

# CONTINUING COMMENTARIES

## TAKING ARTICLE III SERIOUSLY: A REPLY TO PROFESSOR FRIEDMAN

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Professor Barry Friedman's lead article in a recent issue of this *Review*<sup>1</sup> offers much food—indeed, a veritable feast—for thought. I applaud his contribution, but, for reasons I shall explain below, I find some of his claims hard to swallow.

Courtesy and fairness would suggest that I give equal time to those aspects of his approach that I admire, and to those I find unpersuasive. In the interest of brevity, however, I shall focus more on the latter. To counterbalance this bias, let me state at the outset that Professor Friedman's article is an impressive and welcome addition to the general literature—provocative, ambitious, wide ranging, and perceptive.

### I. FRIEDMAN'S GENERAL APPROACH

#### A. *The Meaning of Dialogue*

At the grandest level of abstraction, I have reservations about Friedman's "dialogic approach." According to him, the traditional "congressional control models"—including, apparently, my own approach<sup>2</sup>—"fail because they read the text of article III as providing fixed, immutable lines concerning Congress's power to control and curtail federal jurisdiction."<sup>3</sup> In contrast, his own dialogic approach provides, in his words, "an enduring framework for resolving" the issue.<sup>4</sup> This reminds me of

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<sup>1</sup> Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1 (1990).

<sup>2</sup> I am not quite sure why Friedman appends this label to my work, since I stress key *limits* on congressional power to restrict federal jurisdiction, and suggest that perhaps federal courts may not be obliged to exercise the jurisdiction that is conferred on them. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 205-10, 229-30, 215 n.41, 233 n.96, 239 n.118, 267 (1985) [hereinafter *Neo-Federalist View*]. More generally my methodological approach is that, in the deepest sense, neither Congress nor the courts ultimately should "control"; the *Constitution* should.

<sup>3</sup> Friedman, *supra* note 1, at 3.

<sup>4</sup> *Id.* at 48.

the old adjective-conjugation game. (“*I* am pleasingly plump; *you* are fat; *he* is obese.”) To the extent Friedman offers a true “enduring framework” that does indeed “resolve” anything, is this not logically a reading of the text that, to some degree, is “fixed” and “immutable”? If everything truly is open, we have interpretive nihilism and chaos, not an “enduring framework.” If, on the other hand, Friedman admits that certain claims about article III cannot be made with a straight face, at least under currently imaginable circumstances—such as the claim that article III entitles Congress to simply end the dialogue by eliminating the Supreme Court—then he, too, is establishing “fixed, immutable lines.” Of course, Friedman could point to the amendment process as a way to change these lines, but so too, can adherents of the models he critiques.<sup>5</sup>

Friedman’s rhetoric of “fixed” and “immutable” thus tends to obscure the *real* question: which reading of article III—all of which, including his own, impose some limits—is the best? To put the question another way, granted that all of us (Congress, the courts, scholars, lawyers, and We the People) are engaged in an interpretive dialogue about the meaning of article III, what can we legitimately *say* in this dialogue?

### B. *The Nature of Legal Interpretation*

To answer this question, we must presumably use the same interpretive tools and criteria that generally apply to legal interpretation. Thus, we must examine article III’s text, consider the internal structure of its provisions and their relationship to other constitutional principles, research its history, look to early implementations of that article in Congress and the courts, consider subsequent constitutional developments, and so on.<sup>6</sup>

Friedman suggests that when we do this, no competing interpretation of article III is “inexorable,” or “compelling.”<sup>7</sup> Everything, it seems, is just an argument.<sup>8</sup> At one level, of course, this is obviously true. The text does not “compel” any particular reading by physical force. There is no magical constitutional genie that breaks my kneecaps when I misinterpret. There are, however, generally accepted interpretive conventions that render some readings better than others.<sup>9</sup> And as I shall show below, these standard conventions lead me to continue to prefer my reading of article III to Friedman’s.

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<sup>5</sup> Indeed, I have elsewhere devoted considerable attention to the amendment process, and its implications for jurisdiction-stripping. See Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1079-90, 1102-03 (1988).

<sup>6</sup> See generally P. BOBBITT, *CONSTITUTIONAL FATE* (1982); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

<sup>7</sup> Friedman, *supra* note 1, at 40-41.

<sup>8</sup> See *id.* at 41.

<sup>9</sup> For an extraordinarily rich discussion of this proposition, see P. BOBBITT, *supra* note 6; Fallon, *supra* note 6.

Friedman never gets to this side-by-side comparison. He seems to imply that his job of clearing the field for his own views is done after he shows that other interpretations are not "inexorable." But this claim has no resolving power, because Friedman's reading also is not "inexorable." Indeed, I shall now try to show that key portions of his claim are far less plausible than one of the views he ultimately dismisses.

## II. FRIEDMAN'S (MIS)INTERPRETATION OF ARTICLE III

### A. *The Text*

"If the text were clear," Friedman seems to be saying, "we would be bound by it; but since it isn't, let's Do Dialogue." But no text is ever clear except in the sense that certain readings are more plausible than others. And nothing in the text suggests that its most plausible reading is Friedman's—namely, that the scope of congressional power over article III jurisdiction was left radically unspecified. Elsewhere, I have explored the text at considerable length and parsed it as carefully as I could.<sup>10</sup> Friedman is gracious enough to grant that my approach "surely is the best reading of article III's language,"<sup>11</sup> but he nevertheless clings to his own "dialogic" approach.

His reasons, however, are far from clear. First, he invokes "our friend the exceptions and regulations clause," and says that I have "no better information than anyone else" as to its meaning.<sup>12</sup> My claims about the superiority of my reading are "nothing more than an argument."<sup>13</sup>

I am not quite sure what to make of this. "Nothing more than an argument" might imply radical interpretive nihilism, but if so, Friedman's claim self-destructs, for his own dialogic approach is just another argument as well. Friedman at this point wants to free ride on the fact that others have disagreed with my reading of the "exceptions clause,"<sup>14</sup> but the mere fact of disagreement proves nothing. Friedman needs to show why my critics' readings of the exceptions clause are plausible. He does not. But even if he did, he still would be in trouble, because both I and the critics Friedman cites at this point *agree* that article III does specify with a fair degree of precision the scope and limits of congressional power over federal jurisdiction. Though we disagree about precisely what those limits are, we all are in agreement in rejecting the notion that article III does not specify an answer. That is, we all *disagree* with Friedman's dialogic approach. And once again, if the mere fact of

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<sup>10</sup> See Amar, *Neo-Federalist View*, *supra* note 2.

<sup>11</sup> Friedman, *supra* note 1, at 47.

<sup>12</sup> *Id.* at 41.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 41 nn.209-10.

disagreement were enough to doom a theory, then Friedman's own ideas are doomed from the start.

Why does Friedman not rehearse the reading of the exceptions and regulations clause that, according to him, renders my reading problematic? I suspect it is because Friedman is honest enough to recognize that this reading does not stand up to hard analysis. But we need to see this mysterious argument, for at bottom, Friedman's own approach rests on it.

My reading rests on an integrated set of textual, historical, structural, doctrinal, and other arguments which of course I cannot repeat in full here, but which are set out in the sources cited below.<sup>15</sup> At the risk of grossly oversimplifying, my root textual argument is this: Article III plainly requires that the judicial power of the United States "*shall* [that is, must] be vested" in the federal judiciary, which includes one Supreme Court that "*shall*" (again, must) be established, and inferior federal courts that "*may*," but need not, be created. And that very same "judicial power *shall* [here too, must] extend," in the form of either original or appellate jurisdiction, "*to all cases*" involving federal questions, admiralty, and ambassadors. Professor Friedman's "old friend" the exceptions clause is simply irrelevant, for it restricts *only* the appellate jurisdiction of the Supreme Court, *not* the judicial power of the United States as a whole.<sup>16</sup>

To put the point another way, the critics whom Friedman cites at this point are in unanimous accord that nothing in the "exceptions" clause qualifies the clear mandate that the Supreme Court must exist, and that it must have original jurisdiction in certain cases. If this is so—and I know of no commentator or judge today who thinks otherwise—the reason is that article III commands that "the Supreme Court *shall* have original jurisdiction in *all*" ambassador cases. "Shall" and "all" mean what they say here, and the "exceptions" clause is a red herring. But! . . . the same is true for the mandates that "the judicial power *shall* be vested" in federal courts and "*shall* extend," at least on appeal, to "all" federal question, ambassador, and admiralty cases.

Elsewhere in his article, Friedman notes that my textual argument here is "particularly powerful."<sup>17</sup> Why, then, does he ignore it when dredging up the exceptions clause?<sup>18</sup> Perhaps because this "particularly powerful" argument disables the critics on whom Friedman wants to free

<sup>15</sup> Amar, *Neo-Federalist View*, *supra* note 2; Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter *Act of 1789*]; Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter *Reports*].

<sup>16</sup> See, e.g., Amar, *Reports*, *supra* note 15, at 1654-55.

<sup>17</sup> Friedman, *supra* note 1, at 6 n.28.

<sup>18</sup> Friedman continues to ignore this argument in his Reply, even as he yet again conjures up his "old friend" the exceptions clause. Friedman, *Federal Jurisdiction and Legal Scholarship: A (Dialo)gic Reply*, 85 NW. U.L. REV. 478 (1991).

ride to open up the field for dialogue. If so, this is a bit of a cheat—like one candidate for office repeating (while scrupulously refusing to endorse) unfounded rumors about his competitor.<sup>19</sup>

Indeed, the problem runs even deeper, for Friedman's "dialogue" rests on a reading of the text that requires a Supreme Court with *some* undiminshable jurisdiction. (Friedman's "flexible" dialogue thus reads the text as "fixed" and "immutable," at least to this extent.) Obviously there would be no dialogue if Congress could silence the Court by stripping it of all jurisdiction, original and appellate, or better still, by eliminating the Court altogether. Why wouldn't Congress, using Friedman's formulation, have a textual "leg to stand on"<sup>20</sup> if it tried this? The only answer Friedman could offer is the obvious—and obviously correct—claim that "shall" and "all" mean just that, and the exceptions clause, even if read most broadly, is simply irrelevant to the Court's *original* jurisdiction. But the same thing is true of my reading. "Shall" and "all" mean what they say, and the exceptions clause is simply irrelevant, focusing as it does only on one mode of jurisdiction in one court, rather than on the judicial power as a whole.

### B. History

The foregoing analysis is undoubtedly oversimplified in emphasizing only (one part of) the clean textual argument underlying my reading. But there is far more than plain meaning undergirding my thesis. If, indeed, mine "surely is the best"<sup>21</sup> reading, as Friedman says himself, it is because I have spent a good part of the last seven years exhuming and pondering the historical sources underlying that text. Contrary to Friedman's too-glib claim that I have "no better information than anyone else,"<sup>22</sup> my work has featured considerable historical evidence that had never before been integrated into the scholarly analysis of jurisdiction-stripping, and has yet to be addressed in any satisfactory way by others—including Friedman.<sup>23</sup>

Consider, for example, the following illuminating scrap of history from the Philadelphia Convention. The first complete draft of the five-

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<sup>19</sup> Cf. *id.* at 480 (acknowledging that if my reading is "correct," Friedman has "nowhere to go"). It is also noteworthy that nothing in Professor Wells's Comment—on which Professor Friedman's Reply tries to free ride—purports to address the evidence and arguments I have made. See Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 Nw. U.L. REV. 465 (1991). Perhaps Friedman speaks too soon in proclaiming with such confidence that nothing I might say could ever persuade Wells. (Hope springs eternal.)

<sup>20</sup> Friedman, *supra* note 1, at 50.

<sup>21</sup> *Id.* at 47.

<sup>22</sup> *Id.* at 41.

<sup>23</sup> For a small sample of this evidence, see Amar, *Reports*, *supra* note 15, at 1658-63.

man Committee of Detail who composed the language that eventually became article III provided that:

The jurisdiction of the supreme tribunal *shall extend*

1. to *all cases* arising under laws passed by the general [Legislature] . . .
3. to such other cases as the national legislature *may assign* . . .  
 in disputes between citizens of different states  
 [in disputes between a State & a Citizen or Citizens of another State]  
 in disputes between different states; and  
 in disputes, in which subjects or citizens of other countries are concerned  
 . . .<sup>24</sup>

In this draft, “shall” and “all” obviously mean just that, as evidenced by the sharply contrasting language of provisions 1 and 3 excerpted above. Federal jurisdiction *must* extend to *all* proto-“arising under” jurisdiction (provision 1), but only to those proto-diversity cases that Congress chooses (provision 3). Later versions of article III effected many important changes, but the basic two-tiered structure of article III was preserved in every subsequent refinement,<sup>25</sup> and survives today in the plainly two-tiered language of the final version of article III. Federal jurisdiction “*shall extend*” to “*all*” arising under, admiralty, and ambassador cases (an expanded provision 1); but Congress may choose how far to extend it over diversity-type categories (an expanded provision 3), as is textually evidenced by the conspicuous and intentional absence of the word “all” in the last six categories of “controversies” enumerated in article III.

### C. Structure

To my mind, the myriad structural arguments underlying my reading are even more important than the textual and historical props.<sup>26</sup> Again, I shall not repeat them all here, especially because Friedman appears to agree with all except one. I argue that the “coextensiveness principle” requires that whenever Congress creates legal rights by statute, those legal rights must ultimately be enforceable, at least on appeal, by federal courts. Congress need not create a right at all, but this “greater” power does not subsume the allegedly “lesser” power to adjudicate the law itself—hence the attainder clause.<sup>27</sup> For the same reason, Congress cannot commit ultimate adjudication to bodies dependent on it, or on temporary political majorities. And state courts are surely such bodies, lacking, as they do, article III insulation. Although Friedman deems my ideas “unfathomable,”<sup>28</sup> they derive from deeply held rule-of-

<sup>24</sup> 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 146-47 (1911) (inserts in original, indicating emendations in handwriting of Committee of Detail Chair John Rutledge; emphasis altered).

<sup>25</sup> These changes are traced in Amar, *Neo-Federalist View*, *supra* note 2, at 240-54.

<sup>26</sup> See Amar, *Act of 1789*, *supra* note 15, at 1506-15, and sources cited therein.

<sup>27</sup> *Id.* at 1511-12; Amar, *Neo-Federalist View*, *supra* note 2, at 224-29, 231-34, 250-52.

<sup>28</sup> Friedman, *supra* note 1, at 46-47 n.237.

law ideas that dominated Federalist thought in the late 1780s. If Friedman finds these rule-of-law ideas underlying coextensiveness “unfathomable,” immersion in eighteenth-century sources might help to clear up the confusion. Four obvious textual embodiments of these rule-of-law concerns about generality, prospectivity, and vestedness are the attainder and ex post facto clauses of article I, sections 9 and 10. Thus, the framers knew exactly what they were doing, and why, when—unlike Friedman—they refused to distinguish between federal jurisdiction over federal statutory claims on the one hand, and federal constitutional claims on the other. The text is clear: “the judicial power of the United States shall extend to *all*” federal question cases.

#### D. *Practice and Precedent*

“All very nice,” you say, “but it is a Constitution that we are expounding. How have things unfolded in practice?”

In a way remarkably consistent with my reading. The Judiciary Act of 1789—the basic statutory regime until 1875—comports almost perfectly with my reading.<sup>29</sup> Friedman at one point quotes those who say that “in fact”<sup>30</sup> the Act created important exceptions to categories I deem mandatory, but as Friedman himself explicitly notes in a footnote thirty pages later, this putative “fact” is false.<sup>31</sup> The Judiciary Act of 1801—the so-called Midnight Judges Act adopted by a Federalist-dominated Congress—is even more supportive of my reading of article III.<sup>32</sup> And subsequent congressional developments—including the establishment of general federal question jurisdiction in 1875, the abolition of dollar limits for section 1331 federal question cases in 1980, and the even more recent raising of the dollar limit for diversity actions—add yet further support.<sup>33</sup> Friedman points to only one area where, he claims, Congress has acted inconsistently with my reading of the article III mandate.<sup>34</sup> But this area does not involve jurisdiction-stripping in favor of state courts—the main subject at hand. Rather, it implicates a different set of analytic issues that do not bear upon my jurisdiction-stripping analysis in the way Friedman seems to think.<sup>35</sup> The brute fact is that—

<sup>29</sup> See generally Amar, *Act of 1789*, *supra* note 15.

<sup>30</sup> Friedman, *supra* note 1, at 6 n.28.

<sup>31</sup> *Id.* at 35 n.190.

<sup>32</sup> Amar, *Act of 1789*, *supra* note 15, at 1534 n.114, 1550-51.

<sup>33</sup> *Id.* at 1515; Amar, *Neo-Federalist View*, *supra* note 2, at 247 n.134, 265-69.

<sup>34</sup> Friedman, *supra* note 1, at 44-47 (discussing jurisdiction under cases involving only federal statutory rights).

<sup>35</sup> As I have explained elsewhere, so-called “legislative courts” are, strictly speaking, neither “legislative” nor “courts.” They are executive agencies. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 n.43 (1989) [hereinafter *Marbury*]. A congressional decision to vest judicially unreviewable power in these agencies can be construed as a simple decision not to create *legal* rights—to leave the matter to discretion, not law, subject only to constitutional non-delegation principles rooted in the rule of law and structural due

consistent with my views but in apparent tension with what Friedman would like—Congress has *never* given the last word on any claim of federal statutory right to state courts.

Nothing in this pattern of congressional practice is necessarily inconsistent with Friedman's approach, but this is in part because, with the exception of abolishing the Supreme Court, almost anything fits within his "framework." To the extent Friedman's claims are rooted not in an interpretation of the Constitution itself, but in a description of subsequent practice, it is theory that is rather difficult to falsify. My own approach, by contrast, is rather more clear in specifying what congressional statutes would violate it—and therefore, it seems to me, all the more persuasive and explanatory in accounting for subsequent congressional practice.

Let us, finally, turn to what in fact the Congress and the Court have indeed *said* in Friedman's much vaunted dialogue. Nowhere has either Congress or the Court *ever* said: "Article III is basically indeterminate about everything except for the existence of dialogue itself (and thus the mandated existence of the Court). Now, we really are not concerned about what is the most plausible interpretation of article III and the rest of the Constitution under standard norms of legal interpretation. All we really care about is having a barely plausible leg to stand on, so that we can Do Dialogue."

"Perhaps so," I hear you saying, "but has Congress or the Court in this dialogue ever explicitly embraced *your* pet theory of article III?" Indeed yes. To this day, the most comprehensive Supreme Court statement in the dialogue—focusing not just on Congress's power over lower federal courts, or on its power over the appellate jurisdiction of the Supreme Court, but instead on its power over the judicial power of the United States as a whole—is *Martin v. Hunter's Lessee*.<sup>36</sup> Critical but long-ignored passages from this classic Marshall Court opinion by Justice Joseph Story (with Marshall concurring behind the scenes "in every word")<sup>37</sup> are the source of many arguments I have presented, and consistent with many more. And the basic outlines of the *Martin* approach—its fundamental distinction between a mandatory tier of article III where jurisdiction must explicitly extend to "all cases" and a permissive tier

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process. A congressional decision to leave a matter to state *courts* cannot be similarly understood; by definition, Congress is there creating judicially enforceable legal rights.

Friedman's Reply tries to make hay of the fact that the federal question grant of article III does not explicitly speak of "legal rights." Friedman, *supra* note 18, at 486-87 n.46. Article III does, however, speak of *cases* arising under federal *law*—and as I have explained elsewhere, to have such a "case," one must have a "cause of action"—that is, a vested legal right. Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688, 718 n.154 (1989) (discussing etymological linkage between "case" and "cause").

<sup>36</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>37</sup> Amar, *Reports*, *supra* note 15, at 1667 n.70; Amar, *Act of 1789*, *supra* note 15, at 1514 n.39 (noting that Marshall may have helped draft "Story's" opinion).

where the word "all" is omitted—were repeatedly affirmed by subsequent Marshall Court cases, all landmarks in federal jurisdiction: *Osborn v. Bank of the United States*,<sup>38</sup> *Cohens v. Virginia*,<sup>39</sup> and *American Insurance Co. v. Canter*.<sup>40</sup>

When we turn from Court to Congress, we typically confront not words but deeds—namely, statutes. As noted above, these actions fit extremely well within the boundaries set up by my reading. On one particularly important occasion, however, Congress actually *spoke* on the dialogue. In 1831, Congress gave serious consideration to repealing section 25 of the Judiciary Act—an action that would have impermissibly allowed state courts to have the last word on federal rights in many cases. A House Judiciary Committee voted to approve the repeal, but a committee minority wrote a blistering dissenting report that was eventually vindicated by the full House, which rejected the bill by a decisive 138 to 51 vote.<sup>41</sup> The ten-page minority report, co-authored by (later President) James Buchanan, has been described by Felix Frankfurter and James Landis as "one of the famous documents of American constitutional law."<sup>42</sup> And what did this famous minority report say? It explicitly invoked the "very able and conclusive argument of the Supreme Court" in *Martin* and *Cohens* (the only opinions cited), said that "shall" meant "must," and emphasized over and over—four times in italics—the phrase "all cases."<sup>43</sup>

Here, then, we have True Dialogue—speeches back and forth, rather than inferences from silence and inaction. Even better, we have True Dialogue leading to True Agreement about what article III says and why. And the nub of that True Agreement is the reading of article III that I have attempted to advocate and elaborate.

### III. FRIEDMAN'S CONTRIBUTION

So far, I have been sharply critical of Friedman's approach. In the end, much of my criticism may boil down to basic methodological and jurisprudential differences. I see Friedman's article as plagued at times by a trendy relativism that (unsurprisingly) goes nowhere, and a hesitation to take the Constitution seriously on conventional interpretive terms. For Friedman, no reading is compelling because he does not *want* to be bound by a text. But of course, even his approach rests on implicit

<sup>38</sup> 22 U.S. (9 Wheat.) 738, 821-22 (1824) (Marshall, C.J.) (labelling first tier "most important class").

<sup>39</sup> 19 U.S. (6 Wheat.) 264, 378 (1821) (Marshall, C.J.).

<sup>40</sup> 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.); see also Amar, *Marbury*, *supra* note 35, at 483-85 (discussing Taney Court case law).

<sup>41</sup> See generally Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161-64 (1913).

<sup>42</sup> F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 44 n.143 (1928).

<sup>43</sup> H.R. REP. NO. 43, 21st Cong., 2d Sess. 11-20 (1831).

constitutional constraints (as I hope I have shown), although he occasionally seems to obscure this point by labeling his approach “dialogic.” Friedman’s most cherished arguments are those he labels “normative,”<sup>44</sup> but I suspect he realizes these will not generally be accepted by the legal community as dispositive unless he can show that they are indeed needed to “break a tie” because other conventional tools of interpretation—textual analysis, structural methods, historical approaches, doctrinal analysis of precedent, and so on—point in very different directions.<sup>45</sup> Unfortunately for Friedman, I think these conventional approaches converge and reinforce each other on the issues discussed thus far. Although Friedman at times comes close to admitting this—hence his quite kind overall characterization of my approach—at other times he backs away from this admission, for his ultimate decision to deviate from “surely . . . the best” reading would require much more self-conscious methodological justification than he in fact offers.

Why then, did I begin this essay with heartfelt words of praise and admiration? First, because I think Friedman does make a major contribution in describing much of the post-Marshall Supreme Court case law—especially in doctrinal areas other than jurisdiction-stripping. His account of these cases is thoughtful, shrewd, and extremely provocative. Friedman’s article also elegantly illustrates that federal courts themselves have often chosen not to exercise jurisdiction that Congress has given them. (Nothing about that practice is necessarily inconsistent with my theory about jurisdiction-stripping, as Friedman admits.)<sup>46</sup> But I also think he has made a very helpful contribution to the jurisdiction-stripping debate. To my mind, his most persuasive claim is not that Congress has *broader* jurisdiction-stripping power (e.g., over cases involving federal statutory, rather than constitutional, rights) than my reading would suggest, but that Congress may have even *narrower* power.

Recall that my argument places virtually no limits on Congress’s power to allocate jurisdiction in all admiralty and federal question cases *within* the federal judiciary. Although the last word on each of these cases must be vested in some article III court, that court need not be the Supreme Court. For a variety of reasons,<sup>47</sup> I have been critical of efforts to define a fixed category of cases that must be heard by the Supreme Court as part of its “essential functions.”

Much of my argument here is structural. All article III “judges” are appointed by the President and confirmed by the Senate; all enjoy undiminishable salaries with life tenure; all are officers of the nation and

<sup>44</sup> See, e.g., Friedman, *supra* note 1, at 41.

<sup>45</sup> See generally Fallon, *supra* note 6; cf. Friedman, *supra* note 18, at 480 (if two-tier thesis is correct, Friedman “has nowhere to go”).

<sup>46</sup> Friedman, *supra* note 1, at 7 n.30, 38 n.201; cf. *supra* note 2.

<sup>47</sup> Amar, *Neo-Federalist View*, *supra* note 2, at 220-22, 254-58; Amar, *Act of 1789*, *supra* note 15, at 1509-10.

accountable to the nation through the national impeachment process. None of these things, of course, is true for state judges. Structurally, then, all article III judges—Supreme and inferior—are essentially fungible. Indeed, although we today in ordinary conversation distinguish between Supreme Court “Justices” and lower federal court “judges,” the constitutional text makes no such distinction; all are simply labeled “judges.” Jurisdiction-stripping *within* the federal judiciary, then, is fundamentally analogous to Court-packing: both simply reallocate authority from one set of article III judges to another. To put the point another way, nothing in article III prevents Congress from establishing a “Supreme Court” with, say, eight hundred judges, whose decisions would generally be made by three-judge panels (with Ninth Circuit-like en bancs in the event of conflicts among panels).<sup>48</sup> Thus, Congress through its undoubted power to shape the internal structure of the Supreme Court could accomplish the same basic result as would be achieved through my reading of the exceptions clause—namely, radical decentralization of decisionmaking power *within* the federal judiciary.

Friedman finds this last suggestion a strained one,<sup>49</sup> but once again, a page of history is worth volumes. Given that the nation’s population is one hundred times what it was in 1789, and Congress is now ten times as large, why is it so hard to imagine a similar growth in the size of the Supreme Court? And let us not forget the judicial regime in place for the first one hundred years of our nation’s history, patterned in part on the British *nisi prius* system. Supreme Court Justices were simultaneously lower federal court judges as well, sitting in two and three judge panels and deciding cases on circuit.<sup>50</sup> Although circuit riding has since been abolished, even today Supreme Court justices may sit by designation in lower federal courts (but never in state courts, once again illustrating my structural thesis).<sup>51</sup> Note also that in hesitating to reconceptualize the possible structure of the Supreme Court, it is Friedman who shows himself to be more “fixed” and “rigid,” confusing the familiar with the constitutionally necessary.

Nevertheless, Friedman’s doubts about this part of my thesis, and his very helpful focus on how the Supreme Court has evolved over two hundred years into an entity that really is not fungible with other federal courts, have induced me to rethink. Indeed, he has to my mind reinvigorated the whole notion of Supreme Court “essential functions.”

Let me try to recast Friedman’s basic insight into my own methodological framework. I’m not sure Friedman would choose to argue his

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<sup>48</sup> Amar, *Neo-Federalist View*, *supra* note 2, at 268 n.213.

<sup>49</sup> Friedman, *supra* note 1, at 44 n.222.

<sup>50</sup> Amar, *Act of 1789*, *supra* note 15, at 1536-39.

<sup>51</sup> Amar, *Neo-Federalist View*, *supra* note 2, at 265-67.

point this way, but for me, at least, what follows is the most persuasive formulation:

Even if we admit that Congress must vest all federal question and admiralty cases somewhere within the federal judiciary, because “shall” and “all” mean what they say, additional textual limitations exist. After all, one court is supposed to be “Supreme.” And restrictions on its appellate jurisdiction are supposed to be the “exception,” not the rule, both quantitatively and qualitatively. To be sure, both “Supreme” and “exception” can be read narrowly, per Amar. (The High Court is “Supreme” only in that it, unlike other federal courts, must be created, must have an undiminishable core of original jurisdiction, and can never be reversed by any other court in any case that *is* given to it.<sup>52</sup> “Exception” implies only some trivial residuum of jurisdiction, which could be easily satisfied by leaving the Supreme Court with the last word on patent cases.) But both words are also plausibly read—indeed, *more* plausibly read—as having more bite than Amar admits. He appears to be driven to his narrow reading because of his obsession with justiciable bright-line rules.<sup>53</sup> And indeed, if we did have to “fix” *ex ante* an “immutable” category or percentage of cases that could *never* be removed from the Supreme Court, then perhaps any attempted formulation would be either overly rigid or too mushy to provide the justiciable line Amar seeks. But not all constitutional norms need be fixed, bright-line, highly justiciable formulations. Perhaps we should instead see the undoubted “give” in the words “Supreme” and “exceptions” as invitations to Court and Congress to hammer out these concepts in a fluid, common-law—indeed, dialogic—process of give and take, of backing and filling. Under this approach, the vigor with which the Supreme Court resists any congressional effort to shift a category of cases from it to some other federal court is itself a very good index of how important that category is (at that time), and therefore of whether Congress has attempted to make the “exceptions” swallow the rule. Although Congress could legitimately create a very different looking Supreme Court, it has not done so. By constituting the Supreme Court as it has, Congress, for its part, has estopped itself from claiming that “Supreme” must be read narrowly. Although Congress is still free to change the structure of the Court—even radically—unless it does so, it may be obliged to give the Court more jurisdiction than otherwise. So long as Congress insists on constituting the Court as a Frankenstein, it must feed the monster (or at least negotiate with it).

Now I find this line of argument extremely powerful. It may, indeed, be the best way to interpret the words “Supreme” and “exceptions.” I am therefore extremely grateful to Professor Friedman for suggesting this argument.

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<sup>52</sup> *Id.* at 221 n.60.

<sup>53</sup> *Id.* at 220, 230 n.86; Amar, *Act of 1789*, *supra* note 15, at 1514-15, 1515 n.44.