

# Notes

## Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role”

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There has been considerable debate about the limits of Congress' power under the exceptions clause<sup>1</sup> to strip the Supreme Court of appellate jurisdiction. Some have argued that Congress may strip the Court of all its appellate jurisdiction, withhold jurisdiction from the lower federal courts, and thereby all but eliminate the judicial branch.<sup>2</sup> Others have argued that the Supreme Court has an “essential role” that Congress may not destroy through exceptions.<sup>3</sup> Still others have argued that the exceptions clause gives Congress unfettered discretion to distribute appellate jurisdiction among the federal courts—that is, to make exceptions in favor of other Article III courts.<sup>4</sup>

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1. U.S. CONST. art. III, § 2, cl. 2 (“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.”).

2. See, e.g., Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 902 (1982) (no limits on exceptions power).

3. See, e.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (Congress may not make exceptions that destroy Supreme Court's “essential role”); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (Congress may not make exceptions that prevent Supreme Court from performing “essential functions” of ensuring supremacy and uniformity of federal law).

4. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 254-59 (1985) (Congress may make any exceptions it wishes in favor of lower federal courts); Sager, *The Supreme Court, 1980 Term—Forward: Constitutional Limitations on Congress'*

The first of these theories, which would give Congress power to destroy the judicial branch, seems the least plausible and will be considered only briefly in this Note.<sup>5</sup> Proponents of the second theory (the essential functions reading) and proponents of the third (the distributive reading) believe that the Constitution requires the existence of a federal judiciary, but they differ as to how that judiciary may be structured. Proponents of the distributive reading argue that federal courts are “structurally superior” to state courts but that all federal courts are equal to each other.<sup>6</sup> They deny that there is an “essential role” for the Supreme Court that limits Congress’ power to strip the Supreme Court of appellate jurisdiction and assign that jurisdiction to lower federal courts.

This Note presents a new argument in support of the “essential role” thesis<sup>7</sup> and against the view that all federal courts are equal and interchangeable. It will argue that the original jurisdiction clause<sup>8</sup> reflects the Framers’ vision of the Supreme Court as the most important court in the nation. The Framers assigned these cases to the most important court out of respect for the dignity of the parties involved and because the Framers thought these cases would be unusually sensitive—so sensitive that they might take the United States to war.<sup>9</sup> If the Framers meant for the Supreme Court to be the most important court, they must also have meant the exceptions power to be limited rather than absolute. The exceptions power cannot include the power to strip the Supreme Court of all appellate jurisdiction because Congress could then destroy the Supreme Court’s status as the nation’s most important court.

Part I of this Note discusses the essential functions and distributive readings of the exceptions clause. Part II argues that the words “supreme,” “inferior,” and “exceptions,” along with the assignment of original jurisdiction to the Supreme Court, show that the Framers envisioned it as the nation’s most important court. Part III then offers a reformulation of Hart’s “essential role” test: Congress may not make such exceptions as will destroy the essential role of the Supreme Court as the most important court in the nation.

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*Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 56-57, 60 (1981) (same).

5. See *infra* note 10.

6. Amar, *supra* note 4, at 235-38, 262; Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1509-10 (1990); Sager, *supra* note 4, at 61-68.

7. It has become common to refer to Hart and those who have elaborated on his “essential role” idea as “essential functions” scholars. “Essential functions” is Professor Ratner’s phrase, not Hart’s, and this Note is critical of Ratner’s arguments about the essential functions of the Supreme Court. See *infra* notes 14-20 and accompanying text. However, because the label “essential functions” is so well established, this Note will use “essential functions” and “essential role” interchangeably to refer to Hart’s insight that the Supreme Court is different from other courts, and this Note should be seen as falling within the “essential functions” school.

8. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.”). For convenience, this Note refers to the cases within the Supreme Court’s original jurisdiction as “ambassador cases” and “state party cases” respectively.

9. See *infra* notes 73-76 and accompanying text.

## I. OPPOSING INTERPRETATIONS OF THE EXCEPTIONS CLAUSE

The two most plausible readings of the exceptions clause that have been offered to date are the essential functions reading and the distributive reading.<sup>10</sup> Ultimately, each falls short: the essential functions theory (as elaborated by Professor Ratner) fails because it does not reflect the Framers' understanding of the Court's role; the distributive reading fails because it ignores key differences between the federal courts, especially the grant of original jurisdiction to the Supreme Court.

### A. *The Essential Functions Reading*

In his famous *Dialogue* about the federal courts, Professor Henry Hart suggested that Congress could not make exceptions "such as will destroy the essential role of the Supreme Court in the constitutional plan."<sup>11</sup> Because later scholars have tried to flesh out Hart's idea by identifying "essential functions"

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10. At least two other readings bear mention. Professor Redish argues that the exceptions power has no limits whatsoever. When combined with Congress' power to withhold jurisdiction from lower federal courts, or not to create lower federal courts at all, this reading gives Congress the ability to eliminate the judicial branch almost entirely. Redish, *supra* note 2, at 902; *see also* C. BLACK, *DECISION ACCORDING TO LAW 17-19, 37-39* (1981) (Congress' power to limit federal jurisdiction is majoritarian check upon which legitimacy of Court rests). Redish's thesis is inconsistent with the text and structure of the Constitution, which establishes three coordinate branches of government. It is also inconsistent with the philosophy of a majority of the Constitutional Convention who voted early on to establish a federal judiciary. *See* 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 35 (M. Farrand rev. ed. 1937) [hereinafter *RECORDS*] (resolved May 30, 1787, by the Committee of the Whole "that a national Govern. ought to be established consisting of a supreme Legislative, Executive & Judiciary"); *see also id.* at 124 ("Mr. Madison observed that . . . [a] Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.").

Many scholars have found unlimited congressional control over the jurisdiction of the federal courts troubling. Professor Hart, who believed state courts were intended to be the primary guarantors of constitutional rights, Hart, *supra* note 3, at 1401, proposed the idea of an "essential role" precisely to avoid leaving Congress with complete control over the jurisdiction of the federal courts. In his view, such control was tantamount to "reading the Constitution as authorizing its own destruction." *Id.* at 1365. The mandatory jurisdiction theorists, *see infra* note 22, seem to be motivated by the same desire to avoid this "constitutional destruction"—that is, complete elimination of the federal judiciary. Professor Amar and others have overlooked the need for an essential role theory to supplement their theories of mandatory jurisdiction because the mandatory jurisdiction theory can solve the problem of "constitutional destruction" without relying on an essential role for the Supreme Court. *See infra* notes 21-23 and accompanying text.

Another reading worth mention maintains that Congress may make exceptions only to the Supreme Court's appellate review of facts. R. BERGER, *CONGRESS V. THE SUPREME COURT* 286-91 (1969); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 *OR. L. REV.* 3, 5 (1973); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 *MINN. L. REV.* 53, 68 (1962). These scholars argue that the exceptions clause modifies only the word "Fact" and not the Court's appellate jurisdiction generally. The problem with this reading is that the words "both as to Law and Fact" were not inserted by the Constitutional Convention until August 27, 1787, well after the exceptions clause appeared in a Committee of Detail draft. 2 *RECORDS*, *supra*, at 431.

Provisions of the Constitution outside Article III, such as the Bill of Rights, also limit Congress in the exercise of its exceptions power. *See* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 *HARV. C.R.-C.L. L. REV.* 129 (1981). However, such "external" limitations are beyond the scope of this Note.

11. Hart, *supra* note 3, at 1365.

that the Court must be allowed to perform, Hart and these scholars have come to be called the essential functions school.

Hart himself made no effort to identify what the "essential role" of the Supreme Court might be.<sup>12</sup> Although two later scholars have claimed to present versions of the essential functions thesis, only Professor Ratner truly belongs in the essential functions school with Hart. Only Ratner has argued, as Hart did, that the Supreme Court has an essential role that is distinguishable from the role of the federal judiciary as a whole.<sup>13</sup> Professor Ratner argues that maintaining the uniformity and supremacy of federal law are the essential functions of the Supreme Court.<sup>14</sup> He says that the Supreme Court must perform these functions because Congress was not required to create any other courts.<sup>15</sup>

However, Ratner does not explain why the Supreme Court must continue to perform these functions once Congress has exercised its option to create lower federal courts. The supremacy of federal law over state law can be maintained by lower federal courts without recourse to the Supreme Court, and the Framers considered this an option.<sup>16</sup> Uniformity of federal law can also be maintained without involving the Supreme Court through inter-circuit en bancs or by establishing specialized federal courts in particular areas of law.<sup>17</sup> Moreover, while supremacy is constitutionally required,<sup>18</sup> uniformity is not.

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12. Indeed, Hart acknowledged that his "essential role" test was "indeterminate." *Id.*

13. Professor Sager has also claimed to present a "narrowed form of the 'essential function' view of the Supreme Court's appellate jurisdiction." Sager, *supra* note 4, at 43. Sager identifies review of constitutional claims as the essential function but would permit lower federal courts to have the final word on these cases. *Id.* at 56, 60. His argument is thus about the essential functions of the federal judiciary and not the essential functions of the Supreme Court.

Sager questions whether Hart would really have insisted on an essential role for the Supreme Court as opposed to the federal judiciary as a whole. Hart said that *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), would have passed his essential role test. Hart, *supra* note 3, at 1365. In *McCordle*, the Supreme Court upheld an act that stripped the Court of jurisdiction to decide a habeas appeal that had already been argued before it. Hart noted that the circuit courts remained available for habeas relief, and Sager infers from this that Hart might have felt that lower federal courts could fill the essential role. Sager, *supra* note 4, at 57 n.114. Sager neglects to mention that Hart also noted, in his discussion of *McCordle*, that the Supreme Court itself remained open to habeas petitions that were filed with it in the first instance. Hart, *supra* note 3, at 1365. The Court used its power to review original writs of habeas corpus just a few months after *McCordle* in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). Sager would like to use Hart to support Sager's version of the mandatory jurisdiction argument, but Hart, who saw state courts as the primary guarantors of constitutional rights, see Hart, *supra* note 3, at 1401, did not believe that any substantial portion of Article III jurisdiction had to be vested in the federal courts. In short, there is little reason to think that Hart meant "federal judiciary" when he said "Supreme Court."

14. Ratner, *supra* note 3, at 160-61.

15. *Id.* at 162.

16. Hamilton argues in *The Federalist* that Congress would have the option of making appeals from state courts lie to the lower federal courts instead of to the Supreme Court. THE FEDERALIST No. 82, at 495 (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition]; see also 1 RECORDS, *supra* note 10, at 124 (Madison observing "that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction [sic] in many cases, appeals would be multiplied to a most oppressive degree" (emphasis in original)).

17. *E.g.*, a tax court. 26 U.S.C. § 7441 (1988).

18. U.S. CONST. art. VI, cl. 2.

Uniformity does not appear to have been a major concern of the Convention, the first Congress, or the early Supreme Court.<sup>19</sup> Ratner's theory seems to be based more on his own view of how the judiciary should be structured than on what is required by the history and text of Article III.<sup>20</sup>

### B. *The Distributive Reading*

Professors Amar and Sager have suggested a different reading of the exceptions clause, which gives Congress almost complete discretion to distribute cases within the federal judiciary as it sees fit.<sup>21</sup> Amar, Sager, and Clinton each combine this reading with his own theory of "mandatory" federal jurisdiction—that is, that there are certain categories of cases over which the federal courts *must* have jurisdiction, either in original or in appellate form.<sup>22</sup> Thus, the distributive reading views the exceptions power as including two different powers: the power to strip the Supreme Court of appellate jurisdiction in favor of lower federal courts, which is unlimited, and the power to strip the Supreme Court of appellate jurisdiction in favor of state courts, which is limited by the requirement that certain cases be heard by some federal court. This combination of mandatory federal jurisdiction and a distributive reading of the exceptions clause makes sense because underlying both is the belief that certain constitutional provisions make all federal judges structurally equal to one another but structurally superior to state court judges.<sup>23</sup>

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19. While most Federalists found supremacy a compelling argument for an independent federal judiciary, Hamilton was one of a very few who also felt uniformity was important. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 832 (1984). In passing the Judiciary Act of 1789, the first Congress left holes in the Supreme Court's appellate jurisdiction that allowed for non-uniform interpretations of federal law and of the Constitution. Section 22 of the Act did not provide for Supreme Court review in any criminal cases or in civil cases where the amount in controversy was less than \$2,000. Judiciary Act of 1789, ch. 20., § 22, 1 Stat. 73, 84. Finally, in its earliest cases, the Supreme Court itself did not give "uniform" opinions. Rather, the justices issued their opinions seriatim, and there was no opinion of the Court. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

20. For criticism of the essential functions approach, see generally Amar, *supra* note 4, at 220-22; Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901-10 (1984).

21. Amar, *supra* note 4, at 254-59; Sager, *supra* note 4, at 56-57, 60; see also Clinton, *supra* note 19, at 796 ("The extent of the congressional power over the judiciary envisioned by the framers was the power to structure and organize the Supreme Court and the inferior federal courts, and to *distribute* the constitutionally mandated jurisdiction among these national courts." (emphasis in original)).

22. Amar argues that federal question, admiralty, and ambassador cases must be heard by some federal court, but that Congress may leave the six kinds of "controversies" to the state courts. Amar, *supra* note 4, at 209-10, 238-46. Sager argues that the federal courts must hear constitutional cases. Sager, *supra* note 4, at 45-60. Clinton believes that the federal courts must have jurisdiction over every type of case in Article III. Clinton, *supra* note 19, at 749-50.

23. Amar, *supra* note 4, at 235-38, 262; Amar, *supra* note 6, at 1509-10; Sager, *supra* note 4, at 61-68; see also Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing preference of constitutional litigators for federal forum); *infra* notes 25-33 and accompanying text. In the area of state law, any structural superiority is offset by state court expertise. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941) (federal courts' lack of expertise in state law counsels abstention).

### 1. *Implications for the Supreme Court's Appellate Jurisdiction*

If Congress' exceptions power has no limit, Congress may strip the Supreme Court of all its appellate jurisdiction. This would leave the Court with only its constitutionally assigned original jurisdiction, which is not covered by the exceptions clause.<sup>24</sup> Under the distributive reading, the Supreme Court may be reduced to a tribunal for hearing ambassador and state party cases only. Such a radical restructuring of the federal judiciary may be acceptable if all federal courts are equal and interchangeable, but the evidence on that point is far from conclusive.

### 2. *The Parity of Federal Judges*

In arguing for the parity of all federal courts, Amar first notes that federal judges are structurally superior to state judges because of constitutional provisions that assure their independence, promote their competence, and make them accountable to the nation as a whole.<sup>25</sup> The salary of Article III judges may not be reduced during their time in office, and they hold their offices "during good Behaviour."<sup>26</sup> These salary and tenure guarantees ensure greater independence from the political branches of government. The Framers also sought to ensure the competence of federal judges by having the President appoint them and by subjecting them to the scrutiny of the Senate.<sup>27</sup> Finally, by making federal judges impeachable by the Senate for corruption or gross misbehavior, the Framers sought to ensure the integrity of federal judges as well as their accountability to the nation as a whole.<sup>28</sup> The Constitution contains no similar provisions to ensure the independence, competence, integrity, or accountability of state judges.

Each of the above provisions applies equally to "Judges . . . of the supreme and inferior Courts."<sup>29</sup> In fact, the Constitution makes no distinction between lower court judges and Supreme Court justices; it calls both "judges," with the exception of a reference to the "Chief Justice" of the United States, who will

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24. Professor Amar has argued that Congress may strip the Supreme Court of original jurisdiction in state party cases because it is not required to vest jurisdiction over these cases in the federal courts at all. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 478-83 (1989). However, most scholars believe that Congress may not reduce the Court's original jurisdiction, *see, e.g.*, Hart, *supra* note 3, at 1372-73; Redish, *supra* note 2, at 901, and the Supreme Court has stated that the ability of Congress to limit the Court's original jurisdiction is "extremely doubtful." *California v. Arizona*, 440 U.S. 59, 66 (1979). While this Note assumes that Congress may not reduce the Court's original jurisdiction, Congress may give the lower federal courts concurrent jurisdiction over ambassador and state party cases. *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 463-69 (1884); *Börs v. Preston*, 111 U.S. 252, 256-61 (1884).

25. Amar, *supra* note 4, at 235-38; *accord* Sager, *supra* note 4, at 61-68.

26. U.S. CONST. art. III, § 1.

27. *Id.* art. II, § 2, cl. 2.

28. *Id.* art. II, § 4.

29. *Id.* art. III, § 1.

preside at the impeachment trial of the President.<sup>30</sup> Professor Amar finds further support for the parity of federal courts in the Judiciary Act of 1789.<sup>31</sup> The Act left the last word to lower federal courts both in criminal cases and in civil cases involving less than \$2,000, reflecting confidence in the ability of lower federal courts to render final decisions.<sup>32</sup> The Act further created circuit courts that were to be staffed by district judges and Supreme Court justices sitting together with each having an equal vote.<sup>33</sup>

For all the structural similarities, however, there are structural differences that make Supreme Court justices superior to lower federal court judges and the Supreme Court different from the lower federal courts. As for the judges themselves, first, as Amar notes, while the Constitution mandates Senate confirmation for members of the Supreme Court, it does not mandate the confirmation of lower court judges. Were lower court judges to be considered "inferior Officers," Congress could vest the power of their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>34</sup> These judges would not then be subject to Senate confirmation, which helps ensure their competence.<sup>35</sup> Second, most of the lower federal courts sit in the states rather than in the capital. Since lower federal court judges usually come from the areas in which they sit, they are more likely to have "provincial ties."<sup>36</sup> Their more local nature also makes lower court judges subject to pork-barrel politics in a way Supreme Court justices are not.<sup>37</sup> Third, because lower federal judges depend on the political branches for appointment to a higher court, they may be less independent than Supreme Court justices.

The Supreme Court and the inferior federal courts are also structurally different in two respects. First, lower courts depend entirely on Congress for their jurisdiction, while Article III grants the Supreme Court jurisdiction directly. The constitutional grant of power might embolden the Supreme Court to resist unconstitutional attempts by Congress to strip it of jurisdiction where lower courts would be more hesitant to resist.<sup>38</sup> Second, Article III gives the Supreme Court original jurisdiction over two categories of cases that were

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30. *Id.* art. I, § 3, cl. 6.

31. Amar, *supra* note 4, at 262.

32. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

33. *Id.* § 4, 1 Stat. 73, 74-75.

34. U.S. CONST. art. II, § 2, cl. 2.

35. Amar, *supra* note 4, at 235 n.103.

36. Amar, *supra* note 24, at 477.

37. It is common today for the President to leave the choice of lower federal court judges to the senators of his party.

38. In practice, the Supreme Court has been extremely reluctant to rely exclusively on its constitutional jurisdiction. In *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), Chief Justice Marshall asserted, as a rule of statutory interpretation, that Congress' failure to grant the Court appellate jurisdiction by statute implied a decision to withhold that jurisdiction under the exceptions clause. *Id.* at 314 (Members of first Congress "have not, indeed, made these exceptions in express terms . . . but they have described affirmatively [the Court's] jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.").

likely to be extremely sensitive and where the dignity of the parties involved required attention from a particularly important court. While both differences suggest that federal courts are not necessarily interchangeable, it is the second that has particular implications for the exceptions clause.<sup>39</sup>

## II. THE FRAMERS' VISION OF THE SUPREME COURT

The Framers did not see all federal courts as equal and interchangeable. Rather, they envisioned a role for the Supreme Court as the most important court in the nation. There are two types of evidence for this. First, there are the words "supreme," "inferior," and "exceptions," which fit most naturally with an understanding of the Supreme Court as more important than any other court.<sup>40</sup> It is possible to read these words otherwise, but only by ignoring the counsel of Chief Justice Marshall that "[i]t is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies."<sup>41</sup>

Second, there is the original jurisdiction clause, which assigns ambassador and state party cases to the Supreme Court's original jurisdiction. The Framers wanted these unusually sensitive cases, involving parties of great dignity, to be heard by the most important court in the nation.<sup>42</sup> By assigning these cases to the Supreme Court, the Framers showed their understanding that it was to be the most important court.

### A. "Supreme" and "Inferior"

"Supreme" and "inferior" seem to indicate relative importance. One scholar has noted that Blackstone's *Commentaries* used the word "inferior" mostly to describe English courts that were subject to narrow geographic and subject matter restraints.<sup>43</sup> Only two courts, the Court of King's Bench and the House of Lords, were called "supreme."<sup>44</sup> If the Supreme Court were reduced to a tribunal for hearing only ambassador and state party cases, it would, in its narrow jurisdiction, resemble England's "inferior" courts rather than its "supreme" courts.

39. See *infra* Sections II.C-D.

40. See *infra* Sections II.A-B.

41. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1816) (discussing "necessary").

42. See *infra* Subsections II.C.2.a-b.

43. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 *IND. L.J.* 457, 466 (1991). For example, the Court of Piepoudre was to have jurisdiction only over causes of action arising in a fair or market. 3 *W. BLACKSTONE, COMMENTARIES* \*33.

44. 3 *W. BLACKSTONE, supra* note 43, at \*43, \*56. Both the Court of King's Bench and the House of Lords were courts of great dignity. The Court of King's Bench took its name from the fact that the King once sat on this court. *Id.* at \*41. Both courts had general appellate jurisdiction over any court of record below, *id.* at \*43, \*56, and, while the Court of King's Bench had non-exclusive, original jurisdiction over personal actions, *id.* at \*42, the House of Lords had no original jurisdiction at all, *id.* at \*56.

There are certain respects in which the Supreme Court, stripped of appellate jurisdiction, might still be called "supreme." It would still be the only court created by the Constitution, the only court deriving its jurisdiction directly from the Constitution, the only court with an irreducible core of original jurisdiction, and the only court from which no appeal may constitutionally lie.<sup>45</sup> But this reads "supreme" for the least it can be worth, which is inconsistent with Marshall's advice that the words of the Constitution be understood in "a more mitigated sense."<sup>46</sup> It seems reasonable to assume that, if the federal judiciary were arranged so that one court heard only ambassador and state party cases and another heard all appeals from the courts of appeals, an impartial observer would identify the latter as "supreme" and the former as somehow "inferior." It would be stretching the meaning of the words to insist that the court of much narrower jurisdiction was "supreme" just because it had been created by the Constitution.

### B. "Exceptions"

Both the common usage of the word "exception" and the history of the exceptions clause indicate that an exception must be something less than the whole.<sup>47</sup> One scholar, after reviewing eighteenth- and early nineteenth-century dictionaries, concluded that the general usage of the word "exception" at the time of the framing indicates that an exception cannot completely nullify the rule it modifies.<sup>48</sup>

The history of the Convention supports this "common usage" interpretation. The delegates to the Convention agreed very early that there should be a supreme court with powers of appellate review.<sup>49</sup> The exceptions clause first appeared later, in the drafts of the Committee of Detail, which was assigned to flesh out the resolutions of the Convention but not to make substantive changes.<sup>50</sup> If the Convention had intended to give Congress the power to abolish all of the Supreme Court's appellate jurisdiction by way of the exceptions clause, it would have been natural to say so explicitly. Indeed, as it emerged from the Committee of Detail, Article III included an "assignment" clause that explicitly authorized Congress to distribute almost any part of the

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45. See Amar, *supra* note 4, at 221 n.60. Congress, of course, can use its exceptions power so that appeals do not lie from lower federal courts either. See *supra* note 16.

46. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1816).

47. In Professor Sager's words, "it is a nibble, not a bite." Sager, *supra* note 4, at 44.

48. Ratner, *supra* note 3, at 169.

49. 1 RECORDS, *supra* note 10, at 95. See generally Clinton, *supra* note 19, at 757-62 (describing Convention's first proposals for federal judiciary).

50. Clinton, *supra* note 19, at 772. But see Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990) (arguing that Committee of Detail exceeded its mandate and substantially increased power of states).

Supreme Court's jurisdiction, original or appellate, to inferior courts.<sup>51</sup> The Convention, however, eliminated this provision from the draft on August 27, 1787.<sup>52</sup> During the same discussion, it was moved that the exceptions clause be replaced by a clause reading "the Judicial power shall be exercised in such manner as the Legislature shall direct," but this motion was defeated by a vote of six states to two.<sup>53</sup> Thus, the Convention appears to have moved away from giving Congress complete control over the Supreme Court's appellate jurisdiction.

However, as Professor Hart has pointed out, if the exceptions clause test is simply that some residuum of appellate jurisdiction must be left to the Supreme Court, "Congress could meet that test by excluding everything but patent cases."<sup>54</sup> To show that there are stricter limits on the exceptions power, one must look to the original jurisdiction clause for evidence of what the Framers saw as the role of the Supreme Court.

### C. *The Original Jurisdiction Clause*

A key difference between the Supreme Court and lower federal courts is that Article III gives the Supreme Court a core of original jurisdiction that Congress may neither expand nor contract:<sup>55</sup> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction."<sup>56</sup> The historical record on the purpose of the clause is thin because the original jurisdiction clause was not very controversial. At the ratifying conventions, most of the debate about the federal judiciary focused on the Court's appellate jurisdiction.<sup>57</sup> Professor Amar has suggested that geographic concerns motivated the original jurisdiction clause.<sup>58</sup> In *The Federalist*, Alexander Hamilton offers a different explanation—the sensitivity of these cases and the dignity of the parties involved means that they should be heard by the most important court

51. "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." 2 RECORDS, *supra* note 10, at 186-87.

52. *Id.* at 431.

53. *Id.*

54. Hart, *supra* note 3, at 1364.

55. See *supra* note 24 and accompanying text; *infra* notes 60-63 and accompanying text. *But see* Amar, *supra* note 24, at 478-83 (Congress need not vest Supreme Court with jurisdiction over state party cases); Amar, *supra* note 4, at 254 n.160 (same); Clinton, *supra* note 19, at 778 (Congress may increase Court's original jurisdiction under exceptions clause).

56. U.S. CONST. art. III, § 2, cl. 2.

57. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 517-78 (reprint ed. 1987) (J. Elliot 2d ed. 1836) [hereinafter DEBATES] (debates of Virginia ratifying convention about Article III). See generally Clinton, *supra* note 19, at 801-03 (describing opposition of Anti-Federalists to Article III).

58. Professor Amar has not, however, claimed that geography was the only factor influencing Supreme Court original jurisdiction. Amar, *supra* note 6, at 1560 n.222.

in the nation.<sup>59</sup> While geography appears to be a good explanation for why the Framers limited the original jurisdiction of the Supreme Court, sensitivity and dignity better explain why these particular cases were assigned to the Court and why Congress may not contract this jurisdiction.

### 1. Purpose of an Original Jurisdiction Limit

In the Committee of Detail's original draft of Article III, which was prepared by Edmund Randolph, Congress did have the power to increase the Court's original jurisdiction.<sup>60</sup> However, this power was eliminated in the subsequent Wilson-Rutledge draft and never reappeared.<sup>61</sup> The understanding of the Framers and of the state ratifying conventions was that the Supreme Court's original jurisdiction could not be increased. Hamilton said in *The Federalist* that the Court's original jurisdiction "would be confined to two classes of cases, and those of a nature rarely to occur,"<sup>62</sup> and Edmund Pendleton noted at the Virginia ratifying convention that "the legislature cannot extend its original jurisdiction, which is limited to these cases only."<sup>63</sup>

Amar's arguments about geographical convenience appear to be the best explanation for limiting the Supreme Court's original jurisdiction.<sup>64</sup> It was presumed that the Supreme Court would sit in the nation's capital since the Court would hear cases affecting ambassadors.<sup>65</sup> The Framers may have felt that the parties and all their witnesses should not have to travel hundreds of miles to try a case in the first instance. John Marshall, arguing for ratification of the Constitution in Virginia, praised the advantages of creating lower federal courts, saying that otherwise "we should be dragged to the centre of the Union" to try cases.<sup>66</sup>

While geography may explain Congress' lack of power to expand the Court's original jurisdiction, it is a less compelling explanation for the particular

59. THE FEDERALIST No. 81, at 487 (A. Hamilton); see *infra* Subsections II.C.2.a-b.

60. 2 RECORDS, *supra* note 10, at 147 ("this supreme jurisdiction shall be appellate only except, in those instances, in which the legislature shall make it original").

61. *Id.* at 172-73.

62. THE FEDERALIST No. 81, at 488 (A. Hamilton).

63. 3 DEBATES, *supra* note 57, at 518. It has been argued that the exceptions power includes the power to move cases from the Supreme Court's appellate to its original jurisdiction. See, e.g., Clinton, *supra* note 19, at 778; Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 31-32. However, no 18th century source has been found to support this reading. See Amar, *supra* note 24, at 467-68.

64. See Amar, *supra* note 24, at 469-78.

65. Cf. U.S. CONST. art. II, § 3 (ambassadors and public ministers to be received by President).

66. 3 DEBATES, *supra* note 57, at 552. Marshall later wrote the opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which held that Congress could not expand the Supreme Court's original jurisdiction. It is worth noting that under a broad reading of the exceptions clause, Congress could effectively reverse the result in *Marbury*. Congress could strip the Supreme Court of all but its original jurisdiction and create a new court in Washington vested with all the appellate jurisdiction that the Supreme Court now exercises. This new court would come to be seen as the "new Supreme Court" and yet it would be an "inferior" court with no limits on its original jurisdiction. Congress would be free to give this new court original jurisdiction over any category of cases, including mandamus actions against executive branch officials.

cases assigned to the Court's original jurisdiction and for the fact that this jurisdiction may not be reduced.<sup>67</sup>

## 2. Purpose of an Original Jurisdiction Core

The sensitivity of the cases and the dignity of the parties involved explain the content of the original jurisdiction clause better than arguments about geographical convenience. After the provisions that became Article III were reported from the Committee of Detail, the delegates made two changes in the original jurisdiction clause. First, they eliminated Congress' power to reduce the Court's original jurisdiction by assigning it to lower federal courts.<sup>68</sup> Second, they transferred impeachments from the Court's original jurisdiction to the Senate.<sup>69</sup>

The original jurisdiction clause, as noted above, was not controversial. Among the delegates to the Philadelphia Convention and the state ratifying conventions, only Hamilton, who undertook to explain Article III clause by clause, offered an explanation for the original jurisdiction clause. Hamilton cites the same two factors as motivating the assignment of ambassador and state party cases to the Supreme Court's original jurisdiction: the sensitivity of the cases and the dignity of the parties involved.<sup>70</sup> Hamilton's explanation of what was done with impeachments, which were the first category of cases assigned to the Court's original jurisdiction, also reflects a concern about sensitivity.<sup>71</sup>

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67. For the argument that geography explains the choice of cases assigned to the Court's original jurisdiction, see Amar, *supra* note 24, at 476-77.

68. The Committee of Detail report included the following clause: "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." 2 RECORDS, *supra* note 10, at 186-87. This clause must have applied both to the Court's appellate and to its original jurisdiction because of the parenthetical that denies Congress the power to assign the President's trial to lower federal courts. Impeachments were assigned to the Court's original jurisdiction. If the assignment clause had applied only to the Court's appellate jurisdiction, it would have been unnecessary specifically to exempt the impeachment of the President from assignment to a lower court.

Professor Clinton argues that deleting the assignment clause effected no change in Congress' power. In his view, the exceptions clause allowed Congress to take jurisdiction from the Supreme Court, and the assignment clause allowed Congress to give that jurisdiction to lower federal courts. When the paragraph listing the categories of jurisdiction was changed so that it described "the Judicial power" and not just "[t]he jurisdiction of the supreme Court," the assignment clause became redundant. Clinton, *supra* note 19, at 792-93; accord Ratner, *supra* note 3, at 164 n.34. What Clinton overlooks is that the exceptions clause applies only to the Supreme Court's appellate jurisdiction, whereas the assignment clause applied also to its original jurisdiction. By dropping the assignment clause, the Framers made a significant change in Congress' power to control the Supreme Court's jurisdiction: they eliminated Congress' power to reduce the Supreme Court's original jurisdiction by assigning it to lower federal courts. Given the almost word-by-word scrutiny to which Article III was subjected by the Convention, see 2 RECORDS, *supra* note 10, at 422-32, it seems unlikely that the Framers simply overlooked this change in congressional power.

69. U.S. CONST. art. I, § 3, cl. 6.

70. See *infra* Subsections II.C.2.a-b.

71. See *infra* Subsection II.C.2.c.

Finally, subsequent case law appears to have made sense of the original jurisdiction clause in terms of sensitivity and dignity as well.<sup>72</sup>

a. *Ambassador Cases*

In *The Federalist*, Hamilton groups the ambassador cases together with state party cases and diversity cases under the heading of “those which involve the PEACE of the CONFEDERACY.”<sup>73</sup> He writes, “[a]s the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”<sup>74</sup> The Framers, however, were not content to give foreign officials access to any federal court but went on to give the Supreme Court original jurisdiction in these cases.<sup>75</sup>

Hamilton defends the assignment of ambassador cases to the Supreme Court’s original jurisdiction both in terms of preserving the peace and in terms of respect for foreign sovereigns:

All questions in which [public ministers] are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.<sup>76</sup>

While geography may also have played a role in the assignment of these cases to the Supreme Court, there are several problems with relying on geography as the sole explanation. Ambassadors and public ministers would usually

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72. See *infra* Subsubsection II.C.2.d.

73. THE FEDERALIST No. 80, at 475 (A. Hamilton).

74. *Id.* at 476.

75. Congress may give concurrent jurisdiction over ambassador cases to lower federal courts. *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 463-69 (1884); *Börs v. Preston*, 111 U.S. 252, 256-61 (1884). However, the point of original jurisdiction is not that the Supreme Court must hear every case affecting an ambassador. The Court has acknowledged that such a rule might turn what was intended to be a privilege into a burden. *Ames*, 111 U.S. at 464. The point is rather that foreign officials have *access* to the nation’s highest court, particularly if they are defendants. The asymmetrical jurisdictional provisions of section 13 of the Judiciary Act of 1789 confirm that the important point is access. Section 13 gives the Supreme Court exclusive original jurisdiction over suits *against* ambassadors and public ministers, their families, or their domestic servants, but nonexclusive original jurisdiction over suits brought *by* ambassadors or public ministers. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. Consuls may be sued in federal district court but not in state courts. *Id.* § 9, 1 Stat. 73, 77.

Professor Amar has suggested that the Supreme Court may have the power to remove original jurisdiction cases from the concurrent forum at the request of the defendant. Amar, *supra* note 24, at 492 n.219. The Judiciary Act of 1789 granted all federal courts, including the Supreme Court, the power to issue any writs “which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.” Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82. The Court retains this power today. 28 U.S.C. § 1651(a) (1982).

76. THE FEDERALIST No. 81, at 487 (A. Hamilton).

be present in the capital. However, consuls would not, and the original jurisdiction clause gives the Supreme Court original jurisdiction over cases affecting consuls, too.<sup>77</sup> Assigning ambassador cases to a court located in the capital might also have enabled the executive to communicate more easily with the court in cases that had ramifications for foreign affairs. However, the convenience of the parties and ease of communication might both have been accomplished by assigning these cases to a lower federal court located in the capital. That the Framers went so far as to insure access to the Supreme Court indicates something more. Hamilton says it was the twin concerns of sensitivity and dignity.

The geography argument may, in fact, be turned around. Although Amar argues that ambassador cases and state party cases were assigned to the Supreme Court because the Court was to be located in the capital,<sup>78</sup> the Supreme Court may rather have been located in the capital because it needed to hear ambassador and state party cases. One may view the location of the Court not as the *cause* of this jurisdictional assignment, but rather as a *consequence* of it.

#### b. *State Party Cases*

Hamilton mentions sensitivity and dignity again when discussing the state party cases. "The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined [cases affecting foreign citizens]."<sup>79</sup> While all diversity cases may be sensitive, those in which a state is a party also implicate the dignity of the state. "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."<sup>80</sup>

Geography alone is a less compelling explanation than sensitivity and dignity for the assignment of state party cases to the Supreme Court's original jurisdiction. If the Framers had sought merely to provide a neutral forum for state party cases, an inferior federal court would have been sufficient, as with diversity of citizenship cases. If one were concerned that local federal judges

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77. See U.S. CONST. art. II, § 3 (President receives ambassadors and other public ministers but not consuls). The first Congress, recognizing that the Supreme Court might not be convenient for consuls, gave the district courts concurrent jurisdiction over these cases. Judiciary Act of 1789, ch. 20, §§ 9, 13, 1 Stat. 73, 77, 80-81.

78. Amar, *supra* note 24, at 476-78.

79. THE FEDERALIST No. 80, at 477 (A. Hamilton).

80. *Id.* No. 81, at 487 (A. Hamilton). As with ambassador cases, *supra* note 75, Congress may provide for concurrent jurisdiction in the lower federal courts over cases to which a state is a party. The Judiciary Act of 1789 gave the Supreme Court original and exclusive jurisdiction over cases between two states and original but nonexclusive jurisdiction over cases between a state and citizens of another state. The Act gave no jurisdiction to the Supreme Court in cases between a state and its own citizens. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

would be biased, a lower federal court in a third state could have provided the forum. Depending on the circumstances, a third state might be significantly more convenient for the litigants. For example, in a dispute between Connecticut and Massachusetts, Rhode Island would certainly be a more convenient neutral forum than Washington, D.C. The specification of Supreme Court original jurisdiction must be explained by something more than geographic neutrality.

c. *Impeachments*

Although the final version of Article III does not give the Supreme Court original jurisdiction over impeachments, impeachments were the first category assigned to the Court's original jurisdiction.<sup>81</sup> Therefore, impeachments may also show how the Framers saw the original jurisdiction clause and thus the way they saw the Supreme Court.

The Convention ultimately voted to remove impeachments from the Supreme Court and place them in the Senate.<sup>82</sup> One reason Hamilton gives for this decision is the extreme sensitivity of impeachments. He first notes that impeachments

will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other . . . .<sup>83</sup>

Hamilton argued that the Supreme Court might not have enough "fortitude" to resist partisan influences on the one hand, and enough "credit and authority" to "reconcil[e] the people to a decision that should happen to clash with an accusation brought by their immediate representatives" on the other.<sup>84</sup> A deficiency in the latter, he says, would be "dangerous to the public tranquil-

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81. John Rutledge edited Randolph's original Committee of Detail draft to give the Court original jurisdiction in cases of impeachment. 2 RECORDS, *supra* note 10, at 147. The subsequent Wilson-Rutledge draft added ambassador and state party cases to the Court's original jurisdiction, but the legislature could assign these cases to lower federal courts, while impeachment cases could not be so assigned. *Id.* at 172-73.

82. U.S. CONST. art. I, § 3, cl. 6.

83. THE FEDERALIST No. 65, at 396 (A. Hamilton).

84. *Id.* at 398.

ity.”<sup>85</sup> The theme of sensitivity thus occurs again in connection with cases assigned to the Court’s original jurisdiction.

d. *Subsequent Case Law*

Subsequent Supreme Court decisions, trying to discern the purposes of the original jurisdiction clause, have also explained the clause in terms of sensitivity and dignity and not in terms of geography.<sup>86</sup> While this says nothing about how the Framers viewed the original jurisdiction clause, it does suggest that reading the clause to reflect sensitivity and dignity concerns makes common sense.

The Supreme Court’s original jurisdiction over ambassador cases has been directly invoked only three times.<sup>87</sup> *Ex parte Gruber* was the only one of these cases to discuss the issue of jurisdiction, and it explained the original jurisdiction clause in terms of sensitivity: “The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments.”<sup>88</sup> The same theme occurs in state party cases, where Supreme Court jurisdiction is depicted as an alternative to war between two states. In *Georgia v. Pennsylvania Railroad Co.*, the Court said: “The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative.”<sup>89</sup>

The Court has also noted that dignity concerns motivated the grant of original jurisdiction. In *Ames v. Kansas ex. rel. Johnston*, the Court noted that “[t]he evident purpose” of the original jurisdiction clause was “to open and keep open the highest court of the nation” to hear state party and ambassador

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85. *Id.* In fact, impeachments seem to have been removed from the Supreme Court’s original jurisdiction in order to preserve the Court’s impartiality if called upon to hear an appeal in a criminal case brought against the impeached person. Gouverneur Morris made such an argument at the Convention, 2 RECORDS, *supra* note 10, at 500, and he seems to have been chiefly responsible for the assignment of impeachments to the Senate. Morris first moved to postpone the impeachment issue and then sat on the Committee of Eleven, which resolved all matters postponed. *Id.* at 427. Hamilton reiterated Morris’ argument and also mentioned the difficulty of constituting a tribunal for impeachments from representatives of the states who would be scattered throughout the country. THE FEDERALIST No. 65, at 398-400 (A. Hamilton). The latter argument shows that geography may have influenced the Framers assignment of impeachments to the Senate, but a lower federal court might have been just as convenient geographically, and no one appears to have suggested that impeachments be heard by lower federal courts. In fact, the Committee of Detail report permitted Congress to assign most of the Court’s original jurisdiction to lower federal courts but expressly forbade the assignment of the President’s impeachment trial to lower federal courts. 2 RECORDS, *supra* note 10, at 186-87.

86. Amar suggests that the ease of travel today makes modern scholars less aware of the impact of geography on the Framers. Amar, *supra* note 24, at 477. Later Supreme Courts may have ignored geographical convenience as a purpose of the original jurisdiction clause for the same reason.

87. P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 345 (3d ed. 1988).

88. 269 U.S. 302, 303 (1925). The *Gruber* Court held that its original jurisdiction extended only to cases affecting *foreign* officials and not to a case against the U.S. Consul General in Montreal, Canada.

89. 324 U.S. 439, 450 (1945).

cases. "So much was due to the rank and dignity of those for whom the provision was made . . . ."<sup>90</sup> The *Ames* Court went on to uphold concurrent jurisdiction in the lower federal courts because

to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any he chose . . . would be, in many cases, to convert what was intended as a favor into a burden.<sup>91</sup>

The *Ames* Court did not see geographical convenience as a purpose behind the original jurisdiction clause, but rather saw the clause as a potential source of geographical inconvenience.<sup>92</sup>

These cases confirm the common sense of reading the original jurisdiction clause to reflect concerns about sensitivity and dignity. The fact that Hamilton defended the assignment both of ambassador cases and of state party cases in these terms, and the fact that sensitivity was most likely a concern of the Framers regarding impeachments as well, suggest that sensitivity and dignity were the Framers' reasons for creating an irreducible core of original jurisdiction in the Supreme Court.<sup>93</sup>

#### D. *The Supreme Court as the Most Important Court*

The Framers thought that sensitivity and dignity required that ambassador and state party cases be heard in the first instance by the nation's most important court. Hamilton used the words "the highest judicatory of the nation."<sup>94</sup>

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90. 111 U.S. 449, 464 (1884).

91. *Id.*

92. See also, *California v. Arizona*, 440 U.S. 59, 65-66 (1979) ("The Framers seem to have been concerned with matching the dignity of the parties to the status of the court . . . ."); *United States v. Texas*, 143 U.S. 621, 643 (1892) ("Such exclusive jurisdiction [as was granted in the Judiciary Act of 1789] was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.").

93. Because Congress was not required to create lower federal courts, one might object that the assignment of ambassador and state party cases to the Supreme Court's original jurisdiction reflects the Framers' concern that these cases be heard in the first instance by federal courts rather than state courts, but does not reflect any intention to distinguish between federal courts.

There are two responses to this argument. First, if the Convention had wanted simply to insure that some federal court heard ambassador and state party cases in the first instance, it could have done so more directly, by providing for exclusive federal court jurisdiction over these cases. Second, Hamilton distinguishes between cases for which some federal forum is necessary and those for which the Supreme Court is necessary. Hamilton felt that "the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned," *THE FEDERALIST* No. 80, at 476 (A. Hamilton), but that only a subset of those, ambassador cases, should be heard by "the highest judicatory of the nation." *Id.* No. 81, at 487 (A. Hamilton). See *supra* notes 73-76 & 79-80 and accompanying text.

94. *Id.* No. 81, at 487 (A. Hamilton). At least two subsequent Supreme Court decisions have also phrased the dignity requirement in terms of the "highest" court. *United States v. Texas*, 143 U.S. 621, 643 (1892) ("the highest . . . judicial tribunal of the nation"); *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 464 (1884) ("the highest court of the nation").

He could have meant highest in the sense of most important, highest in the sense of being at the top of the appellate ladder, or both. However, there are two reasons to see the requirements of sensitivity and dignity in terms of importance rather than in terms of hierarchy.

First, sensitivity and dignity seem better served by importance than by hierarchy. Sensitivity is obviously related to dignity. Hamilton acknowledged that the cases assigned to the Court's original jurisdiction might involve the risk of war, discord among the states, or violence among political factions.<sup>95</sup> These cases are not sensitive because of their subject matter, as, for example, an abortion ruling is sensitive because it involves a personal decision. They are sensitive because of the parties involved and the danger that these parties may decide to resist the decision of the court. Sovereigns, states, and presidents may be more inclined to resist court decisions than other parties because they have greater power and, therefore, greater ability to resist. Thus, the requirement that a court in some sense match the dignity of the parties is not simply a matter of flattery. Rather, it reflects a concern that the court have sufficient authority to be obeyed. When a higher court speaks to a lower court, its authority comes from its position in the hierarchy and its ability to reverse the lower court. But when a court speaks to a foreign sovereign, for example, its authority depends more on prestige. The court's position in the domestic judicial hierarchy is significant only in its contribution to that prestige.

Second, the Framers did not believe that the appellate ladder had to extend to the Supreme Court in every instance. The Judiciary Act of 1789 did not provide for Supreme Court review in every instance,<sup>96</sup> and the exceptions clause is itself evidence that Congress may limit appellate review by the Supreme Court. The "most important" formulation expresses the Framers' general view that appeals could be limited.

### III. THE SUPREME COURT'S ESSENTIAL ROLE

Presumably, the Framers would not have understood the exceptions power to be so broad that it would conflict with their vision of the Supreme Court, as reflected in the original jurisdiction clause. If we wish to interpret the exceptions power as the Framers must have understood it, we must interpret it to be consistent with the Court's status as most important court. The Framers' understanding of the exceptions power may be expressed by reformulating the "essential role" test: Congress may not make such exceptions as will destroy the essential role of the Supreme Court as the most important court in the nation.

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95. See *supra* notes 73-76, 79 & 83-85 and accompanying text.

96. See *supra* note 19 and accompanying text.

It remains to sketch out what it might mean to be the “most important court.” The Court begins with its core of particularly sensitive and important cases, but a court limited to hearing only these cases would not be the “most important” for three reasons. First, the number of the Court’s original jurisdiction cases is small,<sup>97</sup> and it cannot be expanded by increasing the Court’s original jurisdiction.<sup>98</sup> Second, the Court’s jurisdiction would be extremely limited, a circumstance that better fits the eighteenth century understanding of an “inferior” court than of a “supreme” court.<sup>99</sup> Third, while the Supreme Court need not be at the top of the appellate ladder in every instance,<sup>100</sup> being at the top of the ladder in some instances will add to a court’s perceived importance. Both of the courts Blackstone called “supreme” had extensive appellate jurisdiction and one of them, the House of Lords, had no original jurisdiction at all.<sup>101</sup> Thus, some amount of appellate jurisdiction seems necessary to make the Supreme Court the most important court. How much is difficult to say, but it seems clear that it must be more than just patent cases, which Hart suggested would be enough to meet the test that an exception must be something less than the whole.<sup>102</sup>

On the other hand, any single exception, even the creation of an abortion court, staffed with new appointees, that would hear all cases challenging abortion legislation,<sup>103</sup> would be unlikely to deprive the Supreme Court of so much jurisdiction that its essential role as the most important court would be threatened.<sup>104</sup> Likewise, a statute like the one at issue in *Ex parte McCordle*<sup>105</sup> would not be unconstitutional, not just because other federal courts (and indeed the Supreme Court through a different route) remained open

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97. From its 1980 term through its 1989 term, the Supreme Court disposed of 43 original jurisdiction cases, an average of just 4.3 a year. *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 367 (1990). The Framers expected the number of original jurisdiction cases to be small. *See THE FEDERALIST* No. 81, at 488 (A. Hamilton) (original jurisdiction is “confined to two classes of cases, and those of a nature rarely to occur”).

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

99. *See supra* notes 43–44 and accompanying text.

100. *See supra* note 16.

101. *See supra* notes 43–44 and accompanying text.

102. *See supra* note 54 and accompanying text.

103. *See Amar, supra* note 4, at 258 (suggesting that abortion court would not be unconstitutional).

104. While abortion cases may be characterized as “sensitive,” they are sensitive in a different sense than the cases assigned to the Supreme Court’s original jurisdiction. Ambassador and state party cases are sensitive because of the parties involved and their ability to resist the Court. Abortion cases are sensitive because of their subject matter. *See supra* text following note 95. Furthermore, the rule to be gleaned from the original jurisdiction clause is not that the Supreme Court must hear every sensitive case. The Framers chose to vest the Court with original jurisdiction in only a small number of the cases that were potentially sensitive. The rule implicit in the original jurisdiction clause is rather that the Court must be the most important court so that it will be capable of deciding those few sensitive cases over which it is given original jurisdiction.

105. 74 U.S. (7 Wall.) 506 (1868).

to hear the case, as Hart argued,<sup>106</sup> but because the Court retains enough *total* jurisdiction to make it the most important court.<sup>107</sup>

It may make sense to give certain kinds of cases greater weight than others, so that First Amendment cases count more in importance than patent cases even though there may be fewer First Amendment cases. Judgments about the importance of different kinds of cases are of course subjective, just as any determination about how much appellate jurisdiction will tip the balance and make the Supreme Court the most important court is subjective. But subjectivity is not out of place here. After all, this exercise of judging importance is driven by the need to protect the dignity of certain parties before the Court and the authority of the Court to speak in particularly sensitive cases. Both of these are subjective requirements.

### CONCLUSION

The “essential role” test offered here is less indeterminate than Hart’s.<sup>108</sup> It is also rooted in the Framers’ understanding of the Court’s role in a way that Ratner’s “essential functions” test is not.<sup>109</sup> But, at the same time, it recognizes a fundamental difference between the Supreme Court and lower federal courts that advocates of the “distributive reading” have ignored. The idea of the Supreme Court as the nation’s most important court is consistent with the argument that federal courts are structurally superior to state courts. However, it is inconsistent with the idea, put forward by the “distributive reading” theorists, that all federal courts are equal and interchangeable.<sup>110</sup>

In Article III, which leaves remarkable discretion over the shape of the federal courts to Congress, the original jurisdiction clause stands out. It was created as a pocket for particularly sensitive cases that involved parties of particular dignity. The Framers wanted the court that would hear these cases to be the most important court in the land. This vision of the Court’s role requires that Congress’ exceptions power have limits.

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106. *See supra* note 13.

107. This “importance” test may concede more power to Congress than one might think politically ideal. However, the point of this Note has not been to establish the politically ideal limits to the exceptions power, but rather to find limits that are defensible on historical and textual grounds. Furthermore, even if the power to strip the Supreme Court of jurisdiction over abortion cases lies within the exceptions power, Congress’ exercise of that power must not violate the constitutional rights of individuals. *See generally* Tribe, *supra* note 10, at 139-52.

108. *See supra* note 12 and accompanying text.

109. *See supra* notes 14-20 and accompanying text.

110. *See supra* notes 23 & 25-33 and accompanying text.