AN ORTHODOX VIEW OF THE TWO-TIER ANALYSIS OF CONGRESSIONAL CONTROL OVER FEDERAL JURISDICTION

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In a carefully conceived and well-regarded article, Professor Akil Amar has advanced a two-tier theory of congressional control over federal jurisdiction.[1] He posits a mandatory tier of cases consisting of the first three heads of jurisdiction in Article III, Section 2: "arising under" litigation, admiralty cases[2] and cases "affecting Ambassadors, other public ministers and consuls." Within this mandatory tier, Congress is free to restrict the Supreme Court's appellate jurisdiction only insofar as the inferior federal courts are vested with jurisdiction over the excluded cases.[3] Article III's remaining "Party" controversies are in the second or permissive tier.

The most appealing aspect of the two-tier thesis is that it seems to provide a principled basis, drawn from the very text of Article III, that renders one of the obviously most important heads of jurisdiction mandatory while leaving comparatively less important heads permissive. The textual keystone is the selective use of the word "all" in Article III, Section 2: "The judicial Power shall extend to *all* cases" in the mandatory first tier, but the modifier "all" is missing from the discretionary second tier of controversies. Professor Amar infers that Article III requires complete aggregate vesting of jurisdiction over the cases modified by "all" but leaves the other controversies to Congress's discretion. This construction, however, is only one of several possible readings of the pertinent text. There are at least two other readings, both of which treat the

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1. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985) [hereinafter Amar].

2. Admiralty law has become a form of federal common law. *See Ex parte* Western Maid, 257 U.S. 419 (1922). Therefore admiralty cases are functionally a subset of the federal question cases encompassed by the "arising under" clause.

3. Conversely, Congress may limit the inferior federal courts' jurisdiction as long as the Supreme Court is permitted to retain appellate jurisdiction over state court adjudications of the excluded cases.

selective use of "all" as being no more significant than the superficial distinction between "Cases" and "Controversies" in the same section of the Constitution. Furthermore these two alternative readings are more in harmony with Section 2's fundamental purpose.

The first alternative reading turns on the possibility that the difference in wording was accidental. Experience in drafting documents that detail and regulate complex relationships suggests that perfection is unattainable, especially when working under time constraints. Inconsistencies like the presence or absence of "all" in Article III inevitably creep into the most carefully drafted documents. Furthermore, Article III was a collective effort. The first tier of Section 2 may have been written originally by a member of the Convention's Committee of Detail who used the word "Cases" modified by an express "all." The second tier may have been written by a fellow drafter who preferred the word "Controversies" modified by an obvious but implicit "all." After the two tiers were joined, these insignificant inconsistencies of style were never resolved. This alternative reading is necessarily a matter of conjecture. There is no extant comprehensive record of the Committee of Detail's internal drafting process.

Another possible reading draws more directly upon Article III's superficial distinction between "Cases" and "Controversies." Some judges have suggested that "Cases" denotes a concept broader than "Controversies"—that cases include criminal litigation while controversies are strictly civil.[4] If this is so, the modifier "all" could be read as a stylistic emphasis of this distinction. Again, however, there would be an implicit "all" insofar as the civil controversies in the second tier are concerned.

These alternative readings, standing alone, are little more than mind-games that lawyers play when parsing the written word. The general structure of Article III provides a more serious objection. Professor Amar sees Article III's list of cases and controversies as a limit to congressional power to curtail federal jurisdiction, but most people have viewed the list primarily as a limit on congressional power to expand jurisdiction.[5] Professor Amar presumably agrees that Article III contains a negative inference that federal judicial power may not extend to unlisted cases. The two-tier thesis does not reject this established and primary understanding of Article

4. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

5. *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (Marshall, C.J.). The orthodox view of congressional power to curtail federal jurisdiction begins with the constitutional text that expressly addresses curtailment. *See* U.S. Const. art. III, § 1 (inferior courts); § 2, Second Paragraph (Supreme Court).

III's list of cases. Instead the thesis presses Article III's list into double service with quite unfortunate—indeed, unacceptable—consequences.

If the list limits congressional power both to enhance and to curtail jurisdiction, Congress appears to lack constitutional authority to vest the federal courts with power over "all" the controversies in the second tier. For example, according to Professor Amar, Article III's reference to "Controversies to which the United States shall be a Party" does not include all such cases for purposes of curtailing jurisdiction. If so, it must not include all United States litigation for purposes of vesting the courts with jurisdiction. The strange result is that the two-tier thesis seems to forbid the federal courts to hear some cases directly involving the national government.

I note this constitutional *double entendre* for a limited purpose. If the constitutional text is to be taken seriously, the textual dilemma created by the two-tier theory must be resolved, and the resolution inevitably will involve a tortured construction of the constitutional text. The obvious solution to the dilemma is simply to decree that Article III has implicit "alls" for the purpose of defining the judicial power of the United States but that these unspoken "alls" flicker out of existence when the very same language is used to judge power to curtail jurisdiction. Such a reading is possible, but at that point the two-tier thesis can no longer claim to be a straightforward and hence plausible exegesis of constitutional text.

Although the two-tier thesis can with some ingenuity be eased into the constitutional text, the thesis is even less plausible as a matter of historical analysis. For example, the allocation of cases between the discretionary and mandatory tiers is incoherent. If the framers and ratifiers actually thought that some cases involve such significant national interests that federal jurisdiction should be constitutionally mandated, the presence of federal question and perhaps ambassador cases in the mandatory tier is plausible. But why are cases involving the United States itself relegated to the less important second tier? Surely the leaders in the early Republic did not view government litigation as less important than cases in the first tier. Until convincing historical evidence is adduced to the contrary, we may plausibly believe that such an anomalous dichotomy was not intended.

I have seen no direct evidence that anyone associated with the framing, ratification, or initial implementation of the Constitution ever espoused the two-tier thesis. With two dubious exceptions, all the historical sources advanced in favor of the two-tier thesis easily

can be read otherwise, as statements of actions Congress might profitably take under Article III. One exception comes during the course of an extended *dictum* in *Martin v. Hunter's Lessee*, in which Justice Story noted the inconsistent use of "all" in Article III and seemed to view the inconsistency as significant.[6] He was, however, only nine years old when the Constitutional Convention met in Philadelphia. Furthermore, he carefully stated that his textual analysis was tentative.[7] Finally, in other parts of his opinion he advocated a broader theory of mandatory vesting that is inconsistent with the two-tier thesis.[8]

In addition to Justice Story's tentative *dictum* that he himself may have rejected, a preliminary version of Article III clearly did provide for two tiers of mandatory and discretionary jurisdiction.[9] This draft, however, is what it is: a preliminary draft. We do not know its relation to the drafting process, but we do know that this clearly two-tiered language was deleted from the final draft. We also know that Edmund Randolph, who wrote the preliminary draft, did not believe that the final version of Article III embodied the two-tier thesis. As Attorney General of the United States, he reported that Congress had plenary power to enact a general amount-in-controversy limitation that absolutely precluded both original and appellate jurisdiction.[10] Randolph's proposal was applicable to cases in both tiers of jurisdiction and was expressly based upon the traditional understanding of congressional power over federal jurisdiction.

Randolph's report cannot be dismissed as a sport. In urging ratification of the proposed Constitution, Oliver Ellsworth, who also served on the Committee of Detail in Philadelphia, expressly endorsed the traditional understanding of plenary legislative power over federal jurisdiction.[11] In the first Congress Ellsworth gave

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6. Amar, *supra* note 1, at 210-15.

7. 14 U.S. (1 Wheaton) 304, 336 (1816) ("We do not, however, profess to place any implicit reliance upon" the selective use of the word all); *id.* at 334 ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred").

8. See the discussion in H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1983) at 366-68.

9. Amar, *supra* note 1, at 243.

10. H.R. Rep., 1st Cong., 3d Sess. (Dec. 31, 1790), reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21-36 (W. Lowrie & W. Franklin eds. 1834). For a more detailed discussion of Randolph's report, see Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 1120-22 [hereinafter Casto]; Holt, *"Federal Courts as the Asylum to Federal Interests": Randolph's Report, The Benson Amendment, and the "Original Understanding" of the Federal Judiciary*, 36 BUFFALO L. REV. 341 (1988).

11. *See* Casto, *supra* note 10, at 1104. During the ratification process, Roger Sherman and James Iredell also advocated extensive, even plenary, congressional power over federal jurisdiction. *Id.*

force to this understanding when he drafted the Judiciary Act of 1789, which completely excluded a number of federal question cases from original and appellate federal jurisdiction.[12] For example, the Act did not allow federal jurisdiction over a tremendous number of significant cases arising under the Treaty of Paris concluding the Revolutionary War, the most important treaty in United States history. This and other curtailments of jurisdiction were passed by a Congress that included fifty-four members who had been delegates to the Philadelphia Convention or their state ratification conventions.

Ellsworth reaffirmed his understanding after he became the third Chief Justice of the United States. In *Wiscart v. D'Auchy*, he formally considered the issue of congressional control and wrote the opinion of the Court that embraced plenary congressional power over the Supreme Court's appellate jurisdiction.[13] *Wiscart* itself, was a diversity case from the discretionary second tier of Article III, but a companion case was a suit in admiralty from the mandatory first tier.[14] Under the two-tier thesis, Ellsworth should have recognized the two consolidated cases as requiring quite separate and distinct analyses, but he espoused a unitary theory of congressional authority.

Justice Wilson's dissent in *Wiscart* is even more damning. Like Ellsworth and Randolph, Wilson had been a member of the Committee of Detail at Philadelphia. Wilson's opinion is devoted almost entirely to statutory construction, and his precise position on Congress's authority to curtail jurisdiction is difficult to assess. Nevertheless, he briefly touched on the subject when he wrote, "Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."[15] Because the consolidated admiralty case was an appeal from an inferior federal court, congressional curtailment of the Supreme Court's appellate jurisdiction clearly was permissible under the two-tier thesis. Perhaps Wilson had in mind something like Henry Hart's "essential functions" analysis,[16] but he cannot possibly have been writing about the two-tier thesis.[17]

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12. For a complete discussion of the first Judiciary Act's implications for congressional power over federal jurisdiction including the ideas in the text of the paragraph accompanying this note, *see* Casto, *supra* note 10.

13. *See id.* at 1122-23.

14. *See Wiscart*, 3 U.S. (3 Dallas) 321, 324 n* (reporter's note) (1796). *See also id.* at 324 (Ellsworth, C.J.) (noting that the Court intended to address cases of "equity [and] admiralty jurisdiction").

15. *Id.* at 325 (Wilson, J., dissenting).

16. *See infra* notes 26-27 and accompanying text.

17. A lawyer might explain Wilson's cryptic sentence in *Wiscart* as based upon some

The theory of plenary power expressly endorsed by the Founding generation has become settled tradition. The combined impact of *Osborn v. Bank of United States*[18] and *Louisville & Nashville RR v. Mottley*[19] excludes a vast array of federal question litigation from the district courts' original jurisdiction. Some federal question cases must therefore be filed in state court. If the federal question proves not to control the outcome, the Supreme Court cannot review any issues of fact, with the result that a case in the first tier will never receive a full hearing in an Article III court. This complete absence of federal jurisdiction can only be reconciled with the two-tier thesis by another manipulation of Article III's text. Perhaps the mandatory "alls" in the first tier refer to issues of law in "arising under" cases but not all issues of fact. Such a subtle reading is possible but not readily apparent from the text.

The historical evidence is not kind to the two-tier thesis. Three of the five members of the Committee of Detail who drafted Article III simply did not draw Professor Amar's suggested distinction between the two posited tiers. Randolph and Wilson took positions that seem quite inconsistent with the distinction. Furthermore Randolph and Ellsworth clearly had a unitary understanding of the issue. This apparent antipathy to the two-tier thesis is a plausible explanation of the Committee of Detail's apparent rejection of the preliminary draft, which clearly would have established a two-tier structure. In the two hundred years since the Committee's decision, only two people, Justice Story and Professor Amar, appear to have given any credence to the thesis. Story was expressly tentative and refused to place complete reliance upon the thesis, but some hundred fifty years later Professor Amar is quite enthusiastic. If the two-tier thesis was actually the common understanding of the time, why is the evidence so elusive?

Although the two-tier thesis has textual problems and little historical basis, the thesis is perhaps easier to justify as a matter of constitutional policy. Rather then restate objections that have been suggested by others,[20] I will limit myself to one additional

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constitutional theory that supplements rather than supplants the two-tier thesis. This imaginative explanation is logically possible but historically implausible in the absence of supporting historical evidence.

18. 22 U.S. (9 Wheaton) 738 (1824) (The Constitution's "arising under" language interpreted as including all cases in which a federal question might appear).

19. 211 U.S. 149 (1908) (federal question jurisdiction statutes limited to cases in which the federal question appears on the face of the well-pleaded complaint).

20. *See* H. HART & H. WECHSLER *supra* note 8, at 386-87. In addition to these objections, the idea of protective jurisdiction as a form of federal question jurisdiction is difficult to reconcile with the two-tier thesis. By definition, protective jurisdiction is authorized by Article III's "arising under" clause, but cases within the federal courts' protective jurisdiction

consideration.

The "arising under" cases provide the laboratory for testing the wisdom of the two-tier theory. As a matter of policy—though perhaps not constitutional text—this theory of mandatory vesting could be limited to cases involving constitutional rules of decision. After all, Congress and the president have plenary power over treaties and other sub-constitutional federal laws. Therefore, a curtailment of jurisdiction over these subconstitutional cases might fairly be viewed as being properly, albeit indirectly, based upon substantive lawmaking authority. This whittling away leaves the two-tier thesis in its strongest configuration: The Constitution mandates federal jurisdiction (either appellate or original) over all cases involving issues of constitutional law but gives Congress general discretion to curtail jurisdiction over all other cases.

I believe that even this trimmed down core of mandatory vesting is unacceptable constitutional policy. Any theory of mandatory vesting must deal effectively with cases in which there is a serious disagreement between Congress and the Supreme Court and in which Congress has consciously decided to muzzle the Court by curtailing jurisdiction. Fortunately and not coincidentally, this type of constitutional crisis has been quite rare in our history. The obvious prototype is found in the era of Reconstruction[21]—in *McCardle* and *Yerger*. Perhaps Congress's postponement of the eventual decision in *Marbury v. Madison* is another example.[22]

By definition these crucial—in my opinion all-important—cases involve predominantly political crises that directly challenge the Court's basic role under the Constitution. When we recall that Congress's view of the underlying substantive issue may be superior to the Court's,[23] the essentially political nature of these crises is highlighted. In these *sui generis* crises, the Court must consider the extent of its political capital and its consequent ability to vindicate its vision of the underlying principle of substantive constitutional law that has provoked the crisis. An all-or-nothing, absolute rule like the two-tier thesis is simply too brittle a tool for crafting an

literally cannot be identified without an act of Congress. *See* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184-96 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224-25 (1948). Therefore either protective jurisdiction must be rejected or the Supreme Court's appellate jurisdiction over state court adjudications must be expanded to include cases in which Congress could have but has not vested the district courts with protective jurisdiction.

21. *See* HART & WECHSLER *supra* note 8, at 364-66.

22. *See* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 5 (1969).

23. *Cf.* Norris-LaGuardia Act, 29 U.S.C. § 101 (muzzling federal district courts that were abusing their equity powers in labor disputes).

adequate judicial response to the congressional challenge. Flexibility is essential for the Court to protect its authority. Inflexible rules like the two-tier thesis provide grossly unrealistic guidelines for coping with intricately nuanced political crises.

The two-tier thesis' inflexibility illustrates by negative example the primary value of Henry Hart's now-orthodox "essential functions" theory. Hart reasoned that Article III's "exceptions" clause could not be plausibly read "as authorizing exceptions which engulf the rule [that the Supreme Court shall have appellate jurisdiction over the enumerated cases and controversies.]"[24] He conceded that the limits upon Congress's exceptions power are difficult to measure. Nevertheless, he wrote: "It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[25]

Critics of Hart's vision "emphasize the vague, slippery, open-ended nature of the limit,"[26] while others have attempted to remedy the deficiency by developing more precise definitions of the Court's essential functions. Both groups, however, misconceive the primary strength of Hart's theory. By keeping the definition of essential functions vague, the theory gives the Court room to maneuver when confronted with a constitutional crisis like the Reconstruction litigation—in *McCardle* to acquiesce, then in *Yerger* to reassert its independence.[27] Likewise the theory explains decisions like *Lockerty v. Phillips* in which the Court acquiesced in a curtailment of jurisdiction during World War II when the nation was fighting for its political life.[28] The existence of vague but nevertheless real limits upon congressional power to curtail jurisdiction also provides congressional defenders of the Court with ammunition to defeat a curtailment at the outset and thus forestall a constitutional crisis. As academics sometimes forget but lawyers all should know, vagueness can be an important virtue.

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24. HART & WECHSLER 3d at 393.

25. *Id.* at 394.

26. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 903 (1984).

27. I do not mean to suggest that Professor Hart had this political rationale specifically in mind when he developed his theory.

28. *See* HART & WECHSLER *supra* note 8, at 370-75.