power of Exceptions Clause). But see Martin H. Redish, Text, Structure, and Common Sense in the Interpretation of Article III, 138 U. Pa. L. Rev. 1633, 1635-36 (1990) (arguing that regardless of meaning of other provisions of Article III, Exceptions Clause unambiguously empowers legislature to restrict jurisdiction); Velasco, supra note 14, at 712 n.196 (arguing as backup that “[r]egardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words ‘shall extend’”). As one scholar recently put it, such “constitutional tension” suggests that “Article III is at war with itself.” Grove, supra note 4, at 870-73 (arguing that tension is resolved by “structural safeguards” of Article I that save Article III from itself).
“jurisdiction.” As this Part explains, however, that shallow distinction overlooks the deeper interdependence of the two concepts. The constitutional drafting history sheds bright light on their relationship, in that for most of the Federal Convention, the subject of the clause was in fact “jurisdiction.” The late edit to “judicial Power” had nothing to do with facilitating legislative control of the Court’s jurisdiction. The power was to be resolutely judicial and would inherently retain a jurisdictional dimension.

A. A Judicial—Not Legislative—Power

The most salient characteristic of the “judicial Power” may be the most obvious: it is judicial. Such truisms can smack of facile tautological sophistry. For example, when Chief Judge Roberts announced that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” 45 he was subtly equating invidious majoritarianism with affirmative action. 46 And Yogi Berra’s dictum that “[i]t ain’t over ’til it’s over” 47 conflates the plausible and the possible. 48 But sometimes a judicial power is just judicial.

In a different context, the Supreme Court recently expanded on that fundamental tenet of Article III: “[T]he ‘judicial Power of the United States’ . . . can no more be shared [with another branch than] the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.” 49 In other words, the Article III power is not just primarily judicial, but solely judicial.

The context for that pronouncement was Stern v. Marshall, in which the Court held that a federal statute authorizing bankruptcy courts to adjudicate state-law tort counterclaims in bankruptcy proceedings violated the Constitution by vesting the judicial power in courts whose judges lack the protections of Article III. 50 Undergirding the holding was the principle of separation of powers: “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.” 51 From that premise, the Court reasoned that “in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” 52

One might think that a Court with such an emphatic view of the judiciary’s independence would likewise frown on legislatively withdrawing from federal courts’ cognizance cases and controversies listed in the Extension Clause. To be sure, a particular concern about congressional aggrandizement—seizing power from another branch for

46 See id. (holding that school assignment plan designed to achieve racial balance violated Equal Protection Clause).
50 Id. at 2620.
51 Id. at 2609.
52 Id. at 2609 (quoting Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)).
itself—may have animated *Stern.* 53 When confronting separation-of-powers issues, the Court has often viewed such power grabs with special skepticism. 54 Though stripping the Court of jurisdiction may not be formally equal to legislative assumption of that power, however, it approaches it in substance. By selectively eliminating judicial review, Congress in effect performs its own review of its enactments, implicitly concluding that they are constitutional.

In any event, if, as the *Stern* majority proclaimed, Congress may not even dilute the judicial power by conferring it in original form on non-Article III entities—despite the possibility of appeal to Article III courts—on the ground that “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely,” 55 then it might seem to follow that Congress could hardly strip away the power to decide certain disputes from the Article III judiciary altogether. But in the midst of exalting Article III’s section 1 (vesting the judicial power in federal courts), the majority’s opinion subtly nodded to the conventional view of jurisdiction-stripping that eviscerates section 2: “When a suit is made of ‘the stuff of the traditional actions at common law . . . ,’ and is *brought* within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.” 56

Who is it that needs to bring the suit within those bounds? An innocuous answer might be the plaintiff, but if so, the word “brought” would seem unnecessary: the more likely implicit answer is the conventional one, namely, that federal courts—including the Supreme Court—have no jurisdiction unless Congress affirmatively brings them cases and controversies by enacting jurisdictional statutes within the bounds of the Extension Clause. As to inferior courts, that view may have merit, based on Congress’s discretion about the courts’ existence, 57 but that understanding is the norm even as to the Supreme Court. Perhaps the *Stern* majority used the passive voice because the standard view is so commonplace as to be understood even when not spelled out. Or perhaps next to *Stern*’s ringing language about the separation of powers, it would have been embarrassing to emphasize that the responsibility for adjudicating the suits listed in the Extension Clause resides with the Article III judiciary only to the extent that Congress sees fit to allow.

Regardless of what signal the *Stern* majority meant to send, there is little reason to think that the Supreme Court is ready to embrace the view that its own jurisdiction is constitutionally enshrined. In 1799, the Court announced that “[i]f congress has given the power to this Court, we posess it, not otherwise . . . .” 58 And after similar pronouncements

53 See id. at 2624 (Breyer, J., dissenting) (framing inquiry about whether Congress sought to aggrandize its own authority).
55 *Stern,* 131 S. Ct. at 2620 (stressing that even seemingly “innocuous” intrusions on judicial power unconstitutionally “compromise the integrity of the system of separated powers”).
56 Id. at 2609 (emphasis added) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).
through the years,\textsuperscript{59} the same principle held true in 1996: “[O]ur appellate powers . . . ‘are limited [by Congress].’”\textsuperscript{60}

More recently, in 2006, a majority of the Court in \textit{Hamdan v. Rumsfeld} managed to avoid exploring “Congress’ authority to impinge upon [its] appellate jurisdiction” on the ground that the jurisdiction-stripping statute in question—the Detainee Treatment Act of 2005—\textsuperscript{61}—did not apply to the case at hand.\textsuperscript{62} Though five justices referred to “grave questions” about that putative legislative authority, those questions apparently focused on the narrow issue of the constitutionality of withdrawing jurisdiction to hear habeas corpus petitions: indeed, two years later, those same five held for the Court that the statute violated Article I’s Suspension Clause and thus had no occasion to address the broader impingement question.\textsuperscript{63} Three justices, all of whom were in the \textit{Stern} majority, dissented in \textit{Hamdan} and directly rejected the argument that Congress could not control the Court’s appellate jurisdiction.\textsuperscript{64}

Still, a Court willing to embrace \textit{Stern}’s robust view of the judicial power and the impermissibility of spreading it to non-Article III entities should be able to acknowledge the independence of that same power from legislative restriction. If (un)constitutionality has a continuum, stripping the Supreme Court of jurisdiction is more egregious—regardless of the putative distinction about whether or not the legislative branch formally acquires any power—\textsuperscript{65}—than allowing bankruptcy courts to adjudicate common-law claims. Under the statutory scheme invalidated by \textit{Stern}, Article III courts retained appellate jurisdiction to review bankruptcy court judgments on such claims—\textsuperscript{66} the harm was thus temporary and ultimately curable,\textsuperscript{67} as with an unwarranted requirement to exhaust state remedies before pursuing an action under 42 U.S.C. § 1983 in federal court.\textsuperscript{68} In contrast, if Congress has withdrawn jurisdiction over the type of case or controversy at issue, no Article III court will weigh in during the life of the litigation; such harm can be permanent and dispositive, as

\textsuperscript{59} E.g., Glidden Co. v. Zdanok, 370 U.S. 530, 567 (1962) (noting with approval that “Congress has consistently with [Article III] withdrawn the jurisdiction of this Court to proceed with a case then \textit{sub judice} . . .”); Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (dismissing appeal for lack of jurisdiction on ground that Congress had, during pendency of appeal, repealed jurisdictional statutory provision relied on by habeas corpus petitioner); Daniels v. Chicago Rock Island R.R., 70 U.S. (3 Wall.) 250, 254 (1866) (“In order to create \[appellate\] jurisdiction in any case, . . . an act of Congress must supply the requisite authority.”); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) (“[T]he Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . .”).

\textsuperscript{60} Felker v. Turpin, 518 U.S. 651, 661 (1996) (quoting Du Rousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810)).


\textsuperscript{64} Hamdan v. Rumsfeld, 548 U.S. 557, 672 (2006) (Scalia, J., dissenting, joined by Justices Thomas and Alito). The \textit{Hamdan} dissenters cited the Exceptions Clause in support, but most statements by the Court about its jurisdictional subjugation do not specify any constitutional text. \textit{See, e.g., Barry, 46 U.S. (5 How.) at 119 (citing only “the constitution of the United States”).

\textsuperscript{65} See supra notes 53-54 and accompanying text (discussing anti-aggrandizement principle).

\textsuperscript{66} \textit{Stern}, 131 S. Ct. at 2603-04, 2618-19.

\textsuperscript{67} But cf. \textit{id.} at 2611 (noting “limited” nature of appellate review, in that Article III courts would defer to findings of fact of bankruptcy courts).

\textsuperscript{68} \textit{See} Monroe v. Pape, 365 U.S. 167, 183 (1961) (holding that § 1983 plaintiffs need not exhaust state remedies before invoking statute to obtain jurisdiction in federal court).
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with the unconstitutional nullification of the writ of habeas corpus.\textsuperscript{69} The maxim notwithstanding, justice denied can be worse than justice delayed.

Indeed, legislative restraints on federal jurisdiction undermine both of what Stern cited as the purposes of the separation of powers. One is “to protect each branch of government from incursion by the others.”\textsuperscript{70} The putative authority of Congress to prevent the judiciary from doing its job—which often happens to include reviewing the constitutionality of congressional acts—invites such an incursion. The other is to “protect the individual.”\textsuperscript{71} On that note, a central purpose of the federal judiciary is to safeguard federal rights and interests that might not receive proper respect in state courts.\textsuperscript{72} In Stern, the Supreme Court protected litigants from having to start in a non-Article III court: one hopes the Court will one day recognize that the conventional view of congressional power raises the federalism concern that litigants may be (unconstitutionally) stopped from ever reaching any federal forum at all.

That day does not seem to be at hand, however. In the 2012 case of Mims v. Arrow Financial Services, LLC, which turned in part on whether a specific jurisdictional statute trumped the general federal-question jurisdictional provision of 28 U.S.C. § 1331, the Supreme Court continued its complicity in the conventional view. Writing for a unanimous Court, Justice Ginsburg noted that federal “jurisdiction” exists over any claim arising under federal law, with a crucial caveat: “unless Congress divests federal courts of their § 1331 adjudicatory authority.”\textsuperscript{73}

Section 1331, of course, would be substantively superfluous absent the conventional view that Congress may divest federal courts of their Article III judicial power. Justice Ginsburg thus implicitly acquiesced to that view, but by resorting to lexical camouflage, she hid from its glare. For what is “adjudicatory authority” but “judicial Power”? And if the “judicial Power” of the United States “shall extend” constitutionally to “all Cases . . . arising under . . . the Laws of the United States,” how can Congress divest that power? One might argue that Congress’s discretion about whether to establish inferior courts in the first place implies discretion to control their jurisdiction,\textsuperscript{74} a point that lies beyond the scope of this Article. But as to the Supreme Court, it is harder to explain the supposed fragility of the “judicial Power.” The awkwardness of evoking Article III’s language presumably drove Justice Ginsburg to seek refuge in the Orwellian “adjudicatory authority.”

Whatever her reasons for choosing that phrase, Justice Ginsburg’s opinion in Mims equated “adjudicatory authority” with “jurisdiction,” in effect acknowledging the commonsense notion that if courts have adjudicatory authority—or in plainer language, judicial power—then they have jurisdiction.

\textsuperscript{69} See Boumediene v. Bush, 553 U.S. 723, 732-33 (2008) (holding that suspension of writ of habeas corpus by Military Commissions Act of 2006 was unconstitutional because substitute procedures provided by Detainee Treatment Act of 2005 were inadequate).

\textsuperscript{70} Stern, 131 S. Ct. at 2609 (quoting Bond v. United States, 131 S. Ct. 2355 (2011)).

\textsuperscript{71} Id.; see also id. at 2615 (calling Article III a “guardian of individual liberty”).

\textsuperscript{72} See, e.g., LARRY W. YACKLE, FEDERAL COURTS 29 (1999) (noting subtle distinction between federal law and federal interests).

\textsuperscript{73} 132 S. Ct. 740, 742 (2012) (emphasis added).

\textsuperscript{74} See supra note 57 and accompanying text (citing authorities about legislative power to control jurisdiction of inferior courts).
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B. The Interdependence of Jurisdiction and the Judicial Power

The constitutionally granted “judicial Power” is not interchangeable with “jurisdiction,” but nor is it unrelated.75 It is simply more expansive.76 The argument that the distinction between those terms permits legislative control of the Supreme Court’s appellate “jurisdiction” is thus unfounded.

1. The Fluidity of the Terms

As many have recognized, jurisdiction—the power to “hear and determine” disputes, as the Supreme Court has called it77—is but a specific dimension of judicial power,78 serving as a threshold or gateway to the power’s other facets.79 A court’s general judicial power also includes, for example, the specific powers to issue judgments,80 to wield certain remedies,81 and to control the attorneys before it,82 as well as other “inherent” powers.83

The argument that jurisdiction is not inherently part of the “judicial Power” of the Extension Clause would have more force if the clause read something like this: “The judicial Power shall extend to the full range of remedies available at common law.” Because the actual text, however, extends the judicial power not to certain remedies but to certain categories of legal disputes, the inference is reasonably clear that the clause addresses the jurisdictional dimension of the power—in other words, the set of disputes

75 See A. Michael Froomkin, Still Naked After All These Words, 88 NW. U. L. REV. 1420, 1422 (1994) (calling the terms “not inevitably synonymous” and discussing their interrelationship).
76 See Amar, supra note 32, at 231 n.88 (referring to judicial power as including jurisdiction); Leland E. Beck, Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court, 9 HASTINGS CONST. L.Q., 773, 783 n.32 (1982) (noting that the term “encompasses not only the authority to hear and determine cases,” but also powers inherent to courts).
77 United States v. Arrendono, 31 U.S. (6 Pet.) 691, 709 (1832) (“The power to hear and determine a cause is jurisdiction . . . .”); see also infra text accompanying notes 276-312 (discussing history of phrase “hear and determine”).
78 See David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 B.Y.U. L. REV. 75, 82-83 (referring to jurisdiction as one “dimension” of judicial power, distinguishable from dimension of “judicial potency” with respect to cases within a court’s jurisdiction); cf. Velasco, supra note 14, at 711 (“[T]he judicial power is the general power of the judiciary while jurisdiction is the authority to exercise that power in a given case.”); William A. Sutherland, Notes on the Constitution of the United States 518 (1904) (“Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit: to adjudicate or exercise judicial power over it.”).
79 See Charles Warren, Congress, Constitution, and the Supreme Court 55 (1930) (“Judicial power comprises the functions exercised by a Court after it has obtained jurisdiction.”); Froomkin, supra note 75, at 1422 n.10 (calling jurisdiction a “prerequisite to the exercise of judicial power”).
80 See Samuel Miller, On the Constitution 314 (1891) (defining judicial power as that “of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision”).
81 See Michaelson v. United States, 266 U.S. 42, 70-71 (1924) (citing “inherent judicial power” as source of authority to hold parties in contempt).
82 Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (authorizing power to punish contempt and to “establish all necessary rules for the orderly conducting [of] business”).
83 See Edward F. Cooke, A Detailed Analysis of the Constitution 94 (6th ed. 1995) (describing “judicial power” as “the power of a court to hear and pronounce a judgment and carry that judgment into effect,” in contrast to “jurisdiction,” which is “the authority of a court to exercise judicial power in a specific case”); Warren, Congress, supra note 79, at 56 (describing judicial power as that “to enter judgment, to issue execution, to enjoin, to commit for contempt, or to do any of the other things which the Court performs as a judicial body”). The Supreme Court has often referred to the ability to control attorneys as part of the judicial power. E.g., Ex parte Garland, 71 U.S. (4 Wall.) 333, 378-79 (1867) (discussing power to admit and disbar attorneys).
that the courts vested with the power (by section 1 of Article III) are able to hear and
determine.

The word “jurisdiction” itself is hardly static. It can signify not only the ability to
hear and determine a case but also the subject matter of a case; that meaning is apparent
in the Extension Clause’s category of “all Cases of admiralty and maritime Jurisdiction.”
Indeed, it would have been odd to describe “jurisdiction” over cases of a certain
“jurisdiction.”

The term can also refer to general governmental authority or sovereignty. And it
can mean geographical territory. Confusion among those senses resulted in the Article IV
prohibition of the creation of new states “within the Jurisdiction of any other State.”
Some states had asserted claims to western territory beyond their borders, and delegates to
the Federal Convention specifically substituted “Jurisdiction” for “limits” to allay a concern
that one state might be “within the asserted limits” of another yet beyond its authoritative
“Jurisdiction.”

As Article III took shape at the Convention, the versatility of “jurisdiction” was all
too evident in the Extension Clause. For most of the summer, the operative draft of the
clause used it in three ways: “The Jurisdiction of the Supreme Court shall extend to . . . all
cases of Admiralty and maritime jurisdiction [and] to controversies between two or more
States, (except such as shall regard Territory or Jurisdiction) . . . .” In the face of such
looming inelegance, it is no surprise that, in late August, the phrase “judicial Power”
intervened as the subject of the clause or that the word “jurisdiction” was reserved to
allocate cases between original hearings and appeals.

“Jurisdiction” was the natural word to use with “original” and “appellate”; it would
have been unthinkably clumsy to refer to a court’s original or appellate “judicial power.”
And the choice of “judicial Power” as the Extension Clause’s subject linked section 2 of
Article III to the previous section, which vested that power in the Supreme Court (and
potentially in inferior courts); the Vesting Clause in turn echoed the introductions of the
legislative and executive powers in the openings of Articles I and II. Since the first days of
the Convention, delegates had referred to the three coordinate “powers”—the same ones
George III had lambasted colonists for using—and a midsummer draft of the Constitution
had stated that “[t]he Government shall consist of supreme legislative, executive, and

84 For example, at the Federal Convention, Connecticut’s Roger Sherman opposed a resolution requiring oaths
by state officials about observing national laws as “unnecessarily intruding into the State jurisdictions.” 1
RECORDS, supra note 23, at 192 (June 11), 203 (Madison’s notes).
85 U.S. CONST. art. IV, § 3. James Wilson, writing not as a constitutional drafter but as a Supreme Court
Justice, asserted the Court’s constitutionally granted power over states in terms that, in context, he treated as
interchangeable: “jurisdiction,” “judicial power,” and “judiciary authority.” Chisholm v. Georgia, 2 U.S. (2 Dall.)
419, 465 (1793) (Wilson, J).
86 See 2 id. at 176 (Aug. 6), 186 (report of Committee of Detail).
87 The “Virginia Plan” introduced by Edmund Randolph resolved that “the Legislative Executive & Judiciary
powers within the several States ought to be bound by oath to support the articles of Union.” 1
RECORDS, supra note 23, at 15 (May 29), 22 (Randolph plan in Madison’s notes). Though that reference was to state
governments, it was clear that the delegates viewed those three “powers” as the pillars of the new national
government. E.g., 1 RECORDS, supra note 23, at 62 (June 1), 67 (Madison’s notes) (summarizing debate about
need to define executive “powers” as distinct from legislative and judiciary “powers”); id. 130 (June 6), 139
(Madison’s notes) (referring to the “Executive,” the “Judiciary,” and “the Legislature” as “distinct powers”), 141
(Yates’s notes); id. 460 (June 29), 469 (Madison’s notes) (summarizing exhortation by Connecticut’s Oliver
Ellsworth to “[l]et a strong Executive, a Judiciary & Legislative power be created”).
88 See supra text accompanying note 1.
juristic Powers.” Keeping “jurisdiction” at the head of the Extension Clause would have neither sufficed stylistically nor communicated the full range of authority granted to the national courts.

2. A False Dichotomy

The expansiveness of “judicial Power” and protean nature of “jurisdiction” are hardly reasons to doubt the Extension Clause’s role as a jurisdictional grant to the Supreme Court. But defenders of the orthodoxy have seized on the distinction between them to argue that even if the “judicial Power” shall extend over the listed cases, Congress retains control over “jurisdiction.” Julian Velasco’s position is illustrative. He sees no inconsistency in arguing that “the Constitution explicitly grants Congress control over the Supreme Court’s appellate jurisdiction” (under the conventional interpretation of the Exceptions Clause) while acknowledging that “Congress has no control over the judicial power.” After all, he rationalizes, “it is only the judicial power, not jurisdiction, that ‘shall extend’ to the enumerated cases.”

It is one thing to note that the concepts are not identical but another to suggest that they do not even overlap. Jurisdiction, after all, is a prerequisite to the exercise of other facets of the judicial power. Velasco apparently could envision a judiciary with plenty of abstract power but no actual jurisdiction. As a theoretical construct, that could work, but as a constitutional foundation, it has no basis. Elsewhere, even Velasco seems to admit that jurisdiction is a dimension of the judicial power. In analyzing a rejected proposal at the Federal Convention for “the Judicial power [to] be exercised in such manner as the Legislature shall direct,” he posits that the proposal would have given Congress “plenary authority not only over jurisdiction, but over the judicial power.” Once those two terms are understood to be interdependent, it becomes hard to explain how one can be “irrevocably vested” (as Velasco admits) in the judiciary while the other is (as he posits) subject to “nearly plenary” congressional control.

Another scholar, John Harrison, takes a superficially more tenable approach. He acknowledges the relationship between the terms: “Judicial power and jurisdiction are obviously closely related concepts, but, just as obviously, they are not the same concept.” The distinction he makes between them, however, is curious: “The judicial power is . . . less specific than a particular court’s jurisdiction, as the potential is less specific than the

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90 2 RECORDS, supra note 23, at 163 (Wilson draft for Committee of Detail), 163.
91 E.g., Velasco, supra note 14, at 705 n.167 (“At most, the judicial power automatically extends to all such cases. Jurisdiction does not.”); Meltzer, supra note 14, at 1573-74 n.14 (citing with approval comment from representative in First Congress that “the failure to give the federal courts jurisdiction does not divest them of the judicial power”); Liebman & Ryan, supra note 14, at 708, 751-52 (noting “confidently” drafters’ distinction between terms and concluding that “the ‘Judicial Power shall extend to’ language could not mean ‘jurisdiction shall be’”).
92 Velasco, supra note 14, at 711 (noting that judicial power is “irrevocably vested”). He later hedges that bet: “Regardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words ‘shall extend.’” Id. at 712 n.196.
93 Id. at 711, 716.
94 See supra notes 78-79 and accompanying text.
95 See Froomkin, supra note 75, at 1423 (“[W]ithout jurisdiction a court has no ‘judicial Power.’”).
96 Velasco, supra note 14, at 733.
97 See id. at 711, 765 (acknowledging permanency of judicial power and embracing traditional view of congressional control of jurisdiction).
98 Harrison, supra note 16, at 214.
actual.”

He concludes that inapt juxtaposition by equating the judicial power with the “potential” as opposed to “actual scope of federal jurisdiction.” Harrison is right that “judicial power” is less specific than “jurisdiction.” But generality is not tantamount to potentiality. Nothing about its higher level of abstraction makes the judicial power “potential,” any more than the executive power is more potential than, say, the treaty power. Whether concerning treaties, the executive branch generally, or the judiciary, the constitutional power is actual: the potential is whether it will be used, and to what extent.

Harrison’s point about potentiality would be harmless if he meant that the entity with the power—the judiciary—could decide when to use it. Instead, though, he insists that the decision to unleash the judicial power is “left for Congress, as many important choices are.”

To support that claim, in addition to relying on the conventional view of the Exceptions Clause, he compares Article III with Article I. The legislative power to “lay and collect Taxes” and so on does not imply a duty to do so. Harrison’s argument is that likewise, the power of the judiciary over a range of cases does not imply that it must have jurisdiction.

The analogy works to a point, but the more logical conclusion to draw from it would be that the judiciary is under no duty to exercise its power.

In the context of Article II, it would be unthinkable to interpret “the executive Power shall be vested” or “he shall have the Power to grant Repreves and Pardons” as having an implied qualifier of “only if Congress decides that the President may use the power.”

Yet the conventional view of the Extension Clause reduces the Supreme Court, with respect to its appellate jurisdiction, to such a puppet. Few commentators argue that the provision of Article III’s section 1 that “[t]he judicial Power of the United States, shall be vested in one supreme Court” allows Congress to interfere, and with good reason: the drafters knew how to convey such authority, as they did in the same clause with respect to the potential establishment of inferior courts. Yet in section 2, the conventional interpretation of “[t]he judicial Power” twists it into, effectively, “the legislative Power to authorize courts to exercise jurisdiction.” Whatever ambiguities inhere in the concept of judicial power, a natural reading cannot shift the power, without any reference to Congress, from the judiciary to the legislature.

C. Words Collide in Philadelphia

The words that became the Extension Clause developed in fits and starts, but most of the editing concerned the substantive list of cases and controversies that would be heard and determined by the Supreme Court. The structure of the clause, in contrast, was relatively stable. As discussed in this section, its subject at first was “jurisdiction” but

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99 Id. at 215.
100 Id. at 218.
101 Id. at 213.
102 Id. at 213-14.
103 See supra text accompanying notes 34-37 (stressing Supreme Court’s lack of obligation to exercise its power in every case).
104 See United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1872) (holding that Congress may not impair executive pardon power); Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 329-30 (1816) (analogizing that because phrase “shall be vested” creates inviolable powers in Articles I and II, it does in Article III as well); cf. Amar, supra note 32, at 224 (drawing similar parallel between judicial power and executive power).
105 But cf. Calabresi & Rhodes, supra note 24, at 1178, 1187-88, 1199-1200, 1209-10 (positing that if “shall” means “will,” clause is merely “descriptive” rather than “mandatory” and thus allows Congress discretion).
106 See infra Section IV(B)(1).
eventually changed to “judicial Power,” for reasons unrelated to legislative control of the Court’s jurisdiction. The equally innocuous appearance of the word “extend” is discussed in a later section.\(^{107}\)

1. **The Early Focus on “Jurisdiction”**

For most of the Federal Convention in Philadelphia during the summer of 1787, the nascent Extension Clause was phrased in terms of “jurisdiction.” The clause originated in the “Virginia Plan” introduced by Governor Edmund Randolph on May 29, at the outset of the Convention.\(^{108}\) The plan chartered a bold course for a radically new national government.\(^{109}\) Though historical sources differ about some of the plan’s details, such as whether it contemplated simply an undifferentiated “National Judiciary” or organized the branch into “one or more supreme tribunals” and “inferior tribunals,” the language that became the head of the Extension Clause is clear: “jurisdiction . . . shall be to hear & determine [various types of cases].”\(^{110}\)

The week that followed brought conflict over the anticipated proliferation of federal courts. The delegates eventually agreed on the “Madisonian compromise,” which punt ed the decision of whether to establish inferior courts to the national legislature.\(^{111}\) Through it all, the basic structure and terminology of the budding Extension Clause survived, including the term “jurisdiction.”

Soon after, on June 13, following discussions about the substantive content of the clause, Randolph successfully introduced a resolution using a new verb but still with the same subject: “[I]f the jurisdiction of the national Judiciary shall extend to [a variety of cases].”\(^{112}\) At the end of July, a five-man Committee of Detail began the task of turning the various resolutions agreed on by the Convention into a working draft of a constitution.\(^{113}\) In each of the two significant drafts that emerged from the committee, the developing Extension Clause did not yet mention the “judicial power” but otherwise continued to resemble the eventual final version: “The jurisdiction of the supreme [tribunal or Court] shall extend . . . .”\(^{114}\)

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\(^{107}\) See infra Section IV(B)(2).

\(^{108}\) Perhaps because he was “handsome” and “eloquent,” IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 199 (1950), Randolph was the spokesman for the Virginia delegation: he had consulted with the other members about the plan. See Letter from James Madison to John Tyler, in 3 RECORDS, supra note 23, at 524, 525.

\(^{109}\) See 2 RECORDS, supra note 23, at 555 (Sept. 10), 560 (Madison’s notes) (relating Randolph’s conviction of need for “radical changes”); RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 88 (2009) (calling Randolph’s plan “an entirely new conception of the fledgling American government” and “a revolutionary step”).

\(^{110}\) Compare J. FRANKLIN JAMESON, STUDIES IN THE HISTORY OF THE FEDERAL CONVENTION OF 1787, at 103-06 (1903) (compiling what Jameson thought original version would most likely have been and referring only to “National Judiciary”), with 1 RECORDS, supra note 23, at 15 (May 29), 21-22 (Madison’s notes) (referring to “supreme” and “inferior” tribunals). In his widely cited Records, Max Farrand acknowledged the unavailability of the original Virginia Plan. 3 RECORDS, supra note 23, at app. C, 593-94 (respecting though disagreeing with alternative perspective).

\(^{111}\) 1 RECORDS, supra note 23, at 115 (June 5), 118 (journal), 127 (Yates’s notes); see infra Section IV(B)(1).

\(^{112}\) 1 RECORDS, supra note 23, at 223 (June 13), 223-24 (journal), 232 (Madison’s notes).

\(^{113}\) 2 id. at 116 (July 26), 117 (journal), 128 (Madison’s notes). The committee was formed on July 24 for the purpose of composing constitutional language reflecting the resolutions that had been passed by the full Convention. See 2 id. at 97 (July 24), 97 (journal), 106 (Madison’s notes).

\(^{114}\) 1 id. at 37 (Randolph draft) (transcribed from original), 47 (“tribunal”); see also 2 id. at 137 (Randolph draft) (transcribed from facsimile), 146; 2 id. at 163 (Wilson draft), 172 (“Court”) (using slightly different capitalization).
2. The Late Shift to “Judicial Power”

It was not until August 27 that the full Convention again focused on the judiciary. On that day, it made a fateful edit that would unwittingly cloud future interpretation of the Extension Clause.

The Committee of Detail had drafted a provision permitting the legislature to “assign any part of the [Supreme Court’s] jurisdiction . . . , in the manner, and under the limitations which it shall think proper, to . . . Inferior Courts . . . .”115 That language would not last. After some adjustments to the substantive list of cases and controversies and the allocation of original and appellate jurisdictional form, the Convention amended the subject of the Extension Clause from the “jurisdiction of the Supreme Court” to the “Judicial Power,”116 thus embracing all Article III courts. Soon after, on the same day, the provision about assigning jurisdiction to inferior courts was struck; in light of the newly broadened subject of the Extension Clause, the assignment clause was presumably deemed unnecessary.117

The change to “Judicial Power” was effected without dissent and without recorded debate. One reason for the change may have been to pave the way for the deletion of the assignment clause. The Madisonian compromise had been a bruising battle,118 and the fewer the references to potential inferior courts, the more elegant and less controversial the judiciary article became.119 There was no parallel language about legislative limitations on the Supreme Court’s jurisdiction, and nothing suggests that the combination of the jurisdictional provisions of the supreme and inferior courts silently incorporated such restrictions.

One signal that “Judicial Power” was meant to include jurisdiction is a motion made later in the day to amend the Appellate Jurisdiction Clause. The proposal would have followed the Original Jurisdiction Clause, which listed cases in which “[t]he supreme Court shall have original jurisdiction.”120 Yet the proposal (which did not pass) read, “In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct.”121 The link between those sentences, evident by the reference to

115 See infra Section IV(B)(1) (detailing debates leading to compromise).
116 See infra text accompanying notes 303-305 (discussing ways to minimize such references).
117 2 id. at 422 (Aug. 27), 425 (journal) (discussing deletion of assignment clause).
118 See infra Section IV(B)(1) (detailing debates leading to compromise).
119 See infra text accompanying notes 303-305 (discussing ways to minimize such references).
120 2 RECORDS, supra note 23, at 422 (Aug. 27), 425 (journal) (emphasis added).
121 2 id. at 422 (Aug. 27), 425 (journal), 431 (Madison’s notes) (emphasis added).
the “other” cases, shows that—at the very least in the mind of the delegate making the proposal — original jurisdiction was a manner of exercising the judicial power.

Likewise, during the debate about Edmund Randolph’s resolution about the jurisdiction of the national judiciary, New York’s Robert Yates in his notes used one term for the other: “Randolph observed the difficulty in establishing the powers of the judiciary ...”122 The actual resolution in question used only the term “jurisdiction,” both originally and in the revised form proposed by Randolph. Yet Randolph—or at least Yates—apparently saw no problem with characterizing jurisdiction as a judicial power.123 To suggest that the later shift of terms conveyed a shift of control is to ignore this overlapping usage.124

Perhaps the clearest indication that the change from jurisdiction to judicial power did not derogate jurisdiction came in a comment by James Madison during a debate about the admission of new states. One concern was the need to protect claims of the United States to western territories. To address that concern, Maryland’s Daniel Carroll moved to add language to the provision about the admission of new states: “Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U. S. to vacant lands ceded to them by the Treaty of peace.” Madison saw no need to insert such language, thinking it best not to address that issue at all. His basis for not worrying about protecting claims of the United States was telling. The nation’s interests would already be protected in that the nation’s courts would be the ones adjudicating disputes about those lands: “in his words, such claims of the United States would be “favored by the jurisdiction of the Judicial power of the U– S– over controversies to which they should be parties.”125

That jurisdictional category (U.S.-party controversies) had been added to the Extension Clause three days earlier,126 on the same day as (and just before) the switch from “jurisdiction” to “Judicial Power.” To Madison, the extension of (at the time) “jurisdiction” to U.S.-party controversies was not transformed into something less when moments later it became an extension of “judicial power.” Instead, his precise phrasing—“the jurisdiction of the Judicial power”—suggests that jurisdiction is a facet or dimension of the judicial power.127 Nothing in his comment implies that this “jurisdiction of the Judicial power” would be subject to congressional control.

122 1 id. at 223 (June 13), 238 (Yates’s notes).
123 Id.
124 See William Blackstone, 3 Commentaries 32 (13th ed. 1800) (arranging discussion of courts from those whose “jurisdiction [is] narrow” to those with the most “extensive . . . power”); 1 id. 258 (1765) (noting that by crown’s delegation of “judicial power,” courts acquire “jurisdiction,” which crown cannot then unilaterally abrogate); A New Law Dictionary (Giles Jacob & J. Morgan eds., 10th ed. London 1782) (citing Blackstone as bulk of alphabetized entry, on unnumbered page, for “judicial power”). Early statutes in Virginia provide examples of the blending of the two words. One provided that “the . . . General Court shall take Cognisance of, and [is] hereby declared to have Power and Jurisdiction to hear and determine, all Causes . . . .” Act of General Assembly, 1753, ch. 1, § 5 (1753), in The Acts of Assembly, Now in Force, in the Colony of Virginia 293 (1769). Another provided that “the Justices of every County Court . . . are hereby declared to have Power, Authority, and Jurisdiction, to hear and determine all Causes . . . .” Act of General Assembly, 1748, ch. IV, § V (1748), in The Acts of Assembly, Now in Force, in the Colony of Virginia 169 (1769).
125 2 Records, supra note 23, at 457 (Aug. 30), 465 (Madison’s notes). If anything, Madison viewed the proposed language as leaning too much in favor of the union: he proposed, successfully, that if the unnecessary language were included, it ought to be balanced by a parallel reference to claims of individual states. Id.
126 2 id. at 422 (Aug. 27), 423 (journal) (motion to insert passed), 430 (Madison’s notes).
127 Cf. 2 id. at 434 (Aug. 28), 439 (Madison’s notes) (statement of Morris that on the subject of interference with private contracts, “[t]he Judicial power of the U— S— will be a protection in cases within their jurisdiction”).

18
Madison’s comment switched the focus of the state-admission debate to jurisdiction. Carroll withdrew his motion, substituting a new one that added the following point: “but all such claims shall be examined into & decided upon, by the Supreme Court of the U. States.”

Pennsylvania’s Gouverneur Morris moved to substitute different language at the front (instead of what was in Carroll’s original motion) and leave off the part about the Supreme Court. Maryland’s Luther Martin moved to amend Morris’s proposal by reinstating that part. Morris protested that such language was “unnecessary, as all suits to which the U. S.—are parties—are already to be decided by the Supreme Court.”

Martin, though, wanted to “remove all doubts.” Martin’s amendment was rejected, and Morris’s motion was approved. Apparently, it was too obvious that the Extension Clause would guarantee the Supreme Court’s jurisdiction over a case listed there to warrant repeating the point elsewhere.

Though the state-admission debate was not directly about Article III, its terms help confirm that the shift from “jurisdiction” to “Judicial Power” did not undermine the Supreme Court’s jurisdiction: it simply embraced inferior courts within the scope of the Extension Clause. The jurisdictional grant in the final version of Article III may not be as explicit as it first was in drafts, but the Court’s jurisdiction nonetheless remains an irrepresible dimension of its judicial power.

III. THE FORCEFUL FUTURITY OF “SHALL”

Thomas Paine’s revolutionary exegesis notwithstanding, the interpretation of directives turning on “shall” is a judicial bugaboo. As judges have practically stripped it of any inherent meaning, the word has become a Rorschach test. Is it a command—“thou shalt not kill”? A definitive prediction—“we shall overcome”? Or something more tentative—“shall we dance?”

Modern legal writing guru Bryan Garner has gone so far as to identify eight distinct senses for “shall” in legal documents. Though most senses denote a duty, the word’s nature is on occasion, as Garner puts it, “directory”—stronger than precatory but weaker than mandatory. Along similar lines, the classic grammarian Henry Fowler wrote that “shall” has both descriptive and prescriptive meanings and thus could function in both the indicative or imperative moods. Eighteenth-century lexicographer Samuel Johnson threw up his hands: “The explanation of shall, which foreigners and provincials confound with will, is not easy; and the difficulty is increased by the poets, who sometimes give to

128 2 id. at 457 (Aug. 30), 465-66 (Madison’s notes).
129 2 id. at 457 (Aug. 30), 466 (Madison’s notes).
130 Presumably, Morris did not consider the possibility of inferior courts.
131 2 RECORDS, supra note 23, at 457 (Aug. 30), 466 (Madison’s notes).
132 See supra text accompanying note 18.
134 See BLACK’S LAW DICTIONARY 1176-77 (abridged 9th ed. 2010) (describing the sense of “duty” as “the mandatory sense that drafters typically intend and courts typically uphold”).
shall an emphatical sense of will...” Put simply, depending on the context, “shall” can convey obligation, certainty, or futurity.

Advocates of the conventional view of congressional control of the Supreme Court’s appellate jurisdiction have seized on that ostensible indeterminacy to claim that the provision that the judicial power “shall” extend to the listed categories of cases and controversies poses no hurdle. For example, one traditionalist has insisted that the “shall” in the Extension Clause “has a [less] imperative ring” than that in the Original Jurisdiction Clause. As this Part explains, the word can be somewhat protean, but its meaning is usually clear in context, and nothing about its usage in the Extension Clause suggests that the viability of the judicial power depends on legislative prerogative.

A. Prescription or Permission

One axis of common confusion has been whether “shall” can be interpreted as if it were “may.” The committee “restyling” the Federal Rules of Civil Procedure in 2006 cited that potential slipperiness as a justification for amending each “shall” in the old rules to “must,” “may,” or “should,” depending on the context. Likewise, some scholars have argued that the Extension Clause is ambiguous because “it does not say, one way or the other, whether ‘shall’ is mandatory.” Another has been less equivocal: “[T]he words ‘shall extend’ are more permissive than mandatory; they are better interpreted as ‘can include’ rather than as ‘must include.’”

Justice Benjamin Cardozo differed, describing “shall” as “the language of command.” Indeed, the Supreme Court has generally read that auxiliary word as making the main verb following it mandatory. It has, however, recognized the confusion

138 Meltzer, supra note 14, at 1597 (critiquing Akhil Amar’s partial theory of mandatory federal jurisdiction): see Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499, 1524-25 (1990) (pointing out this inconsistency in traditionalists’ interpretations of “shall”): Amar, supra note 32, at 239-40 n.118 (same). Steven Calabresi’s work has illustrated the stakes riding on the interpretation of “shall.” In a 1992 article, he did not take a position on the meaning of “shall” but observed that a nonmandatory reading “devastates” theories of mandatory jurisdiction. Calabresi & Rhodes, supra note 24, at 1209-10 & n.70. Fifteen years later, he acknowledged that “shall”... normally means ‘must’” and thus embraced a theory of mandatory jurisdiction, at least for the disputes described in the Extension Clause as “all Cases.” Calabresi & Lawson, supra note 41, at 1013-14 & n.65 (relying on instances of “shall” in Article III’s Vesting Clause, Extension Clause, and Original and Appellate Jurisdiction Clauses).
140 Wells & Larson, supra note 22, at 96 (finding the Extension Clause unsusceptible to textual interpretation).
141 Velasco, supra note 14, at 704: see id. at 705 n.167 (“Congress cannot be required to grant jurisdiction... because ‘shall’ is not a mandate to Congress.”).
142 Escoe v. Zerbst, 295 U.S. 490, 493 (1935) (ordering release of prisoner on ground that district court had bypassed statutory mandate that probationer “shall” receive a court hearing before being imprisoned for violation of probation): see also Randy E. Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. PA. J. CONST. L. 183, 209 (2003) (“[In the eighteenth century] as now, in legal discourse the term ‘shall’ was nearly always a mandatory command.”).
143 E.g., Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (interpreting rule providing that case “shall” be dismissed if no substitution is made within two years of death of party as offering court no discretion, despite potential interaction of rule allowing expansion of time periods based on “excusable neglect”); see also United States v. Monsanto, 491 U.S. 600, 607 (1989) (commenting on statutory language “shall forfeit” that “Congress could not have chosen stronger words to express its intent that forfeiture be mandatory”).
stemming from “shall” and has on occasion construed it to signal permission, as if it were “may.”

But those two words are not interchangeable. The linguistic circumstances in which the odd “may”-for-“shall” interpretation arises are limited. For example, a statutory provision that a defendant “shall” be prosecuted has not prevented the government from choosing to prosecute instead under a different act; likewise, a corporate charter providing that process “shall” be served on the corporation in a certain manner has not barred the legislature from later enacting other means of service. Of course, prosecution or service in the first place is not always required. For example, the old Rule 59(b) read, “A motion for a new trial shall be served not later than 10 days after entry of the judgment . . . .” That rule did not compel that a motion be made, any more than the current rule’s “must” does. The understood background was and continues to be “if the motion is made at all.”

Because no analogous linguistic framework underlies the Extension Clause, there is no reason to read “shall extend” as “may extend.” The claim that the Extension Clause is ambiguous for failing to specify whether the “shall” is mandatory rings hollow; a document need not spell out the interpretation of its own words to be understandable. Whatever ambiguity arises in some contexts about whether “shall” is merely permissive, its usage in the Extension Clause is clear.

A potentially distracting point is that if a power shall extend, then logically the power may be used. The Extension Clause’s “shall” makes the extension of the judicial

144 E.g., Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 430-34 & n.9 (1995) (holding 5-4 that despite statutory provision that “[u]pon certification by the Attorney General . . . any civil action or proceeding . . . shall be deemed an action against the United States . . . , and the United States shall be substituted as the party defendant,” certification was not conclusive of propriety of substitution of United States). Noting that legal writers “sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may,’” the Gutierrez de Martinez Court proceeded to interpret the statute in that fashion. Id. at 432-33 n.9. “May,” of course, has its own ambiguity, in that it can convey either permission or possibility.


146 Richbourg Motor Co. v. United States, 281 U.S. 528, 534 (1930) (“The usual provision of criminal statutes that the offender ‘shall’ be punished as the statute prescribes is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.”).

147 Railroad v. Hecht, 95 U.S. 168, 170 (1877) (“As against the government, the word ‘shall,’ when used in statutes, is to be construed as ‘may,’ unless a contrary intention is manifest.”).

148 See Gutierrez de Martinez, 515 U.S. at 432 n.9 (noting that certain procedural rules use word “shall” to “authorize, but not to require, judicial action”).

149 Perhaps the closest is the canon of construction that “shall” generally means “may” when the actor is the government. Hecht, 95 U.S. at 170. The purpose of that canon, however, is to preserve governmental prerogative vis-à-vis the public. See id. It is not to reallocate power from one branch of the government to another.

150 See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 331-32 (1816) (Story, J.) (rejecting that proposed reading); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1588-1589, 452-53 (1833) (same).

151 Some legislative and executive authority is granted by provisions that the branch “shall have power” to act and some by provisions that the branch “may” act, with no apparent difference. Compare, e.g., U.S. CONST. art. I, § 8 (“The Congress shall have Power To lay and collect Taxes . . . .”), and id. art. II, § 2 (“The President shall have Power to fill up all Vacancies . . . .”), with id. art. II, § 1 (“Congress may determine the Time of chusing the Electors . . . .”), and id. art. II, § 3 (“[The President] may, on extraordinary Occasions, convene both Houses . . . .”).
power definitive but does not in and of itself compel the judiciary to exercise it.\textsuperscript{153} In defense of the traditional view, Daniel Meltzer seizes on that nuance in an attempt to dismiss the notion that the “shall” is mandatory: “One can easily read ‘the judicial Power shall extend’ as referring only to matters over which the federal courts have capability (rather than an obligation) . . . .”\textsuperscript{154} That reading is not unreasonable but is a non sequitur. It is true that federal courts have a capability rather than an obligation; the phrase is “judicial Power,” not “judicial Duty.”\textsuperscript{155} That point, though, is distinct from the question of whether the extension of that power is, as the traditionalists claim, subject to legislative approval.\textsuperscript{156}

Of course, power may be used even if the power \textit{may} extend; the difference is that a legitimate question then arises about who decides whether the power will in fact extend. If the Extension Clause’s “shall” were (or could be interpreted as) “may,” the judiciary might be able to determine when its own power would extend, perhaps collapsing that inquiry with that of when to wield it. One might reasonably argue, though, that in that counterfactual scenario, Congress would be the appropriate body to prescribe the extent of the judicial power, in a law “necessary and proper for carrying [that power] into Execution.”\textsuperscript{157} Be that as it may, in the actual Extension Clause, the “shall” means that nobody needs to make that decision. The delegates made it in Philadelphia.

\textbf{B. Prescription and Prediction}

The other common uncertainty about “shall” is whether it denotes duty or futurity.\textsuperscript{158} A modern drafting guide for the federal government advises that because that word “imposes an obligation . . . . but may be confused with prediction of future action,” regulations should use “must” for obligations and “will” for predictions.\textsuperscript{159} Such confusion is manifest in a justification advanced in support of the orthodox view of the Extension Clause, namely, that its “shall” is merely predictive.\textsuperscript{160} For example, in his concurring opinion in the landmark 1816 case of \textit{Martin v. Hunter’s Lessee}, Justice William Johnson

\begin{footnotesize}
\begin{enumerate}
\item See supra text accompanying notes 34-37 (stressing Supreme Court’s lack of obligation to exercise its power in every case).
\item Meltzer, supra note 14, at 1596 (critiquing Akhil Amar’s partial theory of mandatory jurisdiction); accord id. at 1573 n.14.
\item See Amar, supra note 32, at 233 n.96 (calling it “plausible” that judicial power may be waiveable); infra text accompanying notes 180-192 (describing debate at Convention about whether new government “shall” discharge states’ debts or merely “shall have power” to do so).
\item See Amar, supra note 32, at 233 n.96 (adding that “[i]f the judicial power may be waived, . . . it can only be waived by Article III judges, . . . not . . . by Congress”). Though intended to blunt the force of “shall,” Meltzer’s comment plays into the hand of theories of mandatory jurisdiction in suggesting that federal courts “have” (rather than “may, if Congress assents, have”) capability.
\item U.S. CONST. art. I, § 8.
\item See Akhil Reed Amar, \textit{Intratextualism}, 112 HARV. L. REV. 747, 760 (1999) (explicating passage by Justice Story about whether “shall” in Article III Vesting Clause is “a future-tense verb or an imperative verb”); Tillman \& Tillman, supra note 145, at 454-55 (discussing eighteenth-century usage of “shall” in its “mandatory” sense and in its sense “indicating futurity”).
\item E.g., Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816) (Johnson, J., concurring); REDISH, \textit{TENSIONS}, supra note 17, at 37-38 (casting doubt on whether “shall” implies mandate as opposed to future tense).
\end{enumerate}
\end{footnotesize}
insisted that in that clause it was “plain and obvious” that the word was used “in the future sense, [with] nothing imperative in it.”

To be sure, the “shall” in the Extension Clause is not a direct mandate; if it orders any constitutional entity to act, that entity, Congress, is only implied. Still, one might say that as part of the legislature’s enactment of housekeeping laws “necessary and proper for carrying into Execution” the judicial power, it “shall” (i.e., must) extend that power to the listed categories of disputes. But even if one reads the “shall” merely as intimating the future, such that the Extension Clause is not an order at all but simply a pronouncement of what is to be, that pronouncement is nonetheless definitive: the judicial power “shall” (i.e.,

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161 Martin, 14 U.S. at 374-75. The Martin case turned specifically on whether Congress could authorize the Supreme Court to exercise jurisdiction over cases originating in state courts, not whether Congress could withhold it, but the case served generally as the platform for a wide-ranging analysis of Article III, with “shall” playing a prominent role. The Virginia Court of Appeals had defied a U.S. Supreme Court decision reversing its judgment: the Virginia court’s rationale was that Congress’s grant of appellate jurisdiction to the Supreme Court in such cases exceeded Article III’s limits on the federal judicial power. Arguing that the Supreme Court had properly exercised jurisdiction, counsel for the petitioner focused on the Extension Clause: “The word shall, is a sign of the future tense, and implies an imperative mandate . . . .” 14 U.S. at 314.

Seeking to minimize the federal judicial power, the respondent’s counsel disagreed with that assessment: “Shall is merely a sign of the future tense, and not imperative . . . . ‘Extend,’ or ‘shall extend,’ merely imports that [the judicial power] may extend.” Id. at 316-17 (arguing that if “shall” were imperative, laws giving federal and state courts concurrent jurisdiction would be unconstitutional). Allowing the Supreme Court to review state court decisions, he contended, would be “inconsistent with the whole genius, spirit, and tenor of the constitution.” Id. at 316 (arguing that Constitution operated on individual persons rather than on “state authorities”).

In his opinion for the Court upholding its jurisdiction, Justice Joseph Story expatiated on not only the breadth but also the definitiveness of Article III. As to the Extension Clause, he stressed that “the words are used in an imperative sense,” resulting in a legislative duty to execute the constitutional mandate. Id. at 328, 331. In his view, that mandate left no room for Congress to withhold any jurisdiction from the federal courts collectively, at least in the categories of disputes headed by “all Cases” as opposed to “Controversies.” Id. at 331, 333-36: see 3 Story, supra note 151, at §§ 1588-1590, 452-54 (reiterating same view). He even stitched together an argument, skirting a constitutional “may,” that “Congress are bound to create some inferior courts.” Martin, 14 U.S. at 331.

Justice Johnson concurred in the judgment but disagreed with Justice Story’s vision of mandatory jurisdiction, referring instead to Congress as the body with discretionary “power to assume jurisdiction to the constitutional extent.” Martin, 14 U.S. at 375-76 (rejecting any distinction between “all Cases” and “Controversies”). That view of judicial subservience apparently stemmed from his disagreement with Justice Story’s take on the Extension Clause:

[The plain and obvious sense and meaning of the word shall, in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the constitution is: “We are about forming a general government—when that government is formed, its powers shall extend,” &c. I therefore see nothing imperative in this clause, and certainly it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act.

Id. at 374-75.

As provocative as Justice Story’s opinion was in suggesting that inferior courts must be created and in distinguishing between “all Cases” and “Controversies,” history has instead favored Justice Johnson’s vision of broad legislative discretion with respect to the entire menu of federal jurisdiction. But see Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 243 n.228, 246-47 (1971) (opining that by deleting the phrase “when necessary” from a draft of the Constitution, the Committee of Style “robbed Congress of discretion whether or not to create inferior courts”); Amar, supra note 32 (resuscitating Justice Story’s two-tier interpretation). The putatively non-imperative “shall,” however, does not justify that vision any more than do other arguments advanced by proponents of the conventional view.

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will extend. (That extension could occur via a perfunctory implementing statute or simply as a constitutional rule that is self-executing upon ratification. Whether the clause is an implicit injunction or a mere declaration of the judiciary’s autonomy, it offers Congress no leeway to violate its terms. In the language of litigation, ignoring a declaratory judgment may be less contemptuous than defying a direct court order, but it is no more legal.

In other words, the “duty or futurity” dichotomy is a false one because statements about the future are not inherently permissive. The Extension Clause’s “shall” is simultaneously prospective and prescriptive. It anticipates what will be done, not as a neutral prediction, but by way of ensuring that result, without room for debate. Congress could no more block the extension of judicial power than it could the establishment of a Supreme Court, in which that power “shall be vested.”

The dual role for “shall” is hardly limited to the Extension Clause. That modal verb set the temporal motif of the Constitution. The document was forward-looking, in that it would not govern anyone before ratification by nine states. As a result, with two exceptions, every sentence in the (unamended) Constitution contained a “shall.” In contrast, the immediately effective Declaration of Independence used but a single “shall”; the dominant tense was the present perfect, serving to list the indignities the king had perpetrated. The original Constitution, in all, used “shall” 191 times.

163 Such a reading is a stretch because “shall” signals emphatic futurity, implying definiteness or inevitability—much more so than “will.” See Margaret Sinclair, “It Shall Be So”: Grammatical Usage as Political Intent in Coriolanus, 36 J. AESTHETIC EDUC. 32, 32 (winter 2002) (“Instead of referring to mood or attitude, ‘shall’ generally refers to futurity. Without reference to time, ‘shall’ in the third person signifies determination or purpose.”). The implications of “shall” and “will” are reversed, however, when the subject of a sentence is “I,” Id. at 36 n.4 (“To denote inevitability, writers use ‘will’ with the first person and ‘shall’ with the third persons.”) (citing A.E. Abbott, A Shakespearian Grammar 223 (1897)).

164 Constitutional language in the passive voice, such as the provision that the judicial power “shall be vested,” more readily implies the intervention of an implementing statute than does the active “shall extend.” But regardless of whether the Extension Clause is self-executing, Congress may not contradict it.

165 In the slightly different context of Article III’s Vesting Clause, Calabresi and Rhodes have characterized theories of mandatory jurisdiction as dependent on reading “shall” as “must” rather than “will.” Calabresi & Rhodes, supra note 24, at 1178, 1187-88, 1199-1200, 1209-10 (arguing that extent of presidential power turns on same issue in Vesting Clause of Article II). If “shall” means “will,” they contend, then the clause “suggests . . . but does not command.” Id. at 1188 (declining to take sides in the interpretive debate). But “will” does not mean “may.” “[D]escriptive” though the word “will” may be, id., it leaves no room to stray from the description.

166 Despite his forceful insistence in Martin that the Extension Clause’s “shall” was used in the “future sense” with “nothing imperative” in it, see supra note 161 and accompanying text, even Justice Johnson seemed to recognize that his grammatical distinction amounted to little. As a practical matter, he wrote, “wherever power is given it will be used,” and thus “the same result arises from using [‘shall’] in a future sense.” 14 U.S. at 375 (Johnson, J., concurring). My disagreement with him is thus ultimately less about the meaning of “shall” than about his assumption that the power in question was not given to the judiciary but to Congress. See id. at 375-76.

167 See Calabresi & Rhodes, supra note 24, at 1179 n.125 (raising possibility that “shall” in Vesting Clause is “a present tense ‘performative’ that acquires force from its self-proclaimed status in a constituting document”); cf. Martin, 14 U.S. at 328-30 (Story, J.) (calling all of Article III “mandatory upon the legislature,” which has a “duty to vest the whole judicial power”); Clinton, supra note 32, at 782 (arguing that “shall” was used “in its mandatory sense rather than as future tense”).

168 Every sentence of the Bill of Rights as well uses a “shall” other than the Tenth Amendment, which states simply that powers not delegated to the United States and not prohibited by the Constitution “are” reserved to the states or the people. U.S. CONST. amend. X. That distinction presumably arose because the amendment clarified the existing constitutional order rather than establishing a new right.

169 In a compilation of each occurrence of every word (other than articles, prepositions, and the like) in the text of the Constitution, the entry for “shall” dwarfs all others. See Charles W. Stearns, Concordance to the
For example, writing that all legislative powers “are” vested in Congress would not do, as that description would not be the case until ratification. Thus that opening clause, like those that followed it, was phrased prospectively: “shall be vested.” One exception was the preamble, in which “We the People” did something then and there, namely, “ordain and establish this Constitution.” The other was the provision that each house of Congress “may” determine rules of proceedings, punish its members, and even expel them. \(^{170}\)

Pivoting from the prescriptive determinacy of “shall,” the word “may” conveyed that the chambers would have powers but no duties in those areas. That use of “may” shows (as do plenty of compound sentences mixing “shall” and “may”) that the Constitution’s drafters knew how to grant discretion when appropriate. \(^{171}\)

In short, “shall” was evidently chosen for the Extension Clause, the Legislative Vesting Clause, and others as an alternative not only to “does,” but also to “may.” Not all clauses using “shall” require a specific action; after ratification, nobody was charged with implementing the abstract vesting of the legislative power. \(^{172}\) But those self-executing clauses are still mandatory in that, other than through the amendment procedure, no constitutional actor has discretion to effect a different result. \(^{173}\) Regardless of whether the more grammatically faithful reading of the Extension Clause is that the judicial power “must” or “will” extend to the listed categories of disputes, the legislature lacks the power to derail it.

C. Conventional Usage

Towards the end of the Federal Convention, when the Extension Clause underwent a slew of minor edits, including the August 27 change from “jurisdiction of the Supreme Court” to “Judicial Power,” \(^{174}\) its “shall” went untouched. That was not for lack of appreciation of the word’s importance. When discussing other clauses around that time,
the delegates showed sensitivity to how “shall” would be interpreted. They understood its potency, and they wielded it purposefully.175

For example, a late draft of the Constitution provided that full faith and credit “ought to” be given in each state to official acts of other states and that the national legislature “shall” prescribe laws governing the details.176 During the discussion about the clause, a motion passed to edit the “shall” to “may,” and the “ought to” to “shall.”177

The language about the President’s State of the Union address underwent a similar transformation. The Committee of Detail suggested the following: “He shall, from time to time, give information to the Legislature, of the state of the Union: he may recommend to their consideration such measures as he shall judge necessary, and expedient . . . .”178

When the full Convention took up that point on August 24, Pennsylvania’s Gouverneur Morris successfully moved to strike “he may” in favor of “and,” thus linking “recommend” back to “shall.” James Madison, accentuating the crucial word himself, described the motion’s effect as “mak[ing] it the duty of the President to recommend, & thence prevent umbrage or cavil at his doing it.”179

During the debate about how to flesh out a resolution “[t]o secure the payment of the public debt,” the forcefulness of “shall” took center stage. On August 18, Roger Sherman of Connecticut argued that the Constitution ought to authorize, but not require, Congress to assume state debts; his colleague Oliver Ellsworth disagreed.180 Three days later, reporting from a committee that had considered the issue, New Jersey’s William Livingston proposed language tracking Sherman’s view: “The Legislature of the U. S. shall have power to fulfil the engagements . . . and to discharge as well the debts of the U- S.”181 This time Elbridge Gerry of Massachusetts spoke in opposition, arguing that the mere power without an obligation to use it would “destroy[] the security” of public creditors.182

When the debate resumed the next day, after a comment by Gerry about the need to avoid a pretext under which the new government might try to avoid the public debt of the old one, Gouverneur Morris took Gerry and Ellsworth’s side and successfully moved to amend the proposal to “The Legislature shall discharge the debts & fulfil the engagements

176 2 RECORDS, supra note 23, at 483 (Sept. 1), 483-84 (journal), 485 (Madison).
178 2 RECORDS, supra note 23, at 176 (Aug. 6), 185 (report of Committee of Detail) (Madison’s notes).
179 2 id. at 396 (Aug. 24), 405 (Madison’s notes) (emphasis in original); see also id. 398 (journal).
180 2 id. at 321 (Aug. 18), 327 (Madison’s notes).
181 2 id. at 352 (Aug. 21), 355 (Madison’s notes) (emphasis added); see id. 352 (journal).
182 2 id. at 352 (Aug. 21), 356 (Madison’s notes); see id. 352 (journal).
[of the United States]." In his notes, Madison highlighted the “shall," as he did again the following day when other language was added to the sentence.

Two days later, after a successful motion to reconsider, Virginia’s George Mason—known to distrust heavy-handed governments—resumed the opposition. According to Madison’s notes, “Mason objected to the term, ‘shall . . .’ as too strong. It may be impossible to comply with it.” Mason continued at length, drawing distinctions among public creditors and arguing that though some were less deserving of being paid, the “shall” would seem to require payment to all; he also feared that “the word ‘shall,’ might extend to all the old continental paper.” Morris took the other side, opining that he “preferr’d the term ‘shall as the most explicit.’” He also noted the political benefit of such an unambiguous provision, which would “create many friends to the plan.” Though the sentence was reconfigured and eventually moved from Article I to Article VI, the unqualified “shall” remained.

It was two days later that the delegates amended various aspects of the Extension Clause but left the “shall” intact. In light of the surrounding debates and edits, it is difficult to argue that they failed to appreciate its significance as an unequivocal term of intractability. It is instead scholars supporting the traditional view who do not grant “shall” its due.

For example, John Harrison has drawn a surprising conclusion from the lexicon of the Constitution. Based in part on the lack of the word “must” anywhere in the text, he insists that one cannot impute a similar meaning to the Extension Clause’s “shall.” He does not explore the broader consequences of that argument: if no instances of “shall” are tinged with the imperative hue of “must,” then the whole document becomes precatory, more resolution than constitution.

Harrison relies on the basic constitutional principle of limited federal powers. Positing that the Extension Clause must set a ceiling for the judicial power, he argues that reading “shall extend” as a floor would shatter that ceiling. What he does not contemplate is the possibility of a construction merging the two. In fact, there is nothing unique to the Extension Clause in having “shall” install a floor and a ceiling simultaneously. Throughout the Constitution, “shall” establishes fixed norms, including those about the reach of authority of the governmental branches, such as in the provisions about when “[t]he Congress shall have Power” or “[t]he President shall have Power.”

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183 2 id. at 366 (Aug. 22), 377 (Madison’s notes); see id. 368 (journal).
184 2 id. at 366 (Aug. 22), 377 (Madison’s notes) (emphasis in original); see 2 id. 368 (journal) (not italicizing “shall”).
185 2 id. at 380 (Aug. 23), 392 (Madison’s notes) (emphasis in original); see 2 id. at 382 (journal) (not italicizing “shall”).
186 2 id. at 396 (Aug. 24), 396 (journal), 400 (Madison’s notes).
187 BRANT, supra note 108, at 23.
188 2 RECORDS, supra note 23, at 408 (Aug. 25), 412 (Madison’s notes).
189 2 id. at 408 (Aug. 25), 412-13 (Madison’s notes).
190 2 id. at 408 (Aug. 25), 414 (Madison’s notes).
191 2 id. at 408 (Aug. 25), 414 (Madison’s notes).
192 2 id. at 408 (Aug. 25), 414 (Madison’s notes).
193 See supra text accompanying notes 34-37 (focusing on difference between capability and obligation).
194 Harrison, supra note 16, at 217 (denigrating Robert Clinton’s theory of mandatory jurisdiction).
195 Id.
196 Cf. id. at 218-19 (citing Robert Clinton’s claim to that effect but dismissing it).
198 U.S. CONST. art. II, § 2.
The branches need not always use the full extent of their powers, but the powers are nonetheless inviolable.\textsuperscript{199}

It seems true (especially after the Tenth Amendment\textsuperscript{200}) that, as almost everyone agrees,\textsuperscript{201} the judicial power extends no further than the listed cases and controversies, but it is equally clear that it does extend that far. If the delegates had wanted the legislature to calibrate the extent of judicial power, they could have found a model one constitutional paragraph earlier or later. Section 1 of Article III sets a minimum of a “supreme” court but allows “inferior” courts as well, “as the Congress may from time to time ordain and establish.” The second paragraph of section 2 fixes a floor of cases in which the Supreme Court’s jurisdiction is original, but those cases can be multiplied via “such Exceptions” to the appellate form of the rest of the Court’s jurisdiction “as the Congress shall make.”\textsuperscript{202} In contrast, section 2’s first paragraph—the Extension Clause—says nothing about Congress.\textsuperscript{203} When traditionalists interpret “[t]he judicial Power shall extend” as “Congress may extend the judicial power,” they distort the clause beyond recognition.

\section*{IV. THE PRESENT (NOT POTENTIAL) POTENCY OF \textit{EXTEND}}

An early instance of the word “extend” cited in the \textit{Oxford English Dictionary} described Parliament as being “of great strengthe in matters whereunto it extendethe.”\textsuperscript{204} Under the conventional view in the United States, the same cannot be said of the federal judiciary, at least without a qualifier about the putative legislative power to weaken the judicial branch by withdrawing its jurisdiction in matters within its constitutionally “extend[ed]” bailiwick.

One of the arguments made in support of the conventional view of the Extension Clause is that its verb, “extend,” signals only the outer reaches of where something may potentially go, if unleashed.\textsuperscript{205} According to that claim, the judicial power does not, say, “apply” or “attach” unequivocally to the listed cases and controversies; all it does is “extend”

\begin{itemize}
  \item \textsuperscript{199} \textit{See supra} text accompanying notes 34-37, 101-103, 155 (stressing Supreme Court’s lack of obligation to exercise its power in every case); \textit{infra} text accompanying notes 265-266 (discussing distinction between extension of power and duty to use power).
  \item \textsuperscript{200} Absent the amendment, the argument rests mainly on the slippery doctrine of “expressio unius est exclusio alterius.”
  \item \textsuperscript{201} \textit{See} Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (holding that statute “cannot extend [federal] jurisdiction beyond the limits of the constitution”). One who did not agree was constitutional historian William Winslow Crosskey, who pointed to the Extension Clause’s lack of an explicit ceiling on the federal judicial power. 1 \textit{Crosskey}, \textit{supra} note 44, at 619-20.
  \item \textsuperscript{202} This interpretation of the Exceptions Clause, which is disputed by traditionalists, is elaborated in Glashauser, \textit{supra} note 4; \textit{see also supra} note 39 and accompanying text (summarizing conventional interpretation of Exceptions Clause).
  \item \textsuperscript{203} Two other paragraphs in Article III also refer to congressional powers. \textit{See U.S. Const.} art. III, § 2 (setting venue for criminal trials where “Congress may by Law have directed”); \textit{id.} art. III, § 3 (“The Congress shall have Power to declare the Punishment of Treason . . . ”). Only the Extension Clause and the paragraph about treason do not.
  \item \textsuperscript{204} \textit{Oxford English Dictionary} (2012) (citing 1 \textit{John Strype, Annals of the Reformation} app. x. 28 (1559)).
  \item \textsuperscript{205} E.g., Harrison, \textit{supra} note 16, at 212 (defending traditional view based on paraphrase of Extension Clause as “The judicial power may be used to decide . . . ” or “The judicial power shall be capable of deciding . . . ”); Liebman \& Ryan, \textit{supra} note 14, at 708 (insisting that “shall extend to’ meant that and not ‘shall be’”); \textit{id.} at 721-23, 753 (arguing that editing of clause about cases and controversies from “shall be” to “shall extend” changed clause from jurisdictional floor to ceiling); Velasco, \textit{supra} note 14, at 703-04 (citing dictionary definition of “extend” to support claim that Congress’s right to control jurisdiction stems from a “natural reading of the text of the Constitution”).
\end{itemize}
to that ceiling, and thus the power is merely dormant until Congress animates it. As this Part explains, however, both the plain meaning and the drafting history of the clause show that the extension of the judicial power is a straightforward, unconditional demarcation of the scope of the power that Article III vests in the judiciary.

A. More Than a Ceiling

A paraphrase of the start of the Extension Clause by one defender of the conventional view, John Harrison, exemplifies the interpretation of the clause as merely setting a ceiling of potential jurisdiction: “The judicial power shall be capable of deciding . . . .”206 Awkward as that may be, it makes sense if one reads “[t]he judicial power” as “the judiciary.” According to Harrison, though, a different branch is empowered to turn the capability into reality. As he notes, the Constitution did not need to decide when the judicial power would actually be exercised. Instead, he insists, “the decision can be left for Congress, as many important choices are.”207

Many indeed are, and this one could have been, as Edmund Randolph’s draft for the Committee of Detail suggested for certain cases.208 But nothing about the actual Extension Clause suggests that it was. Interpreting a provision as delegating decisions to a body that it does not mention is an odd move for a scholar who (rightly) admonishes, in critiquing another’s take on the same provision, that “the Constitution is not drafted in [an] indirect and allusive manner . . . .”209 In the absence of instructions to the contrary, whatever choices may exist about whether to exercise the judicial power210 would seem to lie with the branch invested with that power: the judiciary.211

To be sure, a clause in Article I charges Congress generally with the practical task of putting the Constitution into effect.212 But in the language of that clause, it is neither “necessary” nor “proper” to recalibrate the extent of a power that has already been extended. As shown by the analysis below of the simple word “extend”—the word Harrison contorted in his paraphrase—the cases and controversies listed in the Extension Clause are not only the ceiling of the Supreme Court’s jurisdiction, but also its floor.

1. Lexicographical Legerdemain

In the early nineteenth century, John Adams scoffed at the notion of fidelity to the King’s English, urging Americans to develop their own lexicography: “As an independent Nation . . . [w]e are no more bound by [Samuel] Johnson’s Dictionary than by the common

206 Harrison, supra note 16, at 212 (emphasis added) (offering “The judicial power may be used to decide . . . ” as an alternative).
207 Id. at 213 (implying that Exceptions Clause is source of that legislative power).
208 See infra Section IV(B)(3) (chronicling drafting and deletion of provision qualifying jurisdiction grant with phrase “as the national legislature may assign”).
209 Harrison, supra note 16, at 217.
210 See supra text accompanying notes 34-37 (stressing Supreme Court’s lack of obligation to exercise its power in every case).
211 See U.S. CONST. art. III, § 1 (vesting judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); Amar, supra note 32, at 267 (“As a matter of separation of powers, there is a tremendous difference between a court’s decision to decline to hear a case that it is empowered to entertain, and a congressional attempt to deny the court the power to hear that very same case.”).
212 U.S. CONST. art. I, § 8 (empowering Congress to “make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by th[e] Constitution in the Government of the United States”).
or Statute or Cannon Law of England.”

Noah Webster had animated that brand of post-revolutionary zeal, arguing in 1789 that differentiating American English would have “vast political consequence” by facilitating independence of thought. The “honor”—he had recently dropped the “u”—of “an independent nation,” he argued, “require[d] . . . a system of our own, in language as well as government.” In 1828, Webster published what is regarded as the first comprehensive American dictionary. That was a generation or two after the Constitution, though, and so in the early twenty-first century, despite critics’ admonition that old dictionaries from England were prescriptive rather than descriptive, scholars often still seem bound by them, particularly Dr. Johnson’s, when explicating eighteenth-century American text.

Scholarship about the word “extend” is no exception. There is little historical intrigue, however, because its meaning has been static for hundreds of years. The definition in Dr. Johnson’s original edition from 1755 would be serviceable in the United States today:

1. To stretch out towards any part. 2. To spread abroad: to diffuse; to expand. 3. To widen to a large comprehension. 4. To stretch into assignable dimensions: to make local: to magnify so as to fill some assignable space. 5. To enlarge: to continue. 6. To increase in force or duration. 7. To enlarge the comprehension of any position. 8. To impart: to communicate. 9. To seize by a course of law.

214 Noah Webster, Dissertations on the English Language app. at 397-98 (1789) (stressing that “a national language is a band of national union”).
216 Noah Webster, Dissertations on the English Language 20 (1789).
218 See Jeffrey L. Kirchmeier & Samuel A. Thumma, Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century, 94 Marquette L. Rev. 77, 118 (2010) (cautioning that eighteenth-century English dictionaries “listed what words should mean (rather than how words were actually used”)”): cf. Lawrence Solan, When Judges Use the Dictionary, 68 Am. Speech 50, 55 (1993) (noting that problem stemming from definitions’ illusory sheen of precision is “especially pronounced” when “old dictionaries” are used to interpret old statutes or constitutional provisions).
As modern scholars relying on the 1773 edition in analyzing the Extension Clause have explained, “[t]he verb ‘to extend’ . . . derives from the Latin ‘extendere,’ meaning ‘to stretch [tendere] out [ex] an already existing thing or, in this case, a power.” 222

James Liebman and William Ryan cite the first sense of Dr. Johnson’s 1755 definition as well as the above reference to his 1773 edition to support their claim that when the delegates to the Federal Convention edited the verb phrase about the “jurisdiction” of federal courts from “shall be to hear and determine” to “shall extend to,” 223 they transformed the Extension Clause from a jurisdictional floor to a ceiling, “leaving the floor-setting duty to the legislature.” 224 But those sources offer no revelations that advance Liebman and Ryan’s argument. None of Dr. Johnson’s prescriptions suggests that when a power extends—or stretches, spreads, diffuses, expands, widens, magnifies, enlarges, continues, or increases—it is paradoxically reduced to a state of latency and subservience.

The dictionary citations by Liebman and Ryan are embedded in references to articles by Steven Calabresi (one solo, one with a co-author). 225 In other words, rather than invoking Dr. Johnson directly, Liebman and Ryan quote Calabresi’s quotations of his entries, which makes one wonder whether Calabresi’s take on “extend” might bolster their position. It turns out, however, that Calabresi (and his co-author) consulted Dr. Johnson not to comment on congressional control of jurisdiction, but rather to support the taxonomical contention that the Vesting Clause, rather than the Extension Clause, is the formal source of federal judicial power. 226 The verb “extend,” in Calabresi’s view, “merely ‘stretches’ forth the judicial power so that it will ‘reach’ or ‘include’ the nine categories of cases or controversies.” 227

As to Liebman and Ryan’s issue—whether the Extension Clause reserves power for Congress—Calabresi was, in those articles, expressly agnostic: “I t[ake] no position on this question . . . .” 228 In a later article (with a different co-author), though, he did take a position. Noting the inexorable command of the phrase “shall extend,” he embraced, at

223 1 RECORDS, supra note 23, at 223 (June 13), 223-24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes); see infra Section IV(B)(2) (discussing edit in detail).
224 Liebman & Ryan, supra note 14, at 722 & n.129.
225 In a parenthetical explanation of a citation to Calabresi’s solo article, Liebman and Ryan quote—as did Calabresi—the first sense of the entry for “extend” in Dr. Johnson’s 1755 edition. Liebman & Ryan, supra note 14, at 722 n.129 (quoting Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. Rev. 1377, 1380-81 & n.14 (1994) (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755))). In a parenthetical explanation of a citation to the co-written article, they quote the authors’ description of the entry for “extend” in Dr. Johnson’s 1773 edition. Id. (quoting Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 573 (1994) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 696 (Librairie du Liban ed. 1978) (4th ed. 1773))).
226 Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. Rev. 1377, 1381 n.14 (1994) (analyzing Article III’s Vesting Clause for purpose of making parallel with its Article II counterpart); Calabresi & Prakash, supra note 222, at 573 (“The etymology and plain dictionary meaning . . . make clear that it is the verb ‘vest’ in the Article III Vesting Clause that empowers the federal judiciary to act whereas the verb ‘extend’ can carry no empowering meaning or connotation.”).
227 Calabresi, supra note 226, at 1381 & n.13 (quoting Calabresi & Rhodes, supra note 24, at 1210 n.270); see also Calabresi & Prakash, supra note 222, at 573 (arguing that rather than serving as independent power source, Extension Clause applies power conferred by Vesting Clause).
228 Calabresi, supra note 226, at 1388 & n.37; see also Calabresi & Rhodes, supra note 24, at 1209 (stressing separateness of question of which section of Article III is source of judicial power from that of legislative ability to restrict that power).
least for the categories described in the Extension Clause as “Cases,” a theory of inviolable federal jurisdiction.  

In sum, Liebman and Ryan’s citations to Dr. Johnson may add a whiff of lexicographical propriety to their argument, but nothing about his dictionaries supports their thesis.  John Adams’s exhortations notwithstanding, the upheaval wrought by the American Revolution—despite the auspicious editing of the final word of the Declaration of Independence from the Johnson-approved “honour” to the “u”-free spelling that Webster would later endorse—did not extend to every jot of the English language.  The straightforward meaning of “extend” centuries ago in Great Britain has endured through the ages, on both sides of the Atlantic.

In a parenthetical, Liebman and Ryan acknowledge as much: “It . . . makes sense to give ‘extend to’ its eighteenth-century (and current) meaning of flexibly ‘reaching’ as far as, but not mandatorily including, the entire constitutionally permissible jurisdiction.”  But their focus on synonyms is a distraction.  Their pivotal interpretive move is not choosing “reach” as a substitute for “extend”; it is the insinuation that a power extending to or reaching certain objects does not “mandatorily includ[e]” them.  To be sure, possessing power does not mandate its use, but Liebman and Ryan assume that the “judicial” power is held by Congress, arguing that the edit resulting in the verb “extend” replaced what had earlier been envisioned as mandatory jurisdiction “with a legislative power to authorize [judicial] review when appropriate.” That assumption is groundless.  Providing that the judicial power extends to or reaches certain cases and controversies is not tantamount to granting legislative control over whether the judiciary may exercise the power.

Nicholas Rosenkranz is another scholar who has acknowledged the stability of the meaning of “extend.”  He too, however, citing three eighteenth-century dictionaries, has adopted an inexplicably dynamic reading of the word:

The verb “to extend” suggests today just what it signified in 1789: stretching, enlarging . . . Thus, the scope of the judicial power— . . . unlike the scope of the legislative power—is not entirely fixed by the Constitution but may be stretched or enlarged by acts of Congress.

This puzzling conclusion, which Rosenkranz uses in service of a broader argument about the contrasting finiteness of Congress’s own power, imputes transformative ability to the definition of “extend.”  No pile of dictionaries, though, can change “The judicial Power shall extend [or stretch or enlarge] . . .” into “Congress may extend [or stretch or enlarge] the judicial Power . . . .”

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229 Calabresi & Lawson, supra note 41, at 1013-14 & n.65 (reserving judgment on categories described as “Controversies”).


231 Liebman & Ryan, supra note 14, at 723.

232 Id.

233 Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867, 1896 (2005) (contrasting judicial power with legislative power to critique common understanding of scope of Congress’s authority to enact bills implementing treaties).

234 Rosenkranz makes his point about the Extension Clause not to advance an argument about Article III in particular but rather to support his thesis that Congress lacks authority to enact statutes implementing treaties whose subject matter falls outside the boundaries of the powers listed in Article I.  Rosenkranz, supra note 233, at 1868-69 (disagreeing with result in seminal case of Missouri v. Holland, 252 U.S. 416 (1920)).
The vision of congressional control articulated by Rosenkranz differs in kind from the conventional one. As Congress enacts new statutes, he reasons, courts will be called on to interpret them, and thus in a certain quantitative sense, the scope of the judicial power to decide cases will grow.\(^{235}\) That point is true enough, as far as it goes: because some of the constitutionally assigned cases for federal courts to decide are those “arising under” federal laws, it is inevitable that Congress’s pace of substantive (as opposed to jurisdictional) lawmaking, particularly when the laws include private rights of action, can stimulate courts’ wielding of their authority.

The word “extend,” however, contrary to Rosenkranz’s assertion, has nothing to do with that unremarkable truth.\(^{236}\) Even if Article III provided that federal jurisdiction “shall be to hear and determine” the various cases and controversies, as an early draft did,\(^{237}\) Congress’s substantive output would still affect the number of cases available for federal courts to decide, despite the lack of elasticity in the verbs “be,” “hear,” and “determine.” Indeed, the same would be true if Article III echoed the straightforward language of Article I by providing that “[t]he judiciary shall have Power To” adjudicate the cases and controversies.

As for the conventional qualitative claim that cases and controversies falling within the nine listed categories are at the jurisdictional mercy of Congress—a claim not addressed one way or another by Rosenkranz—arguments based on the word “extend” are likewise unavailing. Substituting “stretch” or “enlarge,” as Rosenkranz does, is unobjectionable in and of itself, but whatever dictionary synonym one might plug into the Extension Clause, the legislature does not end up holding a direct on-off switch for the judicial power.

Another scholar to stretch the meaning of “extend” beyond its bounds is Julian Velasco. He has enlisted dictionaries from 1855 and 1993 in support of the orthodox view of congressional power over the jurisdiction of federal courts:

The word “extend” is not unambiguous . . . . [T]he proper definition of the word “extend” is a non-mandatory one, meaning “to reach.” Thus, the relevant constitutional text is best paraphrased as follows: “The judicial power hereby reaches the following cases . . . .”\(^{238}\)

As in Rosenkranz’s interpretation, and Liebman and Ryan’s, the synonyms are but a smokescreen. Whether one defines “extend” as “stretch” or “enlarge” or “reach” is of no moment.\(^{239}\) Velasco’s sleight-of-hand, similar to that by Liebman and Ryan, is his characterization of the definition as “non-mandatory.” On its own, “extend” is inherently neither mandatory nor permissive. The mandatory, or at least inevitable, nature of the Extension Clause springs instead from the word “shall.”\(^{240}\)

Still, Velasco’s paraphrase at the end of the above passage is fair: the judicial power does indeed “reach[]” the listed cases and controversies. In elaborating further on the

\(^{235}\) Rosenkranz, supra note 233, at 1896 (“A new federal statute can give the judiciary something new to do, thus expanding its power.”).

\(^{236}\) See Rosenkranz, supra note 233, at 1896 (attributing elasticity of judicial power to long-standing definitions of “extend”).

\(^{237}\) 1 RECORDS, supra note 23, at 223 (June 13), 223-24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes); see infra Section IV(B)(2) (discussing edit in detail).

\(^{238}\) Velasco, supra note 14, at 703-04.

\(^{239}\) See supra note 227 (critiquing distinction made by Calabresi and Rhodes between “reach” and “include” as potential senses of “extend”).

\(^{240}\) See supra Part III.
clause’s meaning, however, Velasco conjures up illusory flexibility, apparently from the supposed suppleness of “extend”: “Despite the self-executing ‘shall,’ the words ‘shall extend’ are more permissive than mandatory; they are better interpreted as ‘can include’ rather than as ‘must include.’”241 This conception of the judicial power as a reservoir that may or may not be tapped is all too common. Even Steven Calabresi, when endorsing a (partial) theory of mandatory federal jurisdiction based on his reading of “shall” as “must,” managed to characterize “shall extend” as indicating “the maximum potential extent of federal judicial power.”242

From that problematic premise, Velasco, making the same logical leap as Liebman and Ryan, concludes that the body with the power to tap the reservoir is Congress.243 That interpretation, he maintains, stems from a “natural reading of the text of the Constitution.”244 With or without dictionaries, though, there is nothing “natural” about reading the Extension Clause—or, if one would prefer, the Stretching, Enlarging, or Reaching Clause—as turning the judicial power into a legislative one.

2. An Unwarrantable Connotation

When the prodigal protagonist of Shakespeare’s Timon of Athens boasted, “To Lacedaemon did my land extend,” he was not speaking of a contingent interest.245 Later examples of its usage confirm that the verb “extend” did not apply to subjects that were inherently inchoate.

In fact, the extension of jurisdiction (if not “judicial power” per se) was a familiar linguistic construct to Americans in the constitutional era. The Declaration of Independence had used it in one of its defiant remonstrations: “We have warned [our British brethren] from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us.”246 That grievance echoed a similar point from the Declaration and Resolves of the First Continental Congress two years earlier: “Whereas, . . . the British parliament . . . hath imposed rates and duties payable in these colonies . . . and extended the jurisdiction of courts of Admiralty not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.”247

In those revolutionary contexts, “extend” carried no evident connotation of potentiality. If extending jurisdiction had simply been a preliminary step clearing the way for some other body to decide later whether the extended jurisdiction could in fact be exercised, the colonial complaints would have lacked some of their bite.

Nor does anything in the Constitution suggest such a connotation. Of course, the document lacks a glossary as such,248 but the way a word is used in one provision can help

241 Velasco, supra note 14, at 704; see also id. at 716 (referring to “shall extend” as “descriptive”).
242 Calabresi & Lawson, supra note 41, at 1014 (emphasis added).
243 See Velasco, supra note 14, at 704 & n.162 (assuming that it is up to Congress to decide extent to which judicial power should be wielded).
244 Velasco, supra note 14, at 704.
245 WILLIAM SHAKESPEARE, TIMON OF ATHENS, act 2, sc. 2, line 840 (1607). His previous line was “Let all my land be sold.” Id. line 835.
246 THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added).
247 Declaration and Resolves of the First Continental Congress (October 14, 1774) (emphasis added), reprinted in DOCUMENTS OF AMERICAN HISTORY 82, 83 (Henry S. Commager ed. 1944).
248 LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 140 (1993) (critiquing “theoretically incoherent body of law” that results when Supreme Court interprets individual constitutional words across different cases).
explain its meaning in another. In its only other appearance in the unamended Constitution, the word “extend” is used in the negative, with language indicating a range. Section 3 of Article I provides that in cases of impeachment, judgment “shall not extend further than to” removal from one’s current office and disqualification from other offices. Echoing a similarly phrased provision from the Articles of Confederation, that sentence structure puts up a ceiling: no judgment may be more onerous than removal and disqualification, but nothing dictates such a double sanction in any given case.

The clause about impeachment sanctions is not as far removed from the Extension Clause as one might think. The “shall not extend further than to” phrasing originated in James Wilson’s draft, for the Committee of Detail, of what became Article III; it was not until the end of the Convention that the Committee of Style moved it, intact, to Article I. Had Wilson and his fellow committee members wanted to engineer a ceiling in the Extension Clause similar to that in the clause about impeachment sanctions, they could have easily used the same comparative construction: “The judicial Power shall not extend further than to all Cases, in Law and Equity, arising under this Constitution . . . .” Or the same essential idea could have been phrased in the positive, with “shall extend up to . . . .”

Under either of those formulations, one could have more sensibly inferred an eventual need for precise demarcation within the constitutional range, though the identity of the appropriate power broker to pinpoint a new boundary would have been far from clear. Yet Wilson, his committee, and eventually the whole Convention stayed with “shall extend to” for the Extension Clause. By eschewing any language indicating a range, such as “not . . . further than” or “up to,” the delegates, instead of installing a ceiling, simply sealed in a fixed ambit of power for the judiciary.

The Constitution was not the only momentous American document of 1787. One month to the day after delegates in Philadelphia introduced “extend” into the draft of what would become the Extension Clause, the Continental Congress in New York enacted the Northwest Ordinance, which included a precursor to the Bill of Rights. The prefatory language to the six enumerated rights described one of their purposes as “for extending the fundamental principles of civil and religious liberty” to the newly organized territory so

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249 See Amar, supra note 158, at 748 (outlining interpretive method); Calabresi & Rhodes, supra note 24, at 1216 (advocating holistic interpretation under which parallel provisions in Articles II and III would be read in same way).

250 The only appearance of “extend” in the Articles of Confederation also was in the negative, with language indicating a range: “[R]estrictions [on trade and commerce by out-of-state citizens] shall not extend so far as to prevent removal of property imported into any State, to any other State, of which the owner is an inhabitant . . . .” Articles of Confederation art. IV (1781). The range described in the constitutional clause (“not . . . further than”) included the ceiling, whereas the range in the Articles of Confederation (“not . . . so far as”) did not, but each provision left leeway to determine the appropriate sanction or restriction.

251 2 Records, supra note 23, at 163 (Wilson draft for Committee of Detail), 173 (showing emendation by John Rutledge).

252 id. at 582 (Sept. 12), 590 (report of Committee of Style), 592.

253 To be sure, both “shall not extend further than to” and “shall extend up to” can be read as communicating fixed points rather than ranges, but those locutions, with their evocations of distance and height, convey a stronger suggestion of openness and room for movement than does the unadorned “shall extend to.”

254 See infra Part IV(B).

255 Several years later, the Eleventh Amendment negated some of what the Extension Clause had conferred: “The Judicial power of the United States shall not be construed to extend to [certain suits].” Because no phrase such as “further than” was used, the amendment set no ceiling: it simply razed part of the Extension Clause’s existing structure.
that those principles would permeate its legal infrastructure. If “extending” principles was to give them force that was merely potential, subject to later unilateral policy judgments, the principles hardly could have been characterized as “fundamental.” In fact, the ordinance stressed that, unless the existing states and people in the new territory both consented, the rights declared in furtherance of those principles would “forever remain unalterable.” The judicial power “extend[ed]” by the Constitution is no less permanent.

3. An Imperfect Analogy

The jurisdiction of hypothetical police officers serves as the vehicle for an analogy by James Liebman and William Ryan that helps illuminate the meaning of “extend” in Article III. According to Liebman and Ryan, because the Constitution entrusts much of the enforcement of federal rights to state courts, the role of the federal judiciary is to “spot-check” the decisions of state judges, to the extent deemed appropriate by Congress. Thus defending the orthodox model of legislative control of the Supreme Court’s appellate jurisdiction, Liebman and Ryan argue that “[t]he Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts.” In their view, the “judicial Power” refers to the “authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.”

To “extend” that power to certain cases and controversies, they contend, is not to confer jurisdiction but simply to provide that when rendering decisions in such disputes, judges must abide by those qualitative prescriptions.

256 Northwest Ordinance of 1787, § 13 (emphasis added), reprinted in 1 Stat. 50, 52 (1789).
257 Id. § 14.
258 Liebman & Ryan, supra note 14, at 703.
259 Id. at 702-03, 768-69, 775.
260 Id. at 771 (emphasis removed from original). More specifically, Liebman and Ryan describe a federal judicial power embracing five “qualitative attributes” that combine to both constrain and protect the adjudicative process: (1) independence, through life tenure and salary protection; (2) “insulation from self-consciously political decisionmaking” by separation of the judiciary from the other branches of government; (3) dissociation from state courts; (4) “the capacity to decide the whole case,” including both law and fact; and (5) “the obligation to decide cases on the basis of all pertinent federal law,” as a way of insuring the supremacy of federal law. Id. at 769-70.
261 Id. at 753 (arguing that extending judicial power to certain cases serves not to guarantee that all such cases will be heard but “only to require that [federal courts] deploy the included judicial qualities when they do decide them”).
In an attempt to show that the Extension Clause permits legislative discretion about the quantitative extent to which judges may have the opportunity to wield the judicial power, Liebman and Ryan offer this analogy: “[C]onsider a police chief’s statement to line officers: ‘From now on, your [exercise of the qualities of] courtesy, professionalism, and respect shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs.’”262 (The bracketed phrase is theirs.) The analogy matches the basic structure of the Extension Clause, as shown in the table below, and is a commendable effort to parse the clause by preserving its linguistic essence while removing its loaded legal context. It does not, however, reveal what the scholars intend.

<table>
<thead>
<tr>
<th>[Y]our [exercise of the qualities of] courtesy, professionalism, and respect</th>
<th>shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The judicial Power</td>
<td>shall extend to all Cases [and Controversies of various sorts].</td>
</tr>
</tbody>
</table>

Liebman and Ryan draw two conclusions from the analogy. One is unobjectionable on its face, though it does not support their thesis, while the other blurs a crucial distinction between responsibility and permission:

>This statement’s . . . qualitative subject matter makes clear that it does not require officers to attend all, or any, athletic events, parties, or professional conferences, but only to behave themselves when they do. Likewise, to say that “federal courts’ power to reach independent, comprehensive, final, and effectual decisions shall extend to all cases arising under the Constitution, laws, and treaties of the nation” is [1] not to require those courts to decide all such cases but [2] only to require that they deploy the included judicial qualities when they do decide them.263

The scholars’ first conclusion, that federal courts need not decide every case and controversy of the sorts listed, makes sense: the extension of a power to certain situations makes it available but does not compel its use.264 The implication, however, that the Extension Clause thus does not grant federal courts “quantitative (jurisdictional)” protection is groundless. Interpreting the Extension Clause as a non-contingent jurisdictional grant would not “require [federal] courts to decide all such cases.”265 It would simply give courts the authority to do so.

More crucially, a similar conflation of duty and power corrupts the second conclusion—that what the Extension Clause does is impose a “qualitative” restriction on courts whenever they happen to adjudicate the listed cases and controversies. Liebman and Ryan write as though they were comparing two obligations, correlating the officers’ “require[ment] . . . to behave themselves” with the putative “require[ment] that [courts] deploy the included judicial qualities.” The statement of the police chief indeed imposes a standard of conduct that must, in certain situations, be followed: a duty of decorum. In contrast, the constitutional clause by its terms sketches the scope of a “Power.” As the two scholars note, the duty attaches whenever officers attend the listed events. The more

262 Id. at 753 (bracketed phrase in original).
263 Id. at 753.
264 See supra text accompanying notes 34-37 (stressing Supreme Court’s lack of obligation to exercise its power in every case).
265 Liebman & Ryan, supra note 14, at 753 (emphasis added).
logical implication of the parallel would therefore be that whenever federal courts attend to the listed cases and controversies, their judicial *power* attaches.

Notably, neither attachment hinges on the approval of an outside entity. The police directive does not make the duty of decorum depend on implementation by the department; the directive itself creates the duty. Likewise, nothing in the Extension Clause conditions the judicial power on statutory authorization by Congress; the Constitution itself confers the power. The courts’ power is thus as definitive as the officers’ duty.

So a more comparable directive would be something like this: “Your police *power* (to flash a badge and make arrests and so on) shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs.” Just as the *duty* of decorum in Liebman and Ryan’s example categorically applies in those situations, so would the police *power* in this adjusted hypothetical. Nothing in the provision suggests that officers need special permission to attend social events in the first place, or that once they are in attendance, a separate decision is needed to trigger their power. And so it is with the Constitution. Whatever inherent qualities and constraints the judicial power may have, the Extension Clause implies no external activation process for it and contains nary a hint that before exercising jurisdiction in the listed cases and controversies, courts must first secure the substantive approval of the legislature.266

Aside from the confusion over duty and power, Liebman and Ryan’s interpretation is improbable in that it would seem to reduce the Extension Clause to a statement of the obvious. In their view, the clause serves to specify the method for adjudicating the listed cases and controversies, namely, through the exercise of the judicial power.267 In a vacuum, perhaps the clause could be read with that qualitative parameter as its focal point. But because in context there is no mystery about which power federal courts are to use—the judicial power is the only one vested in them—such a reading would make the clause unremarkable to the point of absurdity.

What the Extension Clause would fail to do under that reading is even more problematic: it would set no ceiling on the cases federal courts can hear. After all, mandating that police officers act professionally when attending off-duty social affairs does not bar them from spending free time alone or with their families.269 And so requiring courts to “deploy the included judicial qualities” when deciding the listed cases and controversies would presumably not bar them from deciding unlisted ones. Do Liebman and Ryan believe that federal jurisdiction is infinite, and that the longest of Article III’s nine sentences is dedicated to providing that in a discrete set of disputes, adjudication must be faithful to the qualitative “judicial Power”?  

266 Neutral logistical regulation would of course be appropriate. *See supra* note 29 and accompanying text. As for the police directive, it does not foreclose the possibility that another directive might create a condition. Likewise, one might argue that other constitutional language allows Congress to withhold appellate jurisdiction from the Supreme Court; indeed, many have advanced (albeit unconvincingly) such an interpretation of the Exceptions Clause. *See* Glashausser, *supra* note 4, at 1390-95. But the Extension Clause in and of itself cannot be read to contemplate such subservience for the judicial power.

267 *See* Liebman & Ryan, *supra* note 14, at 753 (“If the legislature were to tell federal courts to exercise something less than ‘the Judicial Power’ in cases within their jurisdiction, the courts would be required to ignore that directive because the Constitution . . . dictates that ‘the Judicial Power shall extend to’ those cases.”).

268 *Id.* at 769-70 (detailing five “qualitative attributes of ‘the judicial Power’”).

269 As Liebman and Ryan stress, their hypothetical directive creates no attendance requirement. *Id.* at 753.
They purport not to. But they cannot have it both ways: if the Extension Clause focuses, as they would have it, on prescribing how the listed cases and controversies are to be adjudicated, then it is a stretch to read into it a paradoxically secondary role of circumscribing what disputes may be adjudicated in the first place. More naturally, answering the what question is the primary—and in fact the only—function of the clause. All it does is sketch the judicial power’s scope, which by negative inference is limited to the listed disputes. Likewise, all the police directive seems to do is sketch the scope of the duty of decorum, which by negative inference is limited (outside of working hours) to the listed events.

Most importantly, even if the Extension Clause serves both purposes claimed by Liebman and Ryan—explaining both the how and the what—nothing in its language or in the scholars’ analogy suggests the further counterintuitive gloss that the judicial power is a merely latent one that is to be superintended by the legislature. To be sure, Liebman and Ryan are correct in stating that the “judicial” nature of the federal courts’ “Power” connotes certain qualitative attributes. But contrary to their claim, the Extension Clause in no way implies that those qualities come at the expense of “quantitative . . . protection” of jurisdiction.

B. An Extended Stay in Article III

The drafting history of the Extension Clause shows the role of the word “extend” to be straightforward, without hidden meaning. Providing that jurisdiction would “extend” to certain cases and controversies was simply a more economical way of conveying that jurisdiction would “be to hear & determine” those disputes.

The weeks leading up to the appearance of “extend” saw a major storm, however, on the judicial front—a storm that sheds light on what the word does not mean. Unable to agree on whether the new national judiciary should include tribunals other than the Supreme Court, the delegates to the Federal Convention struck a delicate compromise that would explicitly save that question for Congress. The question of what cases and controversies the Supreme Court’s jurisdiction should “extend” to was also the subject of significant debate. One draft of the Extension Clause suggested allowing Congress to decide some of that content, but that idea was quickly scotched, and the debate was resolved without resorting to the crutch of future legislative discretion. The delegates knew how to empower Congress with respect to the judiciary if they wanted to, and it was not by using the word “extend.” Once that word entered an early version of the clause, it remained, without amendment or discussion, through the final version of Article III.

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270 Id. at 753-54 ("[I]f the legislature were to assign anything other than the listed ‘Cases’ and ‘Controversies’ to the ‘Supreme’ and ‘inferior’ courts, those courts would have to decline the assignment so as not to address a matter beyond that to which ‘shall extend’ (1) the only ‘Power’ Article III, Section 1 gives them and (2) the power by which they are defined.").

271 See id. at 753 (arguing that Extension Clause serves “only to require that [federal courts] deploy the included judicial qualities when they do decide” listed cases and controversies).

272 See id. at 775 (supporting orthodox view of congressional power over Supreme Court jurisdiction on ground that “[t]he Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts”).
1. **From the Virginia Plan to the Madisonian Compromise**

As discussed above, the Virginia Plan kicking off the Federal Convention in May 1787 included a resolution about a “National Judiciary.” According to the most widely accepted source, the resolution conceived of “one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature”; according to an alternative credible source, the resolution was silent about the hierarchy or structure of any court system, referring only to an undifferentiated judiciary. What is certain is that the resolution provided that the “jurisdiction” of the national courts “shall be to hear & determine” various types of disputes.

The word “extend” would not appear until two weeks later, after much heated discussion about the contours of the judiciary branch and the resulting “Madisonian compromise.” But that discussion provides crucial context for understanding the eventual switch from the “hear & determine” construction to “extend.” And most directly, it shows that had the delegates wanted to open the determination of the Supreme Court’s jurisdiction to the legislature, they knew how to do so without resorting to a putative crevice in a solid word like “extend.”

On June 4, the delegates amended the Virginia Plan’s resolution so that the judiciary would “consist of One supreme tribunal, and of one or more inferior tribunals.” The next day, after the phrase “one or more” was struck, John Rutledge of South Carolina, who advocated a relatively weak national government, moved to strike the reference to inferior tribunals altogether, so as to leave the judiciary consisting only of the single supreme tribunal. State courts, Rutledge argued, should hear all cases originally; the appellate jurisdiction of the supreme tribunal would suffice “to secure the national rights & uniformity of Judgmts.” Inferior courts, he worried, would encroach on state courts’ jurisdiction and thus pose “unnecessary obstacles” to the approval of the Constitution.

Fighting for a robust federal judiciary, James Madison countered with a broadside against Rutledge’s position. From a practical perspective, Madison raised the specter of a flood of litigation that would overwhelm the single supreme tribunal if it were the only federal court. The geographic dispersal of inferior tribunals, he argued, was essential to ensuring the feasibility of taking a case to federal court. His ally, Pennsylvania’s James

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273 *See supra* Part II(C).
274 *See 1 RECORDS, supra* note 23, at 15 (May 29), 21-22 (Madison’s notes).
275 *JAMESON, supra* note 110, at 106.
276 *Compare JAMESON, supra* note 110, at 106 (“[The National Judiciary’s] jurisdiction shall be to hear and determine [the various types of disputes].”), *with 1 RECORDS, supra* note 23, at 15 (May 29), 21-22 (Madison’s notes) (“[The jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort [the various types of disputes].”).
277 *See infra* Section IV(B)(2).
278 *1 RECORDS, supra* note 23, at 93 (June 4), 95 (journal), 104-05 (Madison’s notes).
279 *1 RECORDS, supra* note 23, at 115 (June 5), 116 (journal) (in an apparent error, including word “to” between “inferior” and “tribunals”), 119 (Madison’s notes). Wilson then noted that he would later ask for reconsideration of the issue of inferior tribunals. 1 id. at 115 (June 5), 116 (journal), 120 (Madison’s notes). Further consideration of the resolution was postponed, perhaps because of uncertainty about the status of inferior courts. 1 id. at 115 (June 5), 116 (journal), 121 (Madison’s notes).
281 *See SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787, at 35 (2011) (observing that debate centered more on federalism than on separation of powers).
282 *1 RECORDS, supra* note 23, at 115 (June 5), 124 (Madison’s notes).
283 *Id.*
Wilson, added that certain cases were not suited for state courts at all. Madison worried less about encroaching on state courts’ jurisdiction than about those courts’ encroachments on people’s rights. Judges without the independence that the Constitution would provide might be “biassed,” and state juries could view cases through “local prejudices,” leading to “improper Verdicts.”

Madison’s other appeal for inferior tribunals was more abstract and sweeping. In his vision of the anatomy of the new system, the different branches needed to fit together properly to provide balance. It was essential, he insisted, that the judiciary be “commensurate to the legislative authority.” Eliminating inferior federal tribunals would stunt the judiciary and, by extension, the nation: “A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.” Connecticut’s Roger Sherman, however, was more concerned with the crippling expense he saw in the proliferation of federal courts. Why pay for new courts, he asked, when the existing state courts could do the job?

With the two sides’ positions clear, Delaware’s John Dickinson echoed Madison’s point about interbranch congruity but edged toward a compromise position. “[I]f there was to be a National Legislature,” he reasoned, “there ought to be a national Judiciary . . . ,” and the legislature should be empowered to “institute” courts. Still, Rutledge’s pending motion posed a stark choice: the judiciary would consist of either the supreme tribunal and inferior ones, or only the supreme one. And by a 5-4 vote, with two state delegations divided, the motion to eliminate the inferior courts passed.

By the slimmest plurality, the judiciary seemed destined to be but a single court. Perhaps the closeness of the vote inspired Madison and Wilson to try another tack. Evoking Dickinson’s earlier suggestion, they moved to adopt a provision empowering the legislature to “appoint” or “institute” inferior tribunals. They stressed the distinction between legislative discretion and a constitutional mandate.

Pierce Butler, Rutledge’s South Carolina colleague, was unswayed. He protested that even if preserving the possibility of inferior courts made some theoretical sense, as a practical matter, the states would “revolt at such encroachments.” But Rufus King of Massachusetts lauded the practicality of the compromise. Like Madison, he worried that a multitude of appeals would overwhelm the supreme tribunal were it the only federal court. King’s delegation, which had been divided, cast its lot with Madison and Wilson,
who also converted two other states to their side.\textsuperscript{294} Thus was struck the “Madisonian”—though perhaps it should be “Dickinsonian”—compromise.

The delegates had solved a seemingly intractable problem by, in essence, not solving it at all but instead leaving it open to future political determination. They had done so by explicitly invoking the legislature and describing what it could do to shape the judiciary. No resort was made to the word that, in the eyes of many scholars today, implicitly allows similar control: “extend.”

2. From “Hear . . .” to “Extend”

A week after the Madisonian or Dickinsonian compromise, the resolution about the judiciary returned to the Convention’s floor. The compromise would not be revisited, but the battle was surely fresh in the delegates’ minds, and lingering issues remained. The legislature’s power to “appoint” or “institute” inferior courts was in place, but it was unclear what ripple effect the compromise might have on the description of federal jurisdiction. Moreover, aside from the question of what court or courts would exercise it, the substantive content of that jurisdiction was far from settled. Amid the ensuing edits would enter, quietly, the word “extend.”

First came a motion to amend the resolution to read in part that “the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort all piracies, felonies &ca.”\textsuperscript{295} Based on the account of the original Virginia Plan in the most widely accepted historical source, that amendment would have eliminated the reference to the jurisdiction of inferior courts; the reference to such courts as part of the national judiciary had already been struck in favor of the provision empowering Congress to establish inferior courts,\textsuperscript{296} but still intact was the jurisdictional provision: “[T]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance . . .”\textsuperscript{297} Based on an alternative historical source, according to which the original plan did not refer to the jurisdiction or even existence of inferior courts, or to any allocation of jurisdictional form,\textsuperscript{298} the amendment sought merely to establish that the supreme court’s jurisdiction would take the appellate form; perhaps pointedly, it omitted any reference to potential inferior courts. The motion was not voted on.

The Convention then made several adjustments to the substance of federal jurisdiction. The Virginia Plan included an ambitious list of six categories of disputes to be heard by the national judiciary, including the open-ended “questions which may involve the national peace and harmony.”\textsuperscript{299} Though details are unavailable, apparently some delegates found the list too inclusive. The category of “all piracies and felonies on the high seas” was deleted, as was that of “all captures from an enemy.”\textsuperscript{300} The murky early sketch of diversity jurisdiction, for “cases in which foreigners or citizens of other States applying to

\begin{footnotes}
\item \textsuperscript{294} 1 RECORDS, supra note 23, at 115 (June 5), 118-19 (journal) (recording margin as 7-3, with Georgia and North Carolina having switched sides), 127 (Yates’s notes) (same). Madison recorded that New Jersey switched sides as well. \textit{Id.} at 125 (recording margin as 8-2).
\item \textsuperscript{295} 1 RECORDS, supra note 23, at 209 (June 12), 211 (journal), 220 (Madison’s notes).
\item \textsuperscript{296} See supra notes 281-288 and accompanying text.
\item \textsuperscript{297} 1 RECORDS, supra note 23, at 15 (May 29), 22 (Madison’s notes).
\item \textsuperscript{298} JAMESON, supra note 110, at 106.
\item \textsuperscript{299} See 1 RECORDS, supra note 23, at 15 (May 29), 21-22 (Madison’s notes); JAMESON, supra note 110, at 106.
\item \textsuperscript{300} 1 RECORDS, supra note 23, at 209 (June 12), 211 (journal), 220 (Madison’s notes). Those categories represented the substantive jurisdiction authorized under the Articles of Confederation. See supra notes 19-21 and accompanying text (summarizing pre-constitutional national courts).
\end{footnotes}
such jurisdictions may be interested," was clarified a bit by replacing “other States” with “two distinct States in the union.”

The next day, the whole provision on jurisdiction was temporarily struck to allow a blank slate. Responding to the ominous developments, Randolph and Madison then made a move to strengthen the hand of the Federalists. The previous day’s still-pending motion posed a risk by proposing a jurisdictional resolution without any reference to the possibility of inferior courts. If the jurisdiction described in the Constitution applied by its explicit terms only to the Supreme Court, inferior courts might appear to be a constitutional afterthought. In the face of that risk, Randolph and Madison deftly advanced another, more modest, compromise.

Defining the jurisdiction of any named courts per se could have upset the balance wrought by the Madisonian compromise by either specifically including or conspicuously omitting inferior courts. Instead, Randolph and Madison’s proposal reflected the substantive deletions of the previous day, did away additionally with diversity jurisdiction, and referred to the jurisdiction of the judicial branch holistically:

That 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.

Inferior courts were not unnecessarily highlighted, but their potential jurisdiction was covered. Another bulwark for the judiciary was that, unlike the previous day’s pending motion, Randolph and Madison’s proposal declined to box the Supreme Court into appellate (“dernier resort”) jurisdiction; that omission left the door open to creating a floor of original jurisdiction in the Supreme Court, as Randolph would do in his later draft for the Committee of Detail.

The only recorded statement about the merits of Randolph and Madison’s jurisdictional proposal was by Randolph, who referred to the previous day’s “difficulty” in defining the “powers of the judiciary.” He downplayed that problem, stressing that a committee would later work out the details (and in fact he ended up on the Committee of

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301 1 RECORDS, supra note 23, at 15 (May 29), 22 (Randolph plan) (Madison’s notes); JAMESON, supra note 110, at 106. That category was apparently the seed of diversity jurisdiction: New Jersey’s William Paterson described it as “Disputes between Foreigners and Citizens, and the Citizen of one State and that of another.” 1 RECORDS, supra note 23, at 15 (May 29), 28 (Paterson’s notes).
302 1 id. at 209 (June 12), 211 (journal): see id. 220 (Madison’s notes) (“two distinct States of the Union”).
303 1 id. at 223 (June 13), 232 (Madison’s notes).
304 1 id. at 223 (June 13), 223-24 (journal) (emphasis added), 231 (journal) (compilation of resolutions), 232 (Madison’s notes): see also id. 237 (Madison’s notes of compilation) (prefacing “cases” with “all”); 238 (Yates’s notes) (prefacing “cases” with “all”). That holistic approach to jurisdiction echoed the provision, in the alternative historical source’s version of the Virginia Plan, that set out the jurisdiction of the “National Judiciary,” JAMESON, supra note 110, at 106 (“[I]ts jurisdiction shall be to hear and determine [various disputes].”).
305 The Committee of Detail would later draft a provision specifying that the legislature could “assign” the Supreme Court’s jurisdiction to inferior courts; that provision was eventually deleted in conjunction with the switch from “jurisdiction of the Supreme Court” to “Judicial Power.” See supra notes 115-117 and accompanying text (discussing drafting and eventual deletion of assignment clause).
306 See 4 RECORDS, supra note 23, at 37 (Randolph draft), 48; see also 2 id. at 137 (Randolph draft), 147; Liebman & Ryan, supra note 14, at 722 (noting this effect).
307 1 RECORDS, supra note 23, at 223 (June 13), 238 (Yates’s notes). He appeared to be referring to jurisdiction, thus suggesting that he viewed jurisdiction and judicial powers to be roughly synonymous.
Detail a month later).\textsuperscript{308} Randolph’s exhortations calmed the storm: the proposal passed unanimously.\textsuperscript{309}

And thus “extend” made its Extension Clause debut. There was no recorded discussion of the word per se, nor was there any indication that Randolph or Madison—or any other delegate—intended the word to undermine the vision of a vigorous judiciary by injecting a stealth layer of congressional control over federal jurisdiction.

Instead of using “extend,” Randolph and Madison could have kept the existing phrase, providing that jurisdiction “shall be to hear & determine” the three sets of cases. The “hear & determine” wording was common, having appeared in an oath set out in the Articles of Confederation.\textsuperscript{310} It had been in usage in American law since at least 1636, when a court in Massachusetts Bay proclaimed that magistrates would “heare & determine all causes according to the lawes nowe established, & where there is noe law, then as neere the lawe of God as they can.”\textsuperscript{311} Once the Virginians were shortening the list of cases and rewriting the provision, though, they apparently took the opportunity to streamline it by substituting “extend to.” After all, “jurisdiction” would itself convey the power to “hear & determine.” With two minor exceptions, that serial verb phrase never reappeared in the drafts of the Constitution.\textsuperscript{312}

The hypothesis that stylistic elegance motivated this minor edit is somewhat speculative, but Randolph and Madison’s choice of the verb “extend” to follow the subject “jurisdiction” was thoroughly unremarkable. As discussed above, revolutionary tracts of the previous decade had fulminated against Britain’s overzealous “exten[sion]” of “jurisdiction.”\textsuperscript{313} Georgia’s Constitution of 1777 had used that same formulation, providing “[t]hat the court of conscience [for small debts] be continued . . . and that the jurisdiction thereof be extended to try causes not amounting to more than ten pounds.”\textsuperscript{314} Case law too had discussed jurisdiction in terms of its “extent”—simply to describe its scope, not to convey that it was subject to legislative approval.\textsuperscript{315}

Moreover, at the Federal Convention, consideration of the legislative power often had been framed in terms of how far it should “extend.”\textsuperscript{316} For example, five days earlier, in a debate about whether the national legislature should have the power to invalidate

\textsuperscript{308} Id.

\textsuperscript{309} 1 Records, supra note 23, at 223 (June 13), 238 (Yates’s notes).

\textsuperscript{310} Articles of Confederation art. IX (1781).

\textsuperscript{311} 1 Records of the Governor and Company of the Massachusetts Bay in New England 174-75 (Nathaniel B. Shurtleff ed., 1853) (recording proceedings of May 25, 1636).

\textsuperscript{312} One was in the parallel New Jersey plan brought forward two days later, which had taken that phrase as well as others from the jurisdictional section of the Randolph plan. 1 Records, supra note 23, at 241 (June 15), 244 (New Jersey plan in Madison’s notes). The other was in an oath (as part of a procedure lifted from the Articles of Confederation) that was eventually eliminated. 2 id. at 162, 170-71, 184 (Committee of Detail documents).

\textsuperscript{313} See supra text accompanying notes 246-247.

\textsuperscript{314} Ga. Const. art. XLVI (1777); see also 3 Blackstone, supra note 124, at 85 (discussing how far courts with limited “jurisdiction” can be “extended”); Daines Barrington, Observations on the Statutes 247-48 (London 1766) (noting prevalence during reign of Henry IV of trusts that “courts of common law either could not reach, or were unwilling to extend their jurisdiction to”).

\textsuperscript{315} For example, when refusing to exercise its jurisdiction on a writ of certiorari, the Court of Appeals of Maryland noted that courts should use caution in “extending their jurisdiction.” Maryland v. Johnston, 2 H. & McH. 160, 166 (Md. 1786).

\textsuperscript{316} E.g., 1 Records, supra note 23, at 45 (May 31), 60 (Pierce’s notes) (noting Randolph’s comment about how far legislative power “ought to extend”); see also id. 62 (June 1), 64-65 (Madison’s notes) (noting Charles Pinckney’s fear that executive powers of Continental Congress “might extend to peace & war”).
improper state laws, Elbridge Gerry of Massachusetts had suggested that such power “ought to extend to all laws already made.” A fervent supporter of the congressional “negative,” Madison agreed that the power to negate should be expansive: it should not be limited to certain types of state laws but rather “must extend to all cases.” Gerry and Madison could not have implied that some superseding power would curtail the national legislature’s ability to nullify state laws. Likewise, nothing suggests that when the delegates decided that the Supreme Court’s “jurisdiction”—and later the national “judicial Power”—“shall extend to all Cases . . . ,” they intended to curtail the authority of federal courts.

The congressional negative, of course, did not survive. Nor did the eventual list of legislative powers end up using the word “extend.” Without fanfare, however, “extend” was in Article III to stay.

3. From Edmund Randolph’s Draft to James Wilson’s Draft

As the Convention continued through various drafts and amendments, the word “extend” stayed in place. Other language, however, came and went. Perhaps the most compelling evidence that the final version of the Extension Clause does not confer discretion on the legislature to control the Supreme Court’s jurisdiction is that in a midsummer draft, it did.

Edmund Randolph was part of the five-man Committee of Detail charged with compiling a working draft of the Constitution at the end of July. The first available draft was in his hand. Its rendering of the Extension Clause began familiarly: “The jurisdiction of the supreme tribunal shall extend . . . to all cases, arising under laws passed by the general Legislature . . . .” The second jurisdictional category covered impeachments. That was a brazen move in that just the week before, the Convention had voted to eliminate that sensitive area from the judiciary’s purview. But Randolph was passionate about the need for a judicial role in impeachments, even adding a reference to it in the part of his draft about the executive power. Randolph’s third jurisdictional category was strikingly open-ended: “to such other cases, as the national legislature may assign, as involving the national peace and harmony . . . .” Following that invitation were four more specific types of cases that presumably served as a finite list of what would meet the vague “national peace and harmony” standard. Though the “national peace and harmony” language had been in place since the Virginia Plan, each of Randolph’s four specific instances, such as “the collection of the

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317 E.g., 1 RECORDS, supra note 23, at 162 (June 8), 170 (Yates’s notes).
318 1 id. at 162 (June 8), 164-65 (Madison’s notes).
319 See supra note 113 (introducing Committee of Detail).
320 4 RECORDS, supra note 23, at 37 (Randolph draft), 47-48; see also 2 id. at 137 (Randolph draft), 146. The word “Legislature” was written by John Rutledge. See 2 id. at 137, 137 n.6, 146 (noting emendations by Rutledge).
321 4 id. at 37 (Randolph draft), 47-48; see also 2 id. at 137 (Randolph draft), 146-47.
322 2 id. at 37 (July 18), 39 (journal), 46 (Madison’s notes).
323 4 id. at 37 (Randolph draft), 46; see also 2 id. at 137 (Randolph draft), 145; see also Glashausser, supra note 4, at 1407-08 (outlining Randolph’s passion about the importance of a judicial role in impeachments).
324 4 RECORDS, supra note 23, at 37 (Randolph draft), 48; see also 2 id. at 137 (Randolph draft), 147.
325 4 id. at 37 (Randolph draft), 48 (showing two additional categories inserted by John Rutledge); see also 2 id. at 137 (Randolph draft), 147.
revenue” and “disputes between citizens of different states,” had recently been edited out by the Convention.\textsuperscript{326}

However provocative Randolph’s unilateral expansion of the jurisdictional list may have been,\textsuperscript{327} he leavened it by deferring most of the expansion (all but the impeachments) to the discretion of the legislature, at least for the time being, perhaps awaiting further political will to coalesce at the Convention. Particularly in light of the precarious Madisonian compromise on the issue of whether to have inferior tribunals, it made sense not to push too hard but instead to punt to the legislature much of the difficult decision about just how far the Supreme Court’s jurisdiction should extend.

The punt did not go far. The other coherent draft by the Committee of Detail was in the hand of James Wilson. Using Randolph’s draft as a starting point, Wilson added to the list of cases in the Extension Clause. But he subtracted the qualifier “as the national legislature may assign.”\textsuperscript{328} Nothing like it ever reappeared.

Just as the Madisonian compromise shows that the full Convention knew how to give Congress control of the shape of the judiciary, the Randolph and Wilson drafts show that the Committee of Detail knew how to cede control of the Supreme Court’s jurisdiction. The delegates’ evident decision not to do so is unsurprising. Handing over the jurisdictional reins would have been a major concession by the Federalists. Indeed, the stakes rivaled those of the Madisonian compromise. Even if Congress decided not to establish inferior courts, at least litigants asserting a federal right would always have a chance to get to the Supreme Court, whether through original jurisdiction, on appeal, or by a discretionary writ. In contrast, if Congress were allowed to gut the Court’s jurisdiction, there would be no such guarantee. The Court could become, to quote Madison’s words from a slightly different context, “the mere trunk of a body without arms or legs to act or move.”\textsuperscript{329}

Such paralysis presents a separation-of-powers problem, and a limbless Supreme Court could also raise grave federalism concerns; depending on the existence and jurisdictional scope of inferior courts, litigants might need to rely on state courts to vindicate federal rights. Given the absence of recorded discussion about such a consequential outcome, the lack of any reference to the legislature in the final text of the Extension Clause, and the quick deletion of the one attempt in a draft to confer an explicit measure of legislative discretion over some components of the clause, it is inconceivable that the Convention designed the clause to allow Congress to strip the Supreme Court of its appellate jurisdiction.

**CONCLUSION**

When introducing his draft of the Constitution as part of the work of the Committee of Detail, Edmund Randolph summarized the first resolution the Convention had agreed on as “a declaration” that the three branches of the new government “shall be distinct, and

\textsuperscript{326} 2 id. at 37 (July 18), 39 (journal), 46 (Madison’s notes).
\textsuperscript{327} Outside of the language about the judiciary, Randolph’s draft also included various other provisions with no basis in the resolutions agreed to by the Convention. See STEWART, supra note 280, at 169-74 (summarizing “innovations” of the Committee of Detail).
\textsuperscript{328} See 2 RECORDS, supra note 23, at 163 (Wilson draft), 172-73 (fleshing out Extension Clause but omitting phrase about legislative discretion).
\textsuperscript{329} 1 id. at 115 (June 5), 124 (Madison’s notes) (describing “[a] Government without a proper Executive & Judiciary”).
independent of each other, except in specified cases.”

The independence of federal judges, in contrast, has long been recognized as a cornerstone of the federal judicial power. Section 1 of Article III provides that they “shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” That guarantee has been interpreted as protecting federal judges from worrying about financial reprisals for unpopular decisions. Even more significantly, a companion provision holds that judges “shall hold their Offices during good Behavior.” Though “good Behavior” might seem to be in the eye of the beholder, that constitutional text has generally been interpreted as guaranteeing life tenure (barring the sort of malfeasance that would trigger impeachment). Together, the two clauses create a class of jurisprudentially independent judges.

But like rights without remedies, judges are useless without jurisdiction. Section 2 of Article III addresses that truism by providing that “[t]he judicial Power shall extend” to nine categories of cases and controversies. And yet the conventional view of congressional power disregards that parallel protection for jurisdictional independence, which if anything is more textually rooted than the life tenure provision. Acknowledging “shall . . . receive” and “shall hold” (in section 1) as mandatory but twisting “shall extend” (in section 2) into a legislative option leaves Congress room to undermine the judicial branch by withholding its

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330 4 id. at 37 (Randolph draft), 38-39; accord 2 id. at 137 (Randolph draft), 138.
331 According to Thomas Jefferson, its “spirit” survived, as he later wrote in a letter to Madison: “[The] principle [of the Constitution] is that of a separation of Legislative, Executive and Judiciary functions except in cases specified. If this principle be not expressed in direct terms, it is clearly the spirit of the Constitution . . . .” Thomas Jefferson to James Madison, 1797, 9 THE WRITINGS OF THOMAS JEFFERSON 368 (Memorial Edition, Lipscomb & Bergh, eds. 1903-04).
332 Rutledge edited the introduction without changing those words, other than that he or someone else crossed out the word “except” after “distinct.”
333 E.g., O'Donoghue v. United States, 289 U.S. 516, 531 (1933) (“In framing the Constitution, . . . the power to diminish the compensation of the federal judges was explicitly denied, in order . . . that their judgment might never be swayed in the slightest degree . . . .”). As Alexander Hamilton explained, “a power over a man's subsistence amounts to a power over his will.” THE FEDERALIST No. 79, at 472 (Clinton Rossiter ed., 1961).
335 E.g., O'Donoghue v. United States, 289 U.S. 516, 549-50 (1933) (referring to “good behavior” clause in statute creating non-Article III court as a “life tenure” provision tracking that of Article III); Shurtleff v. United States, 189 U.S. 311, 316 (1903) (referring to constitutional provision of “life tenure” for Article III judges).
337 Gerber, supra note 281, at 28 (arguing that Compensation Clause and Good Behaviour Clause, as well as Vesting Clause, “ensure the independence of the federal judiciary”).
power. Just as spurious is the argument that “[t]he judicial Power” in some sense extends but jurisdiction—the power to hear and determine cases and controversies—does not.

As widely recognized, the drafters of the Constitution envisioned an independent judiciary that could operate without fear of legislative reprisal. What is often overlooked is that the judiciary necessarily consists of not only the judges themselves but also the abstract judicial power—including jurisdiction—that they wield. Together, sections 1 and 2 of Article III declare for the Supreme Court a robust jurisprudential and jurisdictional independence.338

338 See Claus, Constitutional Guarantees, supra note 41, at 459 (referring to jurisdiction and tenure as “the two great pillars that raise up a vigorously independent judiciary”).