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Originally Published as Brian T. Fitzpatrick, The Constitutionality of Federal Jurisdiction-stripping Legislation and the History of State Judicial Selection and Tenure in 98 Va. L. Rev. 839 2012.

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THE CONSTITUTIONALITY OF FEDERAL  
JURISDICTION-STRIPPING LEGISLATION AND THE  
HISTORY OF STATE JUDICIAL SELECTION AND  
TENURE

*Brian T. Fitzpatrick\**

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INTRODUCTION

**F**EW topics have captivated the attention of scholars of the federal judiciary like the question of how much power Congress can exercise over the jurisdiction of the federal courts. For many decades, commentators have debated at great length whether, for example, Congress can do away with lower federal courts, whether it can at least refuse to vest them with jurisdiction to hear some of the cases listed in Article III, and whether Congress can withhold some or all of such cases from the jurisdiction of the U.S. Supreme Court. Of all these questions, however, there is one in particular that has puzzled scholars unlike any other: whether Congress can withhold all federal jurisdiction—jurisdiction from both lower federal courts and the U.S. Supreme Court simultaneously—in a case

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raising a federal constitutional claim. If Congress can do this, federal constitutional claims could be left to be litigated only in state court, with no review whatsoever by federal judges.

Since plenary federal question jurisdiction was extended to the federal judiciary in 1875, Congress has yet to do this<sup>1</sup>—but it threatens to do so all the time. Thus, for example, in recent decades, bills to withdraw federal jurisdiction have been proposed for cases raising constitutional claims over school prayer, segregated schools, the Pledge of Allegiance, same-sex marriage, and the Ten Commandments.<sup>2</sup> Members of Congress proposed these bills because they did not like the way in which federal courts had ruled (or were expected to rule) in these areas and believed that state courts were more likely to reach outcomes they favored. Because these bills would have withdrawn preexisting federal question jurisdiction, they are usually referred to as “jurisdiction stripping” legislation. Because these bills have involved the hottest of hot-button political issues, the question of whether they would violate the Federal Constitution if enacted has captivated scholarly imagination. Despite literally decades of scholarship, however, commentators have been unable to answer this question with satisfaction. Rather, the scholarship in this area has been left in a stalemate.

On the one hand, most scholars believe that it threatens the very nature of constitutional law to leave it in the hands of state judges who lack the independence of Article III judges.<sup>3</sup> The entire point of the Constitution is to regulate majorities and the political branches that represent them. Federal judges have the requisite independence to perform this task; state judges, largely dependent on elections to win and keep their jobs, do not. On the other hand, most of these same scholars also believe that the text and original understanding of Article III of the Constitution would have permitted federal constitutional claims to be left in state courts.<sup>4</sup> In-

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<sup>1</sup> See Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 743–47 (6th ed. 2009). There is one exception to this claim in the habeas corpus context, but, for the reasons I set forth in note 22, *infra*, the habeas corpus context is *sui generis*.

<sup>2</sup> See *Safeguarding Our Religious Liberties Act*, H.R. 4576, 109th Cong. (1st Sess. 2005) (as introduced in House); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 *Harv. L. Rev.* 869, 902–15 (2011).

<sup>3</sup> See Fallon et al., *supra* note 1, at 300–02.

<sup>4</sup> See *id.* at 275–76, 300–02.

deed, as I noted, Congress did not vest the federal judiciary with plenary jurisdiction over constitutional claims until 1875. This is especially puzzling to scholars because, as the constitutional design of the federal judiciary shows, the framing generation thought it was just as important as we do today for the expositors of constitutional rights to be independent from the political branches and the public.

Thus far, scholars have been unable to solve this puzzle; they have been unable to reconcile text and history with constitutionalism and judicial independence. Rather, scholars have largely been left to choose one side of the debate to the detriment of the other—to choose between depriving constitutional adjudication of its fundamental character or ignoring the relatively clear text and original understanding of the Constitution.

In this Article, I offer a solution to this puzzle: the underappreciated history of the independence of state judiciaries—in particular, the history of the gap between the independence of state and federal judges that arose only after the Founding. Consider what most scholars believe to be the most important metrics of judicial independence: the method of selecting judges and the length of their tenure. Unlike their federal counterparts, almost all state judges today serve limited terms and are subject to some sort of popular election.<sup>5</sup> As such, it is perfectly understandable that the adjudication of constitutional claims by state rather than federal judges is widely seen as a threat to constitutionalism and judicial independence. But most scholars of the federal judiciary appear to assume that state judges have been selected and tenured throughout American history just as they are today. For example, one of the most prominent scholars in this area, Professor Robert Clinton, asserted in his seminal work on the subject that “many state judges” at the Founding were “dependen[t] on . . . election.”<sup>6</sup> This assertion, however, is simply not true. Rather, as I show in this Article, at the time of the Founding, no state judges were elected; they were all appointed by public officials like federal judges. Indeed, not only were all state judges appointed rather than elected,

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<sup>5</sup> See *infra* text accompanying notes 62–69.

<sup>6</sup> Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 814 n.233 (1984).

but the vast majority of them shared with their federal counterparts perhaps the single most important feature of independence: life tenure.<sup>7</sup> These features did not change until the middle of the nineteenth century, when states began to replace life tenure with limited terms and appointment with popular elections. By the time Congress first extended plenary jurisdiction over constitutional claims to the federal judiciary in 1875,<sup>8</sup> the nature of state judiciaries had reversed: the vast majority of state court judges were by then (and remain today) popularly elected to limited terms. Although selection and tenure are only two metrics of judicial independence (even if they may be the most important ones), there is little reason to believe that what state judges have lost relative to their federal counterparts by virtue of these developments has been offset by other means.<sup>9</sup> In other words, state judges today no longer resemble their federal counterparts in the way they once did; the narrow crevice between the independence of state and federal judges that existed at the Founding had widened to a chasm by 1875 and remains there today.

Thus, something important has changed since the time of the Founding that bears on the question of whether jurisdiction stripping is constitutional: the state judges to whom constitutional claims are left when federal courts cannot hear them. This change is important because the state judges who would hear cases when federal judges did not were the background against which Article III's requirements were written and interpreted. Moreover, when constitutional backgrounds change, what the Constitution requires can change as well. This conclusion is true even (and perhaps especially) for those who give significant weight to the original understanding of the Constitution. Sometimes the way to be most faithful to the original meaning of the Constitution is to change how the Constitution applies to particular questions. This is the case because the meaning of any text depends on context, and, when context changes, the text sometimes must be applied differently in order to keep its meaning the same.

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<sup>7</sup> See *infra* Tables 1–2.

<sup>8</sup> See Fallon et al., *supra* note 1, at 745.

<sup>9</sup> See *infra* Sections II.B & II.C.

Approaches to constitutional interpretation like this one are sometimes referred to as “translation,” and they are known as originalist-friendly ways to incorporate changed circumstances into constitutional interpretation.<sup>10</sup> Indeed, arguments that sound in translation have been endorsed by a range of scholars, from those who see original understanding as merely one factor among many, to those who call themselves “originalists” but only at a high level of generality, and even to those we might call “hardcore” originalists who apply the theory at a very specific level of generality.<sup>11</sup> To the extent there is disagreement among these scholars about translation, it is usually regarding the strength of the evidence needed before the approach can be adopted. In particular, scholars insist on different burdens of proof with respect to how important the constitutional background was to the Founding generation and how much that background has really changed.<sup>12</sup>

I think the evidence in favor of translation on the question of the constitutionality of withholding jurisdiction may be able to satisfy most, if not all, federal courts scholars. Not only is the evidence very strong that the parity between state and federal judges has weakened considerably since the Founding, but there is plenty of reason to believe that this constitutional background was one that was important to the Founding generation, and, accordingly, that the Founding generation might have understood Article III to operate differently had they lived with our state judges rather than their own. It is for this reason that I believe that the history of state court selection and tenure can resolve the jurisdiction-stripping dilemma that has mired scholars for so long.

In Part I of this Article, I describe the congressional attempts to strip all federal courts of jurisdiction over constitutional claims, and I set forth the scholarly impasse over whether the practice is constitutional. In Part II, I recount the history of judicial independence in the states, focusing on the dramatic change in selection and tenure since the Founding, but also considering other metrics of judicial independence. In particular, I show how the narrow crevice between the independence of state and federal judges at

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<sup>10</sup> See generally Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993).

<sup>11</sup> See sources cited *infra* notes 127 & 135.

<sup>12</sup> See sources cited *infra* note 134.

the Founding has widened dramatically over time. In Part III, I explain how the history I set forth in Part II can solve the puzzle of jurisdiction stripping. In particular, I show how it is possible to honor both the original tolerance of jurisdiction stripping and the modern aversion to it by translating Article III from one context of federal-state parity to another. Finally, I conclude by describing how the history I have uncovered in this Article may have repercussions for many other jurisdictional doctrines of the federal courts.

### I. JURISDICTION STRIPPING AND ITS SCHOLARLY IMPASSE

Article III of the Constitution gives federal courts the power to adjudicate cases in a number of different subject areas—federal constitutional cases, federal statutory cases, diversity cases, etc.—and, ever since the Constitution was ratified, scholars have been debating how much of this power Congress can withhold from federal courts.<sup>13</sup> Scholars have debated, for example, whether Congress was obligated to create lower federal courts at all, how much of Article III's subject matter Congress must vest in lower federal courts if it does, and whether Congress can withhold any or all of Article III's cases from the appellate jurisdiction of the U.S. Supreme Court.<sup>14</sup>

But no question in this debate has drawn more attention from scholars than whether Congress can withhold all federal jurisdiction—from both the lower federal courts and the U.S. Supreme Court simultaneously—in a case raising a constitutional claim. Scholars have been captivated by this question since the 1970s,

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<sup>13</sup> See Fallon et al., *supra* note 1, at 287–300. For a sample of these debates, see, for example, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *Yale L.J.* 498, 513 (1974) (arguing that the inability of the U.S. Supreme Court to review more than a minuscule percentage of state court decisions renders constitutionally obligatory the creation of lower federal courts); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw. U. L. Rev.* 191, 202 (2007) [hereinafter Pfander, *Federal Supremacy*] (same for supervising state courts); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1500 (2000) (arguing that it would raise “serious constitutional questions” if Congress eliminated both the Court's appellate jurisdiction and its authority to supervise lower federal courts by issuing discretionary writs).

<sup>14</sup> See sources cited *supra* note 13.

when Congress repeatedly began to threaten to do this with a variety of politically charged constitutional claims. This legislation—referred to as “jurisdiction stripping” because both lower federal courts and the U.S. Supreme Court would otherwise have jurisdiction to hear these cases under the plenary federal question jurisdiction granted since 1875<sup>15</sup>—is usually proposed for substantive ends: members of Congress believe that state courts will resolve these cases more to their liking than federal courts will.<sup>16</sup> For example, Congress has sought to remove from federal jurisdiction constitutional challenges to school prayer,<sup>17</sup> segregated schools,<sup>18</sup> the Pledge of Allegiance,<sup>19</sup> same-sex-marriage bans,<sup>20</sup> and the Ten Commandments.<sup>21</sup> None of these bills has ever passed both houses of Congress (although some have passed one house), and, consequently, the U.S. Supreme Court has never had to decide whether jurisdiction stripping is constitutional.<sup>22</sup> Nonetheless, as these bills continue

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<sup>15</sup> See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1063 (2010) (describing jurisdiction-stripping legislation as legislation that “would bar the federal courts from resolving specific constitutional claims, usually involving hot-button issues, and thereby channel the litigation of those claims exclusively into state courts”).

<sup>16</sup> See *id.* (“[P]roponents of jurisdiction-stripping legislation have, quite obviously, assumed that state courts are more likely than federal courts to uphold [for example] the constitutionality of abortion restrictions and such practices as school prayer and recitations of the Pledge of Allegiance.”).

<sup>17</sup> See Grove, *supra* note 2, at 902–07.

<sup>18</sup> See *id.* at 907–09.

<sup>19</sup> See *id.* at 911–15.

<sup>20</sup> See *id.*

<sup>21</sup> See *Safeguarding Our Religious Liberties Act*, H.R. 4576, 109th Cong. (1st Sess. 2005) (as introduced in House).

<sup>22</sup> See Fallon, *supra* note 15, at 1045. Congress did enact a statute stripping federal courts of jurisdiction to hear habeas petitions brought by persons held as enemy combatants, and the U.S. Supreme Court did strike it down as unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723, 736–39, 787–92 (2008). But habeas claims are special, and, as such, it is difficult to draw any general conclusions from this decision. Not only is there a specific provision in the Constitution guaranteeing access to habeas corpus proceedings, see U.S. Const. art. I, § 9, cl. 2, but the U.S. Supreme Court also has held that state courts are not available to hear habeas claims against federal officials. See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 397 (1872). Thus, *Boumediene* may have presented a case where no court could hear a federal constitutional claim, rather than a case where no federal court could hear the claim. But see Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 Notre Dame L. Rev. 1975, 1976 (2009). The constitutional case against the former is much stronger than the case against the latter. See Fallon et al., *supra* note 1, at 308–14.

to be proposed, scholars continue to debate whether they are constitutional.

For some time now, however, the scholarly debate has been left at something of an impasse. The impasse arises from the tension between two beliefs that are shared by most scholars of the federal judiciary: (1) withholding federal jurisdiction over constitutional claims is inconsistent with the very nature of those claims, and (2) withholding such jurisdiction is nonetheless perfectly consistent with the text and original understanding of the Constitution.

The belief that jurisdiction stripping is inconsistent with the nature of constitutional claims is a familiar one. The Constitution is designed to limit the work of popular majorities and their representatives in the political branches. In order to see that these limitations are not ignored, it is widely thought that judges should be structurally insulated from the public and the political branches—that is, that judges should be “independent.” But when Congress strips the federal judiciary of the ability to hear a constitutional claim, it leaves the claim to be adjudicated by state judges, who, unlike their federal counterparts, almost universally serve limited terms and are subject to some sort of popular election.<sup>23</sup> There is now a great deal of empirical evidence to support the longstanding intuition that judges without structural independence from majoritarian forces more readily succumb to those forces.<sup>24</sup> It is therefore

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<sup>23</sup> See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *Harv. L. Rev.* 1061, 1063–64 (2010) (“Almost ninety percent of state judges face some kind of popular election. Thirty-eight states put all of their judges up before the voters.”).

<sup>24</sup> See Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 *Va. L. Rev.* 719, 732–40 (2010) (discussing empirical evidence showing that state judges are more inclined to make decisions in line with popular opinion); *id.* at 739–40 (“The whole point of giving federal judges life tenure and salary protections is to ensure their independent decision-making, and the whole point of electing judges is to ensure that they are accountable to the people. . . . [I]f these different selection systems are to serve any purpose at all, then elected judges must, at least sometimes, vote in favor of majority preferences when appointed judges would not.”); Shugerman, *supra* note 23, at 1064 (“[E]lected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do.”). Interestingly, Professor Shugerman has argued that, when elected judiciaries were adopted in the middle of the nineteenth century, it was hoped that they would be more inclined to exercise judicial review than appointed judges, and Professor Shugerman has found that seems to have been the case in the early years. See *id.* at 1066, 1068–69, 1097–1105, 1115–23. Whatever the original motivations behind judicial

easy to see why scholars believe that leaving constitutional claims in the hands of state judges unduly compromises those claims.<sup>25</sup> As two commentators have put it, “legal scholars and commentators . . . have rendered a near-unanimous judgment . . . that [jurisdiction stripping is] ill-conceived . . . .”<sup>26</sup>

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elections, this is neither how we see elected judges today nor how the empirical evidence portrays them.

<sup>25</sup> See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 230 (1985) (emphasizing that “[t]he structural mechanisms to assure independence and competence in the federal judiciary . . . are the same for all Article III judges, supreme and inferior” and that “[n]o similar mechanisms are prescribed by the Constitution for state judges”); Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L.J. 59, 64 (2007) (arguing that it threatens liberty to permit Congress to “preemptively rob the judiciary of the capacity to contribute to constitutional . . . deliberation . . . [freeing] government actors [to] determine conclusively and secretly the reach of their own powers”); Clinton, *supra* note 6, at 754, 762 (noting that “federal judges . . . , unlike their state counterparts, were constitutionally guaranteed judicial independence”); Eisenberg, *supra* note 13, at 507–13 (arguing that Congress cannot withdraw both lower federal court and U.S. Supreme Court jurisdiction to hear constitutional claims because it would undermine the “national judiciary’s role as vindicator of private and individual rights”); Fallon, *supra* note 15, at 1074–83 (arguing that jurisdiction stripping is a problem because it permits Congress to steal from the U.S. Supreme Court the final word on what the Constitution means); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 60 (1990) (“The rights enforced by the judiciary were by and large placed in the Constitution to serve as limitations on popular will. It is hard to accept a model of federal jurisdiction in which the judiciary serves docilely at the whim of the majoritarian branches, enforcing rights when those branches wish, but otherwise not at all.”); Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 Geo. L.J. 839, 851 (1976) (arguing that “[e]nactment of . . . antibusing [jurisdiction-stripping] legislation is an improper congressional interference with judicial authority to issue independent judgments”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 64–66 & n.151 (1981) (arguing that because “[c]laims of constitutional right present the most compelling cases” and because “[s]tate courts are vulnerable to majoritarian pressures,” “exclusion of article III review of such claims in the state courts” cannot be justified).

<sup>26</sup> Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 Geo. Wash. L. Rev. 495, 498 (1983). Indeed, the contemporary unease with jurisdiction stripping is so stark that it played an extraordinary role at the hearings in 1986 on whether to elevate William Rehnquist to Chief Justice. On the first day of the hearings, Justice Rehnquist told Senator Arlen Specter that he thought it was an “open question” whether Congress could strip the U.S. Supreme Court of jurisdiction to hear, for example, First Amendment cases. See *Nomination of William Hubbs Rehnquist to be Chief Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 189–90, 268, 319*

Nonetheless, many of these same scholars have been reluctant to conclude that jurisdiction stripping is unconstitutional. This is the case because there is relatively clear textual and historical evidence that the original understanding of Article III permitted it.<sup>27</sup> First, it is widely acknowledged that the Constitution does not require Congress to create lower federal courts at all.<sup>28</sup> It follows from the fact that Congress has the greater power not to create lower federal courts that it also has the lesser power to withhold jurisdiction from those courts to hear particular cases, including cases raising constitutional claims. Second, the Constitution explicitly permits Congress to create exceptions to the U.S. Supreme Court's jurisdiction to hear appeals from lower federal courts and state courts.<sup>29</sup> Although at some point Congress could create so many exceptions that the exceptions might swallow the rule,<sup>30</sup> the Constitution appears explicitly to empower Congress to withhold at least some number of cases, including constitutional cases, from the U.S. Supreme Court's appellate jurisdiction.<sup>31</sup> While the Constitution no-

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(1986). This answer left such unease with the Judiciary Committee—despite the fact that it went only to the U.S. Supreme Court's appellate jurisdiction and not to the simultaneous jurisdiction of lower federal courts over such cases—that Justice Rehnquist felt compelled the following day to tell Senator Specter that, upon reflection, he thought such legislation would be unconstitutional. See *id.* at 268.

<sup>27</sup> This is sometimes called the “traditional” or “conventional” view. See Fallon, *supra* note 15, at 1064–69; accord Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1569 (1990); Pfander, *Federal Supremacy*, *supra* note 13, at 195, 234–35. This terminology is somewhat controversial. See Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. Rev. 847, 854 n.38 (1997).

<sup>28</sup> See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). At the Constitutional Convention, some members wanted the Constitution to require the creation of lower federal courts, and some members did not want the Constitution to permit lower federal courts at all. In what is known as the “Madisonian Compromise,” the Convention decided to leave the creation of lower federal courts to the discretion of Congress. See Fallon, *supra* note 15, at 1065–68.

<sup>29</sup> See U.S. Const. art. III, § 2, cl. 2 (rendering the U.S. Supreme Court's appellate jurisdiction subject to “such Exceptions . . . as the Congress shall make”).

<sup>30</sup> See Fallon et al., *supra* note 1, at 295–97.

<sup>31</sup> Some commentators have made textual arguments from the Vesting Clause of Article III (“The judicial Power . . . shall be vested in one supreme Court”) and the use of the word “all” in Article III (to describe the federal question cases within the “judicial power”) for the proposition that the U.S. Supreme Court must possess jurisdiction over every federal question case. See Steven G. Calabresi & Gary Lawson, *The*

where says Congress can simultaneously withhold both lower federal court and U.S. Supreme Court jurisdiction in the same case, the Constitution nowhere says Congress cannot. For most scholars, the history of federal question jurisdiction resolves this ambiguity in favor of congressional power to do so. From the very first Judiciary Act in 1789, and for nearly one hundred years thereafter until 1875, Congress left many constitutional claims outside the purview of both the lower federal courts and the U.S. Supreme Court.<sup>32</sup>

Scholars have been largely unable to reconcile their belief in constitutionalism and judicial independence with the text of the Constitution and the early history of depriving federal courts of jurisdiction over constitutional claims.<sup>33</sup> As a result, scholars have

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Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1038 (2007); Claus, *supra* note 25, at 77–80. These commentators argue that the Exceptions Clause only gives Congress the power to move cases from the U.S. Supreme Court's appellate jurisdiction to its original jurisdiction. See Calabresi & Lawson, *supra*; Claus, *supra* note 25, at 77–80. These arguments have not been embraced by scholars, and they are, like other revisionist-originalist accounts, inconsistent with both the Judiciary Act of 1789 and the ensuing century of federal jurisdiction.

<sup>32</sup> See Fallon et al., *supra* note 1, at 743–47 (noting that plenary federal question jurisdiction, subject only to a de minimis amount-in-controversy threshold, was not conferred on the federal judiciary until 1875). For example, Congress conferred hardly any federal question jurisdiction on lower federal courts until they received plenary jurisdiction in 1875. See *id.* at 276. But see David E. Engdahl, *Federal Question Jurisdiction under the 1789 Judiciary Act*, 14 Okla. City U. L. Rev. 521, 521 (1989). Thus, the vast majority of constitutional cases had to be litigated in the first instance in state courts until 1875. Yet, until 1914, the U.S. Supreme Court could review only a subset of these state court decisions (those in which the federal claim was unsuccessful below). See Fallon et al., *supra* note 1, at 276–77.

<sup>33</sup> The leading theories that can be seen as efforts to make this reconciliation are (1) a handful of revisionist-textual and historical accounts that contend that the Constitution was originally understood to require some federal court to hear every constitutional (and, indeed, statutory) claim, see Amar, *supra* note 25, at 206, 209, 229–30, 234; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1509 (1990); Calabresi & Lawson, *supra* note 31, at 1038; Claus, *supra* note 25, at 77–80; Clinton, *supra* note 6, at 768, and (2) theories that examine the motive of Congress in withholding jurisdiction—that is, that permit Congress to withhold jurisdiction for procedural reasons (for example, to reduce the workload of the federal judiciary) but not for substantive ones (for example, because it likes the results state courts would reach better than those federal courts would reach), see Eisenberg, *supra* note 13, at 518–30; Fallon, *supra* note 15, at 1068, 1073–87. These theories have not satisfied most scholars: the former theories (which I take up in more detail in Part III) because they are wholly inconsistent with the lack of plenary federal question jurisdiction for the first one hundred years of the Republic, see generally, e.g., Friedman, *supra* note 25, at 2–3; Meltzer, *supra* note 27, at 1585, the latter theo-

largely been left to choose between abandoning text and history in order to promote constitutionalism and judicial independence or abandoning constitutionalism and judicial independence in order to stay faithful to text and history.<sup>34</sup> Although it may seem perplexing to many contemporary constitutional scholars—for whom the original understanding of the Constitution is only one factor among many to consider, and probably not even the most important one—most federal courts scholars, for whatever reason,<sup>35</sup> have been unwilling to abandon text and history in favor of constitutionalism and judicial independence. As Richard Fallon recently put it while casting his lot in the other direction, “the originalist and textualist style of reasoning . . . has characterized nearly all leading academic writings on congressional control of jurisdiction.”<sup>36</sup>

As I explain below, however, I think the choice between constitutionalism and judicial independence, on the one hand, and text and history, on the other, has been a false one. I think there is a way to overcome the scholarly impasse, a way to credit both the text and history of Article III and the desire for independent adjudication of constitutional rights. This pathway is through the underappreciated history of the independence of the state judiciaries, most particularly the history of the distance that has arisen between state judges and their federal counterparts.

## II. THE HISTORY OF JUDICIAL INDEPENDENCE IN THE STATES

The independence of today’s state judges resembles that of their federal counterparts much less than it did at the Founding. This is most apparent with respect to what scholars regard as the most im-

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ries because they are inconsistent with some rather obvious efforts by Congress to withhold jurisdiction for substantive ends, perhaps none more famous than Congress’s decision to strip the U.S. Supreme Court of jurisdiction to hear a Civil War-era habeas petition despite the fact that the petition was already pending before the Court, see Fallon, *supra* note 15, at 1078. In unanimously upholding the jurisdiction-stripping measure, the Court declared: “We are not at liberty to inquire into the motives of the legislature.” *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869).

<sup>34</sup> See, e.g., Fallon, *supra* note 15, at 1048, 1072–74 (casting his lot with “functional desirability” over “originalist analysis”).

<sup>35</sup> The reason may have to do with the enduring influence of Henry Hart on the field. See *id.* at 1047 (“Professor Henry Hart, who remains the most influential contributor to the discussion, rested principally on originalist grounds . . .”).

<sup>36</sup> *Id.*

portant metrics of independence—the method of selection and the length of tenure of state judges—but, as I explain, it remains true even when other metrics are considered. This development has been underappreciated or even misunderstood by scholars, and, as I explain in the next Part, it is the key to solving the puzzle of jurisdiction stripping.

### A. *Selection and Tenure of Judges*

The metrics of judicial independence that are most often invoked by scholars are structural protections: in particular, the method by which judges are selected and the length of their tenure.<sup>37</sup> For example, it is often thought that selection by election is perhaps the greatest threat of all to judicial independence.<sup>38</sup> The

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<sup>37</sup> See, e.g., G. Alan Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability* (Stanford Univ. Press forthcoming 2012) (manuscript at 18) (on file with author) (“Today conflicts in the states over judicial independence and judicial accountability focus almost exclusively on judicial selection and judicial tenure.”); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. Pa. L. Rev. 171, 208–09 (2008) (“There is little serious disagreement about how to increase a tribunal’s independence. All commentators agree that rules governing selection and tenure . . . are relevant.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 313 (1997) (naming selection and tenure as key factors in demonstrating political independence); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 967 (2007) (“[S]election and tenure . . . affect both the decisional independence of individual judges and the institutional independence of the judiciary as a whole.”); Malcolm Smith, *The California Method of Selecting Judges*, 3 Stan. L. Rev. 571, 571 (1951) (introducing common selection and tenure choices as evidence of the “prevalent belief . . . that the nature of the judicial function required complete independence”).

<sup>38</sup> See, e.g., Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 977 (2000) (identifying the threat to judicial independence as the “chief criticism” of judicial elections); Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. Pa. L. Rev. 181, 233 (2004) (arguing that partisan judicial elections pose a heightened threat to judicial independence); Frost & Lindquist, *supra* note 24, at 721 n.4 (citing, among other scholarly critiques of judicial elections, a remark by Chief Justice Margaret H. Marshall (Massachusetts) that judicial elections are the “single greatest threat to judicial independence”); Pamela S. Karlan, *Judicial Independences*, 95 Geo. L.J. 1041, 1046 (2007) (“Many observers identify judicial elections as a major structural threat to judicial independence.”); Jonathan Remy Nash, *Prejudging Judges*, 106 Colum. L. Rev. 2168, 2204 (2006) (noting the propensity of legal scholars to reject judicial elections because they threaten judicial independence); Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. Rev. 273, 284 (1989) (“Judicial elections would upset the structural arrangements established . . . for the maintenance of federal judicial independence . . .”).

entire point of judicial review, after all, is to restrict the wishes of a majority of the public; yet, if the public elects the judges who will exercise the review, many of us lose confidence that those restrictions will be adequately enforced. Of course, other methods of judicial selection pose similar dangers: when judges are selected by officials elected by the public, as they are at the federal level, there is the same concern that judges will feel beholden to the public that elected the officials. But most of us believe this layer of insulation from the public makes a difference. As Professor Tara Grove has explained at great length, elected officials are repeat players, and, as such, they exhibit a rational reluctance to interfere with courts even though it may be popular with the public to do so at a given time.<sup>39</sup> Professor Grove's example was legislative reluctance to engage in jurisdiction stripping,<sup>40</sup> but there is plenty of evidence of reluctance in other contexts. Consider, for example, the recent experience in Iowa, where three justices of the Iowa Supreme Court were easily removed from the bench by voters for signing an opinion endorsing a constitutional right to marriage for gays and lesbians, even though a constitutional amendment proposing to overturn their decision was defeated in the legislature.<sup>41</sup>

As many scholars have recognized, however, the length of tenure of judges is just as important to their independence—if not more important—as their method of selection.<sup>42</sup> That is, regardless of whether a judge is elected by the public or appointed by public

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<sup>39</sup> See Grove, *supra* note 2, at 882–83 (comparing the tendency for “risk-averse politicians [to] favor an independent judiciary as a useful means of controlling their political opponents during periods when their own side is out of power” to a classic prisoner’s dilemma).

<sup>40</sup> See generally *id.*

<sup>41</sup> See, e.g., A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times, Nov. 4, 2010, at A1 (reporting that three supreme court justices failed to secure the simple majority of votes required for re-election after organizations opposed to gay marriage poured money into a removal campaign); Stephanie Samuel, *Same-Sex Marriage Ban Fails in Iowa Senate*, The Christian Post (Jan. 27, 2011), <http://www.christianpost.com/news/same-sex-marriage-ban-fails-in-iowa-senate-48699/>.

<sup>42</sup> See, e.g., Lee Epstein, Jack Knight & Olga Shvetsova, *Selecting Selection Systems*, in *Judicial Independence at the Crossroads* 191, 205, 213 (Stephen B. Burbank & Barry Friedman eds., 2002) (noting that “reformers were generally less interested in how judges got to the bench than they were in how they retained their seats” and that “institutional designers were equally concerned, if not more so, with retention than they were with appointment”).

officials, if the judge has life tenure, it is thought that the judge will feel free to enforce constitutional restrictions on public preferences. By contrast, if the judge has to come before the public or even elected officials periodically, it is thought that the judge may not feel so free. Thus, both selection and tenure are crucial metrics of judicial independence. Although scholars of the federal judiciary often consult the current selection and tenure practices in state courts to make arguments about federal jurisdiction,<sup>43</sup> they have appeared to assume that, like federal courts, state courts have always been selected and tenured in the manner they are now—or, even worse, that they have become more, rather than less, like federal courts over time.<sup>44</sup> But this is simply not the case.

As I noted above, there are almost no state judges today who enjoy life tenure, and almost all of them must run in some sort of election or referendum before the public in order to win or keep their jobs. This has not always been true. Rather, at the time of the Founding, the vast majority of state judges were selected and tenured much like federal judges.<sup>45</sup> This should not strike us as surprising. There was a great deal of overlap between the Federal Constitution and the state constitutions.<sup>46</sup> After all, the same people who

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<sup>43</sup> See, e.g., Frost & Lindquist, *supra* note 24, at 726–27, 785–97 (arguing that federal courts ought to pay attention to the manner in which state judiciaries are currently selected and tenured when applying jurisdictional doctrines); Sager, *supra* note 25, at 63–68 (arguing that state courts are incapable of resolving constitutional questions because they lack Article III’s tenure and other protections).

<sup>44</sup> Clinton, *supra* note 6, at 814 n.233 (asserting that the lack of judicial independence in the states “may be less serious today than . . . in 1789”).

<sup>45</sup> See James Quayle Dealey, *Growth of American State Constitutions: From 1776 to the End of the Year 1914*, at 36 (1915) (“[T]he states emphasized the virtual independence of the judiciary, as the governmental agency through which the rights of men and of citizens were to be safeguarded.”); Julius Goebel, Jr., *1 History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 98 (Paul A. Freund ed., 1971) (“In some states the independence of the judiciary was regarded to be a matter sufficiently fundamental to warrant incorporation of provisions to secure it. Such were the stipulations regarding tenure and salary . . . .”); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 *Colum. L. Rev.* 990, 1016–17 (2001) (“[A]ll of the state constitutions provided some protection for judges against political retaliation . . . .”); William F. Swindler, *Seedtime of an American Judiciary, 1775–1800*, in *American Courts and Justice* 29, 33 (Glenn R. Winters & Edward J. Schoenbaum eds., 1976) (“The independence of judges was generally accepted . . . .”).

<sup>46</sup> As Alexander Hamilton told the people of New York, the Federal Constitution was but an “analogy to your own state constitution.” *The Federalist No. 1*, at 36

authored the Federal Constitution authored the state constitutions.<sup>47</sup> John Adams, in particular, favored political appointment and life tenure for judges,<sup>48</sup> and his *Thoughts on Government* served as the basis for many state constitutions (even if he was in Europe at the time they were drafted).<sup>49</sup> As one commentator has

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(Alexander Hamilton) (Clinton Rossiter ed., 1961); accord 1 *The Records of the Federal Convention of 1787*, at 406 (Max Farrand ed., rev. ed. 1966) [hereinafter *Records*] (statement of James Wilson) (“[W]e ought to proceed, by abstracting as much as possible from the idea of State Govts.”); see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 2* (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers 2001) (1973) (“Essentially, the basic structure of the Federal Constitution of 1787 was that of certain of the existing state constitutions writ large.”); Dealey, *supra* note 45, at 6–8 (arguing that “by the time the federal convention met in 1787, the dominant features of American constitutionalism were fairly well established in most of the thirteen states”—including separation of “the three great departments of government” and “state judiciaries [that] had on several occasions assumed the right to declare acts of state legislatures to be unconstitutional”—and that the federal convention “did not on the whole originate anything really new in government, but rather carefully culled from the customs and experiences of the states . . .”); William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 *Wm. & Mary L. Rev.* 503, 519 (1976) (“As finally drafted and ratified, the judicial article of the Federal Constitution in many respects reflected the basic features of the antecedent state instruments, though it also incorporated provisions that varied significantly from the prior state models.”); William Clarence Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 *Annals Am. Acad. Pol. & Soc. Sci.* 380, 416 (1897) (“[T]he federal constitution was very largely the product of a wise selection of the best and most generally observed usages of the various states.”).

<sup>47</sup> See Webster, *supra* note 46, at 417–18 (arguing that “the preexisting state constitutions would very greatly influence the formation and adoption of the federal constitution” because “[f]rom one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions” and that an examination of these state constitutions shows the federal document’s “conscious imitation” of the state documents); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *Sup. Ct. Rev.* 135, 143 (“The constitutional experiments in . . . Virginia[] and in Massachusetts are especially important because delegates from these states dominated the Constitutional Convention.”).

<sup>48</sup> See John Adams, *Thoughts on Government*, in 4 *The Works of John Adams* 189, 207 (Charles Francis Adams ed., Boston, Little, Brown and Co. 1851) (“[T]hey should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.”).

<sup>49</sup> See Adams, *supra* note 46, at 118–22 (noting that Adams’s pamphlet “dominated” the competing pamphlet, *Common Sense*, distributed by Thomas Paine); Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787*, at 25 (2011) (noting the pamphlet was “influential in a number of state constitutional conventions . . . including those in New Jersey, New York, North Caro-

summarized it, “elitist assumptions prescribed the selection of judges in the republican constitutional order. In nearly every state, all judicial officials, from Supreme Court judges to Justices of the Peace, were appointed by the legislature or the governor, and most appointments were for life.”<sup>50</sup>

Consider first the selection of state judges around the time of the Founding. As I show in Table 1,<sup>51</sup> judges in every single state were appointed to the bench by public officials.<sup>52</sup> In some states, judges were appointed by the governor, in other states they were appointed by the legislature, and in still other states they were selected by a combination of the two. Nonetheless, like their federal counterparts, no state judges were elected at the Founding.

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lina, and Virginia”); Robert F. Williams, *State Constitutional Law: Cases and Materials* 5 (3d ed. 1999) (recounting John Adams’s boast “I made a Constitution for Massachusetts, which finally made the Constitution of the United States”); Ziskind, *supra* note 47, at 143 (noting that Adams’s pamphlet “was circulated widely in the South”).

<sup>50</sup> James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *Rutgers L.J.* 819, 833 (1991).

<sup>51</sup> In Tables 1 and 2, I use 1790 as the year of the Founding because it was the end of the ratification period. As I explain in Part III, modern originalist theories seek to determine the understanding of the generation that ratified the Constitution, not merely the intent of those who drafted it. As such, 1790 strikes me as a more representative year than 1787 when the Constitution was drafted. Nonetheless, it is true that state selection and tenure practices were not static during this three-year period, and, as such, some in the Founding generation may have held different background assumptions than others. The most significant change in this period was Pennsylvania’s switch to good-behavior tenure in 1790; it should be noted, however, that this was well under contemplation even in 1787. See, e.g., J. Paul Selsam, *A History of Judicial Tenure in Pennsylvania*, 38 *Dick. L. Rev.* 168, 172–173 (1933) (discussing the call for life tenure in 1784 by the Council of Censors and the ensuing agitation for constitutional amendment). I tried to note any other such changes in the notes to the Tables.

<sup>52</sup> See James Willard Hurst, *The Growth of American Law: The Lawmakers* 122 (1950) (“[T]he first state constitutions provided a selection either by the legislature . . . or by the governor . . .”); Swindler, *supra* note 45, at 31 (“All the original states provided for appointment of judges in the major courts—by the governor alone in two instances, by the legislature alone in four, and by the governor and one or both houses of the legislature in the remainder.”).

**Table 1: Method of Selection of Judges in the Original Thirteen States and Percentage of Total Population, 1790**

Appointment by Elected Officials			Popular Election
Executive with consent of Legislators	Commission of Executive and Legislators	Legislators	
<i>Maryland</i> <i>Massachusetts</i> <i>Pennsylvania</i>	<i>Delaware</i> <i>New Hampshire</i> <i>New York</i>	<i>Connecticut</i> <i>Georgia</i> <i>New Jersey</i> <i>North Carolina</i> <i>Rhode Island</i> <i>South Carolina</i> <i>Virginia</i>	
100%			0%

Sources: Del. Const. of 1776, arts. 12, 13, 17; Md. Const. of 1776, pt. II, art. XLVIII; Mass. Const. of 1780, pt. II, ch. II, § I, art. IX; N.H. Const. of 1784, pt. II (“All judicial officers . . . shall be nominated and appointed by the president and council . . .”); N.J. Const. of 1776, art. XII; N.Y. Const. of 1777, art. XXIII; N.C. Const. of 1776, art. XIII; Pa. Const. of 1776, § 20; Pa. Const. of 1790, art. II, § 8; S.C. Const. of 1778, art. XXVII; Va. Const. of 1776 (“The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, [and] Judges of Admiralty . . .”); Thomas Day, *A Concise Historical Account of the Judiciary of Connecticut* 20 (1817); Irving Berdine Richman, *Rhode Island: A Study in Separatism* 191 (1905); Albert Berry Saye, *A Constitutional History of Georgia, 1732–1945*, at 112 (1948); see also G. Alan Tarr, *supra* note 37 (manuscript at 61 tbl.1). Populations are from the first census of 1790 and exclude slaves. See Bureau of the Census, U.S. Dep’t of Commerce & Labor, *Heads of Families at the First Census of the United States Taken in the Year 1790*, at 3, 8 (1908) [hereinafter *The First Census*].

Notes: Connecticut and Rhode Island did not enact constitutions for some time and continued under their royal charters with elected bodies to replace the royal ones. See Adams, *supra* note 46, at 64, 66. In Pennsylvania, judges were appointed by the executive with the consent of the legislature starting in 1790; before then, judges were appointed by the executive, but the “executive” power was vested in a committee of elected representatives. Compare Pa. Const. of 1776, §§ 3, 19, 20, with Pa. Const. of 1790, art. II, § 8. In Delaware, legislators alone selected the court of last resort, but the executive served on that court. See Del. Const. of 1776, art. 17.

Consider next the tenure of state judges around the time of the Founding. As I show in Table 2, in the vast majority of states—covering a full 85% of the population by 1790—state judges enjoyed the same tenure as federal judges: life with good behavior.<sup>53</sup> Again, in light of the similarities between the early state constitutions and the Federal Constitution, it is not surprising that life tenure was conferred upon state judges for the same reason it was conferred upon federal judges: to ensure their independence. As the framers of the New Hampshire Constitution of 1784 put it, “good behavior” tenure is “the only proper term, especially for the Judges of the Supreme Court of Judicature, as they ought . . . to feel themselves independent and free . . . .”<sup>54</sup>

I suspect many scholars of the federal judiciary will be surprised by the data set forth in Tables 1 and 2. For example, Robert Clinton—one of the most prominent scholars in this area—has asserted that “many state judges” at the Founding were “dependen[t] on . . . election.”<sup>55</sup> As I have shown, this is simply not true. But it is not just Professor Clinton who has, in my view, made erroneous assumptions about the independence among state judiciaries around the time of the Founding.<sup>56</sup> As I discuss in Section II.D, other commentators have also understated the independence of state judiciaries at the Founding, often by focusing on the outlier states in Table 2 to the detriment of the others. The data presented in this Section suggest that state judges at the Founding were more like

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<sup>53</sup> See William S. Carpenter, *Judicial Tenure in the United States* 4 (1918) (“[T]he usual tenure in the early constitutions was during good behavior.”); *id.* at 156 (“The security of the judicial office so ardently advocated by the colonists tended to discourage any attempt to place limitations upon the tenure of office of the judges. In nearly all of the States tenure during good behavior was granted the judges, even before the convention of 1787 had stamped this standard with its approval.”); Goebel, *supra* note 45, at 225 (noting that it was unsurprising that the vote at the federal convention to give federal judges good behavior tenure was unanimous given that “[t]his . . . was part of the American constitutional canon which obtained in most states”); Hurst, *supra* note 52, at 122 (“Most constitutions stipulated tenure during good behavior.”); Swindler, *supra* note 45, at 31 (“Nine states provided for life tenure ‘during good behavior’ . . . .”).

<sup>54</sup> 9 Documents and Records Relating to New Hampshire, 1623–1800, at 850 (Nathaniel Bouton et al. eds., Concord, Charles C. Pearson 1875).

<sup>55</sup> Clinton, *supra* note 6, at 814 n.233.

<sup>56</sup> See *id.* (asserting that the lack of judicial independence in the states “may be less serious today than . . . in 1789”).

their federal counterparts than unlike them—indeed, far more like them than unlike them.

**Table 2: Tenure of Judges in the Original Thirteen States and Percentage of Total Population, 1790**

Good Behavior	Renewable Fixed Term
<i>Delaware</i> <i>Maryland</i> <i>Massachusetts</i> <i>North Carolina</i> <i>New Hampshire</i> <i>New York</i> <i>Pennsylvania</i> <i>South Carolina</i> <i>Virginia</i>	<i>Connecticut (1 year)</i> <i>Georgia (3 years)</i> <i>New Jersey (5-7 years)</i> <i>Rhode Island (1 year)</i>
85%	15%

Sources: Del. Const. of 1776, art. 12; Ga. Const. of 1789, art. III, § 5; Md. Const. of 1776, art. XXX; Mass. Const. of 1780, pt. I, art. XXIX & pt. II, ch. III, art. I; N.H. Const. of 1784, pt. I, art. XXXV & pt. II (“All judicial officers . . . shall hold their offices during good behaviour . . .”); N.J. Const. of 1776, art. XII; N.Y. Const. of 1777, art. XXIV; N.C. Const. of 1776, art. XIII; Pa. Const. of 1790, art. V, § 2; S.C. Const. of 1776, art. XX; Va. Const. of 1776 (“The two Houses of Assembly shall . . . appoint Judges . . . to . . . continue in office during good behaviour.”); Day, *supra* Table 1, at 20; Richman, *supra* Table 1, at 191; see also Gerber, *supra* note 49, at 329; Tarr, *supra* note 37 (manuscript at 61 tbl.1); Swindler, *supra* note 46, at 503, 507 tbl.1. Populations are from the first census of 1790 and exclude slaves. See *The First Census*, *supra* Table 1, at 3, 8.

Notes: Prior to 1789, the Georgia Constitution did not specify the terms of its judges, but they were appointed annually or served “at the pleasure of the legislature.” See Saye, *supra* Table 1, at 112. The same was true in Rhode Island until it finally abandoned its royal charter for a constitution. See Richman, *supra* Table 1, at 191. New York judges were required to retire at sixty years of age. See N.Y. Const. of 1777, art. XXIV. Pennsylvania switched to good-behavior tenure in 1790. Compare Pa. Const. of 1776, § 23, with Pa. Const. of 1790, art. V, § 2.

This understatement of state court independence at the Founding has made it easy for scholars to overlook the fact that the dramatic gap between state and federal judges arose only later. The nature of the state judiciaries has radically changed, and the

changes began fairly early on. In the 1830s, states began to turn against life tenure. As Professor Jed Shugerman has recounted:

By 1830, judges in twelve states held their positions during good behavior and judges in six states were term-limited . . . . Then, in the 1830s, seven more states adopted term limits for judges . . . . By the end of the decade, a majority of states limited judges' terms (with a median of seven-year terms), and these states were distributed fairly evenly through every region of the country. . . . The trend of departing from good behavior in favor of specific terms continued in the late 1840s and 1850s . . . .<sup>57</sup>

After life tenure fell, the states began to replace political appointment with judicial elections. Although Vermont experimented with the election of some lower court judges before statehood, and Georgia and Indiana adopted elections for some judges in 1812 and 1816, respectively, the first state to switch wholesale was Mississippi in 1832, and no state followed suit until New York in 1846.<sup>58</sup> But then things changed rapidly. As Professor Shugerman has recounted: "From 1846 to 1851, twelve states adopted judicial elections for their entire court systems, and five states adopted partially elective systems. By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges."<sup>59</sup>

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<sup>57</sup> Shugerman, *supra* note 23, at 1075.

<sup>58</sup> See Carpenter, *supra* note 53, at 171–86 (tracing the mid-nineteenth-century "demand . . . for the adoption of such expedients as would render the judiciary more immediately responsible to the people," beginning with "[t]he abolition of tenure during good behavior" and "closely followed by the application of the elective principle in the selection of judges"); Shugerman, *supra* note 23, at 1066 ("In 1832, Mississippi became the first state to elect its supreme court judges . . . . [N]o other state followed for fourteen years—until New York's constitutional convention of 1846, the turning point. In just eight years, from 1846 to 1853, twenty states adopted judicial elections."); *id.* at 1072.

<sup>59</sup> Shugerman, *supra* note 23, at 1097; accord Hurst, *supra* note 52, at 122 (noting that states began electing some of their judges in 1812, that Mississippi did so wholesale in 1832, and that New York followed in 1846, "open[ing] a trend"); *id.* ("Every state which entered the Union after 1846 stipulated the popular election of all or most of its judges."); *id.* at 122–23 (noting that states began switching to limited terms in the first few decades of the nineteenth century as "the usual accompaniment of the switch to popular election," that "by the Civil War twenty-one states had thus adopted limited tenure," and that "[t]hereafter the trend continued"); Tarr, *supra* note 37 (manuscript at 60) ("Between 1847 and 1910, 20 of the 29 states in the Union

By the time of the Civil War, then, the picture of state judiciaries had flipped from where it was at the Founding: the vast majority of state judges were by then popularly elected to limited terms. Of course, over all this time, the method of selection and length of tenure of federal judges stayed the same. It was only the state judges that had changed, and the changes rendered them no longer comparable with their federal counterparts. It was shortly after this flip, in 1875, that Congress for the first time extended plenary federal question jurisdiction to the federal judiciary (subject only to a *de minimis* amount-in-controversy requirement).<sup>60</sup>

Although there has been some retreat since 1875 from the most potent form of judicial elections—some states have moved from partisan to non-partisan elections and other states from judicial elections to something called “merit selection,” which uses uncontested referenda to retain judges<sup>61</sup>—the dramatic transformation from the Founding is still very much with us today. Only one state today—Rhode Island—grants judges life tenure, and only two states—Massachusetts and New Hampshire—do so but for a mandatory retirement age.<sup>62</sup> In the other forty-seven states, judges serve limited terms and, in the vast majority of these states, must still run in some sort of election to initially take the bench, to retain their spot on the bench, or both. For example, twenty-one states use contested elections—some partisan and some now nonpartisan—both to select and to retain the judges who sit on their courts of last resort.<sup>63</sup> But even though judges on courts of last resort in

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switched to partisan judicial elections, and all state [sic] joining the Union during that period adopted that same process of selection.”); Epstein et al., *supra* note 42, at 198 (noting that “19 of the 21 constitutional conventions held between 1846 and 1860 approved documents that adopted popular election for (at least some of) their judges”).

<sup>60</sup> See Fallon et al., *supra* note 1, at 276.

<sup>61</sup> See Tarr, *supra* note 37 (manuscript at 130–34).

<sup>62</sup> See *Judicial Selection in the States*, Am. Judicature Soc’y, <http://www.judicialselection.us/> (last visited Apr. 15, 2011) (providing an interactive database with information for each state).

<sup>63</sup> See *id.* (Alabama (partisan), Arkansas (nonpartisan), Georgia (nonpartisan), Idaho (nonpartisan), Illinois (initial election partisan, but retention elections are nonpartisan), Kentucky (nonpartisan), Louisiana (partisan), Michigan (nonpartisan), Minnesota (nonpartisan), Mississippi (nonpartisan), Montana (nonpartisan), Nevada (nonpartisan), North Carolina (nonpartisan), North Dakota (nonpartisan), Ohio (nonpartisan), Oregon (nonpartisan), Pennsylvania (nonpartisan), Texas (partisan), Washington (nonpartisan), West Virginia (partisan), Wisconsin (nonpartisan)).

the other twenty-six states are initially appointed to the bench by the governor or the legislature (with the help of a nominating commission in so-called “merit selection” states), the vast majority must also run in either a contested election or, more often, an uncontested public referendum in order to keep their jobs.<sup>64</sup> Although some people have thought that the move in many states to uncontested referenda has enhanced the independence of state courts,<sup>65</sup> the most rigorous studies have concluded otherwise. For example, Professor Lee Epstein and her co-authors found, after examining these and other structural changes in the state judiciaries, that the “cost” state judges must pay to decide cases “sincerely” (what they term “judicial opportunity costs”<sup>66</sup>) has increased “nearly monotonically” since the Founding.<sup>67</sup> “[S]tates have moved to hold their justices more and more accountable; no downward trend appears to exist.”<sup>68</sup> The trend is even more pronounced for lower state court judges; they are subject to elections even more often than their high court counterparts.<sup>69</sup>

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<sup>64</sup> See *id.* (Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, Wyoming). The other states that initially select through appointment retain their judges through reappointment. See *id.* (Connecticut (reappointment by governor with reconfirmation by senate), Delaware (reappointment by judicial nominating commission with senate consent), Hawaii (reappointment by judicial nominating commission), Maine (reappointment by governor with reconfirmation by senate), New Jersey (reappointment by governor with reconfirmation by senate), New York (reappointment by nominating commission with senate consent), South Carolina (reappointment by legislature), Vermont (reappointment by legislature), Virginia (reappointment by legislature)).

<sup>65</sup> Even I had espoused this view before reviewing Epstein et al., *supra* note 42. See Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 *Tenn. L. Rev.* 473, 495–97 (2008); Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 *U. Mem. L. Rev.* 85, 107–08 (2008); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 *Mo. L. Rev.* 675, 682–84 (2009).

<sup>66</sup> Epstein et al., *supra* note 42, at 206, 212.

<sup>67</sup> *Id.* at 212.

<sup>68</sup> *Id.*

<sup>69</sup> Compare *Initial Selection: Trial Courts of General Jurisdiction*, Am. Judicature Soc’y, [http://www.judicialselection.us/uploads/documents/GeneralJurisdiction\\_1196092570157.pdf](http://www.judicialselection.us/uploads/documents/GeneralJurisdiction_1196092570157.pdf) (last visited Aug. 22, 2011) (providing selection methods for trial court judges by state), with *Initial Selection: Intermediate Appellate Courts*, Am. Judicature Soc’y, [http://www.judicialselection.us/uploads/documents/Intermediate\\_1192719467010.pdf](http://www.judicialselection.us/uploads/documents/Intermediate_1192719467010.pdf) (last visited Aug. 22, 2011) (providing selection methods for intermediate appellate court judges by state).

In other words, unlike at the Founding, state judiciaries today are staffed nothing like the federal judiciary. Not only did no state judges at the Founding run for election, but the vast majority also held terms for life. Today, most state judges must run in some kind of election, and almost none hold their terms for life. By contrast, the selection and tenure of federal judges have remained constant. In light of the fact that the manner of selecting judges and their length of tenure are two of the most important metrics of judicial independence, these historical developments strongly suggest that state judicial independence much more closely resembled federal judicial independence at the Founding than it does today.

### *B. Other Structural Protections for Judges*

There are other structural protections of the judiciary besides appointment by public officials and life tenure that have been seen as important features of judicial independence. The framers, for example, saw fixed salaries and protections against easy mid-term removal as important markers of independence.<sup>70</sup> These beliefs are not difficult to comprehend. If the legislature could diminish salaries or remove judges from office when it disagreed with their opinions, then it could influence judicial decision making in a manner not unlike the influence it could bring to bear if judges did not have life tenure. For this reason, the framers conferred upon federal judges constitutional guarantees of salaries that could not be reduced and jobs that could not be stripped without impeachment by a majority of one house and conviction by two-thirds of the other.<sup>71</sup> And, as we know, these protections have endured.

In contrast to what I have said about selection and tenure, there does not appear to have been as much movement in the distance between state and federal judges with respect to these other structural metrics—but there has still been some. With respect to sala-

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<sup>70</sup> See Amar, *supra* note 25, at 235–37 (explaining that “Article III judges are constitutionally assured the structural independence to interpret and pronounce the law impartially” through fixed salaries and lifetime tenure, subject to impeachment only for misbehavior); Clinton, *supra* note 6, at 762 (offering fixed salaries and behavior-based tenure as evidence that the framers intended to assure judicial independence).

<sup>71</sup> See U.S. Const. art. III, § 1; *id.* art. I, §§ 2–3.

ries, like their federal counterparts,<sup>72</sup> state judges at the Founding were, for the most part, constitutionally guaranteed “fixed,” “adequate,” or “permanent” salaries,<sup>73</sup> and the same is true today.<sup>74</sup> With respect to removal, however, the distance between state judges and federal judges has grown. State removal practices at the

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<sup>72</sup> There was some debate at the Founding whether these words conferred upon state judges quite as much protection as the similar words in the Federal Constitution conferred upon federal judges. See *The Federalist* No. 48, *supra* note 46, at 312 (James Madison) (“The salaries of the judges, which the Constitution [of Pennsylvania] expressly requires to be fixed, had been occasionally varied . . .”); *The Federalist* No. 79, *supra* note 46, at 472 (Alexander Hamilton) (“The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions.”); see also Philip Hamburger, *Law and Judicial Duty* 516 (2008) (noting that the constitutional protection in Pennsylvania did not prevent a reduction in pay); John Phillip Reid, *Legislating the Courts: Judicial Dependence in Early National New Hampshire* 31, 54 (2009) (noting that the salaries of judges in New Hampshire varied over time despite the constitutional provision to the contrary); *id.* at 115 (“Hamilton contended that Massachusetts and New Hampshire too easily evaded this constitutional duty because they did not supplement the ‘honorable salaries’ provision with a supporting provision that the compensation of judges ‘shall not be *diminished* during their continuance in office.’” (quoting *The Federalist* No. 79, *supra* note 46, at 472 (Alexander Hamilton))). But see Hurst, *supra* note 52, at 124 (“[T]he historic institution closely fitted the form. . . . [T]he constitutional ban on tampering with judges’ pay was so clear-cut that even expediency dictated that no serious effort be made to evade it.”).

<sup>73</sup> This was true of all of the same states that granted their judges life tenure by 1790, see *supra* Table 2, with the exception of New York (which did not fix salaries) and Georgia after 1789 (which did). See Del. Const. of 1776, art. 12; Ga. Const. of 1789, art. III, § 5; Md. Declaration of Rights of 1776, art. XXX; Mass. Const. of 1780, pt. I, art. XXIX & pt. II, ch. II, § I, art. XIII; N.H. Const. of 1784, pt. I, art. XXXV & pt. II (“Permanent and honorable salaries shall be established by law for the justices of the superior court.”); N.C. Const. of 1776, art. XXI; Pa. Const. of 1776, § 23; Pa. Const. of 1790, art. V, § 2; S.C. Const. of 1778, art. XXXVII; Va. Const. of 1776 (“[Judges] shall have fixed and adequate salaries . . .”); see also Adams, *supra* note 46, at 259 (noting defenses of Pennsylvania’s judges as “independent of the legislature by virtue of their fixed salaries” and long terms); Gerber, *supra* note 49, at 329; Hurst, *supra* note 52, at 123 (“American constitutions generally drew the principles that a judge’s pay might not be withheld or reduced during his term of office . . .”).

<sup>74</sup> See Amended State Constitutional Provisions Regarding Reductions to Judicial Salaries, Nat’l Center for St. Courts (January 2009), [http://www.ncsconline.org/d\\_kis/salary\\_survey/provisions.asp](http://www.ncsconline.org/d_kis/salary_survey/provisions.asp) (reporting that constitutional provisions in twenty-nine states prohibit judicial salary reduction, one other prohibits doing so only for supreme court justices, and five others prohibit doing so unless the reduction applies to all public officers).

time of the Founding have often been thought more permissive than those of the federal government<sup>75</sup>—because, in addition to impeachment, many states permitted judges to be removed through joint address<sup>76</sup>—but this is even more true today. The vast majority of states still permit removal by impeachment, and some additionally still allow joint address, but several more now permit removal by recall election and by judicial-conduct commissions.<sup>77</sup> The truth, however, is that state removal mechanisms have largely fallen into obsolescence because the vast majority of state judges can be removed simply by voting them out of office at the next election.<sup>78</sup> As a result, the rise of judicial elections has left judges less independent than their federal counterparts not only on the front end but on the back end as well. As such, it is fair to conclude that the gap between state and federal judges has widened on these other metrics, too.

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<sup>75</sup> As I explain in more detail in Section II.D, I think these sentiments have been considerably overstated. See *infra* text accompanying notes 109–115.

<sup>76</sup> See Del. Const. of 1776, art. 23 (impeachment and joint address); Md. Declaration of Rights of 1776, art. XXX (joint address); Mass. Const. of 1780, pt. II, ch. I, § II, art. VIII & pt. II, ch. I, § III, art. VI & pt. II., ch. III, art. I (impeachment and joint address); N.H. Const. of 1784, pt. II (impeachment and joint address); N.J. Const. of 1776, art. XII (impeachment); N.Y. Const. of 1777, art. XXXII & art. XXXIII (impeachment); N.C. Const. of 1776, art. XXIII (impeachment); Pa. Const. of 1776, § 22 (impeachment by unicameral legislature); Pa. Const. of 1790, art. IV & art. V, § 2 (impeachment and joint address); S.C. Const. of 1776, art. XXIII & art. XXVII (impeachment and joint address); Va. Const. of 1776 (“[Judges] offending against the State, either by mal-administration, corruption, or other means . . . shall be impeachable by the House of Delegates . . .”); see also Carpenter, *supra* note 53, at 101 (noting that the impeachment and conviction mechanisms in the Federal Constitution “w[ere] borrowed directly from the revolutionary State constitutions where the form of removal on impeachment and conviction was in high favor.”); Hurst, *supra* note 52, at 123 (“American constitutions generally drew the principle[] . . . that a judge might be removed only for cause, established in a formal proceeding.”); James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227, 1239–41 (2007); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104, 1153–55 (1976); Ziskind, *supra* note 47, at 139–47. Some states additionally permitted removal upon conviction in a court of law. See, e.g., Del. Const. of 1776, art. 23; Md. Const. of 1776, art. XL; Md. Declaration of Rights of 1776, art. XXX; N.C. Const. of 1776, art. XXIII.

<sup>77</sup> See *Methods of Removing State Judges*, Am. Judicature Soc’y (2009), [http://www.ajs.org/ethics/eth\\_impeachment.asp](http://www.ajs.org/ethics/eth_impeachment.asp).

<sup>78</sup> See Tarr, *supra* note 37 (manuscript at 118) (noting that “impeachment and address in the states” have fallen into “obsolescence” because “the rise of elections . . . with limited judicial tenure . . . provide alternative avenues for enforcing accountability”).

*C. Legislative Interference with Judicial Decisions*

There is, however, one metric of independence on which I think it is fair to say state judges do fare better today relative to their federal counterparts than they did at the Founding: legislative interference with judicial decisions. In something of a vestige of the English legal system—where until recently the upper legislative chamber served as the court of last resort<sup>79</sup>—some states at the Founding permitted litigants to appeal judicial decisions directly to the legislature. This option was available most often in the outlier states in Table 2 that did not grant their judges life tenure (Connecticut and New Jersey), but it was also available in at least one of the states that did (New York).<sup>80</sup> This practice stripped courts of the final word in adjudication and, therefore, obviously undermined judicial independence. In the states where this interference was permitted, the elected legislature, not the unelected, life-tenured judges, had the ultimate authority to adjudicate cases. Although only a small minority of states permitted this practice at the Founding, the federal system never embraced it,<sup>81</sup> and no state permits such a practice today. As a result, this change might be seen as one way in which state courts have gained some independence relative to their federal counterparts since the Founding.

State legislatures at the Founding had other ways as well to interfere with judicial matters.<sup>82</sup> For example, in some states, legisla-

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<sup>79</sup> See History, Supreme Ct., <http://www.supremecourt.gov.uk/about/history.html> (last visited Aug. 12, 2011) (explaining that until the commencement of the Supreme Court of the United Kingdom in October 2009, the Appellate Committee of the House of Lords served as the highest court of appeals).

<sup>80</sup> See N.J. Const. of 1776, art. IX; N.Y. Const. of 1777, art. XXXII; Day, *supra* Table 1, at 21.

<sup>81</sup> It was once tried but quickly abandoned. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 *La. L. Rev.* 625, 639–40 (1985) (explaining that, in the Invalid Pensions Act of 1792, Congress initially permitted the Secretary of War—and ultimately Congress—to overrule decisions made by the federal judiciary in military pension cases, but that Congress repealed the Act to avoid a separation-of-powers controversy).

<sup>82</sup> See Goebel, *supra* note 45, at 98 (arguing that “the provisions for salary and tenure . . . were insufficient safeguards for the independence of the judicial function” because the legislatures were under “a standing temptation to trespass even in those states where the separation of powers was specifically proclaimed”); Reid, *supra* note 72, at 27 (noting that although the New Hampshire Constitution of 1784 “introduced the doctrine of separation of powers,” there “were no provisions preventing the legis-

tures reopened completed judicial proceedings by granting new trials, often because no equity courts had been created.<sup>83</sup> The most

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lature from exercising judicial authority or interfering with private litigation”); Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 155–56 (1969) (“In the judicial area the constitutions and the chaotic conditions of war had the effect of reversing the growing mid-eighteenth-century distinction between legislative and judicial responsibilities, leading during the 1770’s and eighties to a heightened involvement of the legislatures in controlling the courts and in deciding the personal affairs of their constituents in private law judgments.”); Amar, *supra* note 25, at 226 n.81 (“In some states the lack of structural judicial independence led to the widespread assumption of judicial functions by the legislature itself.”). But see M.J.C. Vile, *Constitutionalism and the Separation of Powers* 147–48 (2d ed. 1998) (“It has been said that the separation of powers was recognized in principle in the early State constitutions, but that this recognition ‘was verbal merely,’ and that in practice it meant little more than a prohibition on plurality of office. . . . But the separation of powers meant more than that.”); *id.* at 157 (“The structure of these state constitutions of 1776 . . . certainly reflects more than a mere ‘verbal’ acceptance of the separation of powers.”). Vile notes that the legislatures meddled in judicial matters, but “[t]his fact . . . does not allow us to conclude . . . that the doctrine of the separation of powers meant nothing in this period.” *Id.* at 158. “On the contrary, it is here that we reach the very core of the problem . . . . It was in the realization of the shortcomings of the doctrine . . . that the Americans retreated from it to find a new and surer foundation for a constitutional theory.” *Id.* The solution was “mixed government,” or a “balanced constitution” where the powers checked one another. *Id.* at 161.

<sup>83</sup> See A Report of the Committee of the Pennsylvania Council of Censors 6 (Philadelphia, Francis Bailey 1784) (noting that objectionable private legislation followed from the lack of a court of chancery); Reid, *supra* note 72, at 67 (“[T]he most important function of special legislative adjudication was to serve as substitute for an equity jurisdiction. . . . Without equitable relief, many distressed parties would have had no remedy if they could not petition the legislature to restore them to a new trial or grant them other special relief.”); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *Am. Hist. Rev.* 511, 515–16 (1925) (noting that the legislature was forced to act through “special legislation” in the states that “withheld equity powers from their courts altogether . . . [or] granted them but sparingly”); see also Pa. Const. of 1776, § 24 (severely limiting the chancery powers of the judiciary); Reid, *supra* note 72, at 48 (noting that “almost all opposition to judicial reform [in New Hampshire] was directed against creating an equity jurisdiction”); William Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 *B.U. L. Rev.* 269, 272 (1951) (“The failure of the legislature to add a court of chancery to the legal system was no oversight. Active and quite vociferous opposition prevented it.”); Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *Law in American History* 257, 257–58 (Donald Fleming & Barnard Bailyn eds., 1971) (“[N]o colonial institution was the object of such sustained and intense political opposition as the courts dispensing equity law.”); Swindler, *supra* note 46, at 510 (“[C]hancery courts (as in New Jersey, Virginia) were few . . .”). South Carolina did not create chancery courts until 1791. See Gerber, *supra* note 49, at 220–21.

celebrated descriptions of these practices come from the reports of the Councils of Censor in Pennsylvania and Vermont,<sup>84</sup> but there were also (vague) accounts of them from Thomas Jefferson in Virginia,<sup>85</sup> and historians have found evidence of the practices in other states.<sup>86</sup> These practices were examples of what is known as “private legislation,” and private legislation was much more common in the early Republic than it is today.<sup>87</sup> Although the legislative

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<sup>84</sup> See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220–21 (1995) (citing these councils); Wood, *supra* note 82, at 407 (same). The reports from these councils were notoriously partisan. See Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776–1790*, at 156–63 (1942); Goebel, *supra* note 45, at 103; Vile, *supra* note 82, at 160–61.

<sup>85</sup> See Thomas Jefferson, *Notes on the State of Virginia* 175 (J.W. Randolph ed., Richmond, Chas H. Wynne Printer 1853) (“[Legislators] have accordingly, in many instances, decided rights which should have been left to judiciary controversy . . .”).

<sup>86</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring) (recounting the Connecticut legislature’s interference in judicial matters); Goebel, *supra* note 45, at 98–99 (citing “persistent” legislative interference in Massachusetts and New Hampshire, “occasional” legislative interference in North Carolina, and executive interference in Pennsylvania); Reid, *supra* note 72, at 10, 27 (noting that the New Hampshire legislature “exercise[d] judicial authority,” or “interfer[ed] with private litigation,” and granted new trials); Corwin, *supra* note 83, at 514 (asserting that the New Hampshire legislature “freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes”); Roscoe Pound, *The Administration of Justice in the Modern City*, 26 *Harv. L. Rev.* 302, 302 (1913) (“Legislative divorces were granted in New York after the Revolution and were known in Connecticut, Maryland, and Rhode Island in the nineteenth century. Pennsylvania did not do away with them till 1874, and the legislature of Alabama attempted to grant a divorce as late as 1888. During the Revolution and even later it was the practice in some states to obtain a new trial by legislative act after final judgment.”); David Rossman, “Were There No Appeal”: The History of Review in American Criminal Courts, 81 *J. Crim. Law & Criminology* 518, 539 (1990) (noting that the early Pennsylvania legislature was petitioned to review criminal judgments).

<sup>87</sup> See Reid, *supra* note 72, at 9 (“During colonial and early republic times, legislatures not only authorized payments of claims made against government; they also adjudicated them, ruling on their validity, determining the state’s liability, and then passing bills appropriating awards to claimants named in the resolutions. Legislative adjudication . . . ‘remained vital in the new republic because early Americans attributed to their political representatives a very different authority to define the political economy than the one we now assume.’ . . . [T]he legislature was the correct tribunal for hearing and redressing contract claims against the government. . . . ‘[I]n the early days of the republic, claims for money against the United States were regarded as financial questions for Congress and not legal questions for the courts. Private claimants were accustomed to pressing their claims in the legislative hall rather than in the courthouse,’ at least until the Civil War.” (quoting Christine A. Desan, *Contesting the*

power to grant new trials is not as dramatic as the power of the legislature to hear appeals from judicial bodies—because the new trial would be back before a court—permitting the legislature to second-guess the judiciary in that way can certainly be understood as undermining judicial independence. Moreover, although Congress was no stranger to private legislation,<sup>88</sup> it does not appear that the

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Character of the Political Economy in the Early Republic, *in* *The House and the Senate in the 1790s: Petitioning, Lobbying, and Institutional Development* 178, 181, 202, 229 (Kenneth R. Bowling & Donald R. Kennon eds., 2002)); see also Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in State Constitutions* 6 (Philadelphia, Kay & Bro. 1894) (“[U]ntil about fifty years ago, public and private, general, special, and local laws were passed indiscriminately, as is still the practice in a few States, as well as to some extent in Congress.”).

<sup>88</sup> See Matthew Mantel, *Private Bills and Private Laws*, 99 *Law Libr. J.* 87, 88–94 (2007) (“Private laws have been with us from the very first Congress, with the first private bill passed by Congress on September 24, 1789, and signed into law by President George Washington.”); Shimomura, *supra* note 81, at 627 (“Legislative determination of private claims was considered a natural and appropriate legislative function, and state legislatures as well as Congress followed this practice.”); Note, *Private Bills in Congress*, 79 *Harv. L. Rev.* 1684, 1687 (1966) (“Congress, deriving its practice from Parliament, has long been passing private bills in many areas, and this action has been widely accepted as a proper legislative function.”); *id.* at 1686 (“In dealing with private bills, Congress acts much like a court; it is not only making law, but is in effect applying it to individual cases. More specifically, it resembles an ancient court of equity . . .”). Due to the nature of its more confined legislative domain, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 *N.Y.U. L. Rev.* 1862, 1889 (2010) (“Congress avoided other common forms of private legislation, perhaps due in part to constitutional limits on the scope of congressional power.”), most of the private bills in Congress involved public rights, but not all of them. See Note, *supra*, at 1684 (noting that “[b]ills dealing with relations between private persons” were “enacted on occasion”). As a result, the distance between state and federal practices was not as great as some have suggested. For example, one of the complaints in the report of the Council of Censors in Pennsylvania was that the legislature sometimes remitted fines citizens had been ordered to pay, but early Congresses did the exact same thing. Compare *A Report of the Committee of the Pennsylvania Council of Censors* 10 (Philadelphia, Francis Bailey 1784) (complaining of legislative remittance of a militia fine as one where the legislature “assumed the business . . . of the courts of justice”), with *An Act for the relief of Nathaniel Twining*, ch. 24, 6 Stat. 3 (1790); *An Act for the relief of Joseph Chase, Jared Gardner, and others*, ch. 64, 6 Stat. 78 (1808); *An Act for the relief of William W. Weymouth and Joseph P. Weeks*, ch. 44, 6 Stat. 95 (1810); *An Act for the relief of Thomas Denny*, ch. 32, 6 Stat. 122 (1813); *An Act for the relief of William Stothart and Josiah Starkey*, ch. 12, 6 Stat. 128 (1814); *An Act for the relief of Samuel Ellis*, ch. 40, 6 Stat. 132 (1814); *An Act for the relief of the owners of the cargo of the brig Patriota*, ch. 45, 6 Stat. 133 (1814); *An Act for the relief of Augustus M’Kinney and Layzel Bancroft*, ch. 63, 6 Stat. 138 (1814); *An Act for the relief of John Whitney and Joseph H. Dorr*, ch. 89, 6 Stat. 143 (1814); *An Act for the*

practice of reopening judicial proceedings by granting new trials ever developed at the federal level.<sup>89</sup> As private legislation declined and respect for separation of powers improved in the nineteenth century, private legislation waned at both the state and federal level, and the practice of granting new trials has largely been eradi-

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relief of Edward Hallowell, ch. 57, 6 Stat. 150 (1815); An Act for the relief of William Morrissett, ch. 15, 6 Stat. 157 (1816) (remitting fines and penalties). Indeed, much like its state counterparts, Congress in the early Republic adjudicated disputes, see An Act to compensate the corporation of trustees of the public grammar school and academy of Wilmington, in the state of Delaware, for the occupation of, and damages done to, the said school, during the late war, ch. 21, 6 Stat. 8 (1792); An Act for the relief of Peter Covenhoven, ch. 7, 6 Stat. 18 (1795) (resolving takings disputes); An Act to indemnify the estate of the late Major-General Nathaniel Greene, for a certain bond entered into by him during the late war, ch. 54, 6 Stat. 28 (1796) (resolving contract dispute between private parties by indemnifying one party out of the U.S. treasury); An Act for the relief of Silvanus Crowell, ch. 19, 6 Stat. 33, 33–34 (1798) (resolving employment dispute); An Act to discharge Robert Sturgeon from his imprisonment, ch. 20, 6 Stat. 40 (1800); An Act for the relief of Theodosius Fowler, ch. 34, 6 Stat. 47 (1802) (requiring cessation of suit by the comptroller of the treasury against a private party); An Act authorizing the discharge of John York from his imprisonment, ch. 22, 6 Stat. 57 (1805); An Act for the relief of Oliver Evans, ch. 13, 6 Stat. 70, 70–71 (1808) (ordering the secretary of state to issue a patent); An Act for the relief of Edmund Beamont, ch. 12, 6 Stat. 79 (1809) (releasing prisoners); An Act to extend to Amos Whittemore and William Whittemore, junior, the patent right to a machine for manufacturing cotton and wool cards, ch. 35, 6 Stat. 80 (1809) (adjusting patent rights), empowered territorial legislatures to adjudicate disputes, see *Maynard v. Hill*, 125 U.S. 190, 205, 210 (1888) (holding that Congress could empower territorial governments to grant legislative divorces and suggesting that it could do the same for all manner of other private legislation, including that which “legalize[s] past acts, correct[s] defects in proceedings, and determine[s] the status, conditions, and relations of parties in the future”), prescribed rules of decision in pending cases, see, for example, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801), rescinded property rights, see An Act to repeal in part the fourth section of an act entitled “An act to authorize a grant of lands to the French inhabitants of Gallipolis, and for other purposes therein mentioned,” ch. 7, 6 Stat. 59 (1806) (repealing a portion of an act granting land to the French inhabitants of Gallipolis and declaring null and void any “patent [that] has issued[] in conformity” with the repealed portion), and retroactively waived statutes of limitations and other legal requirements, see An Act for the relief of Robert Barton and others, ch. 38, 6 Stat. 20 (1795) (statute of limitations); An Act for the relief of Israel Loring, ch. 6, 6 Stat. 22 (1796) (bonding and oath requirements); An Act to extend certain privileges as therein mentioned to Anthony Boucherie, ch. 6, 6 Stat. 70 (1808) (residency requirement).

<sup>89</sup> There were a few stray attempts in later years to do so, however. See Comment, *The Constitutionality of Private Acts of Congress*, 49 *Yale L.J.* 712, 715–17 (1940) (noting that Congress has enacted private bills deeming the activities of certain parties “lawful” despite federal court judgments otherwise as well as private bills depriving parties of their federal court judgments by ordering courts to relitigate the cases).

cated today.<sup>90</sup> Thus, in contrast to the metrics described in the previous Sections, it is fair to say that the gap between state and federal judges has narrowed rather than widened since the Founding on the issue of legislative interference with judicial matters.

The question is how these gains in independence compare against the losses described in the previous Sections. That is, do the gains from the decline in legislative interference offset the losses from the changes in selection, tenure, and removal? I do not think so, and I say this for several reasons. First and foremost, legislative interference is, for the reasons cited above, less threatening to judicial independence than electorate interference.<sup>91</sup> Elected representatives are one step removed from the public, and it is thought that this layer of insulation matters. As I have noted, Professor Grove has explained why public officials do not interfere in judicial matters even though it is popular with the public, and there are endless examples to support this notion, including the recent removal by voters of supreme court justices in Iowa at the very same time a constitutional amendment to overturn their gay-marriage decision failed in the legislature.<sup>92</sup>

Second, the changes in selection and tenure have been ubiquitous whereas the changes in legislative interference have been spotty. No judges at the time of the Founding were elected, whereas almost all of them are today.<sup>93</sup> Likewise, at the time of the Founding, judges serving 85% of the population enjoyed life tenure, whereas virtually none of them do today.<sup>94</sup> By contrast, very few states permitted appeals of court decisions to the legislature, and, although the legislatures in a greater number of states would

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<sup>90</sup> See Tarr, *supra* note 37 (manuscript at 43) (noting that “[d]uring the first half of the nineteenth century,” the “[s]tate legislatures largely ceased granting new trials to disappointed litigants”); see also Reid, *supra* note 72, at 9 (“If it were asked what is the greatest difference between the institutional and constitutional givens of the judiciary of the early republic and that of today, the answer could well be . . . ‘legislative adjudication.’” (quoting Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 *Harv. L. Rev.* 1381, 1384, 1386 (1998))); Mantel, *supra* note 88, at 90 (“Although elaborate procedures have been developed over the years to pass private bills, their enactment has steadily declined.”).

<sup>91</sup> See *supra* text accompanying notes 39–41.

<sup>92</sup> See *supra* text accompanying notes 39–41.

<sup>93</sup> See *supra* Table 1 and text accompanying notes 63–64.

<sup>94</sup> See *supra* Table 2 and text accompanying notes 62–63.

reopen judicial proceedings by granting new trials, it was by no means all of them, and it was by no means very often.<sup>95</sup>

Finally, at least when compared to the legislative practice of granting new trials, the gains in independence have been less potent than the losses. Although a legislature can certainly annoy the judiciary by granting a new trial, the new trial takes place before the judiciary, permitting judges to retain the ultimate authority to adjudicate the matter. Judicial elections without life tenure, by contrast, permit the public to have the ultimate say on judicial matters both by voting out judges who decide cases in ways the public does not like, and, in many states, by voting in judges who will decide cases in ways the public does like. This latter power is all the more effective in light of decisions by federal courts holding that candidates for judicial office cannot be prevented from telling voters how they would decide cases that might come before them.<sup>96</sup> In many states, choosing judges has become little different from choosing legislators.<sup>97</sup>

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<sup>95</sup> See sources cited *supra* notes 83–86.

<sup>96</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

<sup>97</sup> See, e.g., John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. *Envtl. L.J.* 217, 218–19 (2001) (“[I]n recent years state judicial elections have become increasingly indistinguishable from the rest of the American political process, complete with large campaign contributions, ‘independent expenditures’ by special-interest groups, and massive television and print advertising.”); Donald P. Judges, *Who Do They Think They Are?*, 64 *Ark. L. Rev.* 119, 178 (2011) (describing the “current trends in judicial elections toward highly politicized, interest-influenced, money-saturated, partisan warfare—which are increasingly rendering them indistinguishable from elections for ordinary politicians”); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. *L. Rev.* 69, 81 (2011) (“[J]udicial elections have become increasingly politicized, more competitive, and have created new electoral pressures for judges.”); Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 *Willamette L. Rev.* 367, 368 (2002) (“[S]upreme court elections in many states . . . have become hotly contested battles, almost indistinguishable from the rest of the American partisan political process.”); Matthew J. Streb, *The Study of Judicial Elections*, in *Running for Judge 1, 2* (Matthew J. Streb ed., 2007) (“[M]any of today’s judicial races are as rough and tumble as any congressional election.”); Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 *Alb. L. Rev.* 713, 715 (2005) (“The vitriolic name-calling, the attack ads, the million-dollar fundraising, the influence of special interest groups—all are rapidly making judicial elections indistinguishable from other campaigns.”).

*D. Criticism of Founding-Era State-Federal Parity*

The thesis of this Part has been that state judicial independence has declined relative to federal judicial independence since the Founding. Any discussion of this subject would be incomplete without addressing the work of several commentators who have expressed skepticism of the independence of state courts at the Founding relative to their federal counterparts. Although this skepticism is not necessarily inconsistent with the thesis of this Part—the gap between state and federal judicial independence may have widened over time even if it was wide to begin with—it is nonetheless worth discussing because it is relevant to the discussion in the next Part and because this skepticism might be seen as in tension with how I have portrayed Founding-era state courts above.

There have been a number of commentators in recent years who have derided Founding-era state judicial independence relative to that at the federal level, not least among them Professors Akhil Amar and Robert Clinton.<sup>98</sup> As I have noted, some of these ac-

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<sup>98</sup> See Amar, *supra* note 25, at 227 n.81 (“In 1776, the judiciaries of the several states were rarely equal, independent and coordinate branches of state governments, but were often exceedingly dependent on state legislatures.”); Amar, *supra* note 33, at 1512 (“[T]he framers could not fully trust state judges to police Congress . . . [because they] were likely to be too closely tied to state legislatures and excessively vulnerable to short-term political pressures.”); *id.* (“[S]tate judges (who in 1787 often enjoyed virtually no independence from their state legislatures) were not sufficiently ‘adverse’ [to Congress or state legislators].”); Clinton, *supra* note 6, at 814 n.233 (asserting that state judges were often dependent on the legislature “due to limited terms of office, dependency on appointment or election, and, in some cases, legislative control of state judicial salaries”); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821) (“In many States, the judges are dependent for office and for salary on the will of the legislature . . . . When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . .”); Carpenter, *supra* note 53, at 4–5 (arguing that although “[i]n theory it was universally agreed that the judges must be independent” and that “the theoretical basis on which the revolutionary state governments rested was a separation of powers, . . . in practice . . . the case was very different,” citing, *inter alia*, the fact that “in most of the States the legislature controlled the appointment of the judges”); *id.* at 155–56 (arguing that, “[i]n marked contrast to the independence enjoyed by the federal courts, the judiciary in the several States continued under the legislative domination beneath which they fell in the revolutionary constitutions” because “[i]n a majority of the States judges were chosen by the popular assemblies,” but then noting that “not even the action of the convention of 1787 in joining the ex-

counts are based on what I believe are errors of history. For example, Professor Clinton's account is based, at least in part, on his assumption that "many state judges" at the Founding were "dependen[t] on . . . election,"<sup>99</sup> an assumption that I have shown above to be false.

But not all of the accounts are based on erroneous historical assumptions, and, indeed, criticism of state court independence can be found in statements by some prominent members of the Founding generation, including Alexander Hamilton, Thomas Jefferson, and James Madison.<sup>100</sup> Although these statements have some super-

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ecutive and one branch of the legislature in the selection served to bring about a reform in this respect," and "[o]nly the tenure of office during good behavior assured the judges in most of the States contributed to erect the judiciary as a respectable branch"); Wood, *supra* note 82, at 161 ("The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it. . . . The expanded meaning of separation of powers . . . along with a new conception of judicial independence, had to await the experience of years ahead."); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483, 497 (1928) (arguing that "there were . . . grounds for distrust of the local courts" because "[t]he method of appointment and the tenure of the judges were not of the sort to invite confidence").

<sup>99</sup> Clinton, *supra* note 6, at 814 n.233.

<sup>100</sup> Many of these statements were collected by Professor Amar. These statements were uttered in a variety of contexts over a variety of periods:

**Alexander Hamilton:** *The Federalist* No. 79, *supra* note 46, at 473–74 (Alexander Hamilton) ("This provision [in the U.S. Constitution] for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States, in regard to their own judges."); *The Federalist* No. 81, *supra* note 46, at 486 (Alexander Hamilton) ("State Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

**Thomas Jefferson:** Jefferson, *supra* note 85, at 129 ("The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. . . . They have accordingly, in many instances, decided rights which should have been left to judiciary controversy . . ."). It should be noted that Thomas Jefferson famously changed his mind on these questions. See, e.g., Tarr, *supra* note 37 (manuscript at 27–28).

**James Madison:** 1 *Annals of Cong.* 813 (1789) (Joseph Gales ed., 1834) ("[A] review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States, it is true, they might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature,

ficial appeal, in my view commentators have too often overread them.

To begin with, many of these very same framers—when their political purposes were different—simultaneously made other statements praising the independence of state courts.<sup>101</sup> Indeed, as Wil-

and the Legislature is itself the last resort in civil cases. In Rhode Island, which we hope soon to see united with the other States, the case is at least as bad. In Georgia, even under their former constitution, the Judges are triennially appointed, and in a manner by no means unexceptionable. In Pennsylvania, they hold their places for seven years only. Their tenures leave a dependence, particularly for the last year or two of the term, which forbid a reliance on Judges who feel it. With respect to their salaries, there are few States, if any, in which the Judges stand on independent ground.”); 1 Records, *supra* note 46, at 124 (worrying about the “biassed directions” of a “dependent” state court judge); 2 *id.* at 27–28 (“Confidence can <not> be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures. In Georgia they are appointed annually by the Legislature. In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.”).

Edmund Randolph: 1 Records, *supra*, at 203 (“The Executive & Judiciary of the States, notwithstanding their nominal independence on the State Legislatures are in fact, so dependent on them, that unless they be brought under some tie <to> the Natl. system, they will always lean too much to the State systems, whenever a contest arises between the two.”); 2 *id.* at 46 (“Courts of the States can not be trusted with the administration of the National laws.”).

William Smith: 1 Annals of Cong., *supra*, at 799 (arguing that federal judges “will be more independent than the State judges” because the former hold their “commission[s] during good behaviour, and [are] not influenced[s] by the fear of a diminution of [their] salar[ies]”).

James Wilson: 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 446 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836) (1788) [hereinafter *Elliot’s Debates*] (criticizing the lack of independence among Pennsylvania’s judges because their “appointment has been for a less period than during good behaviour”).

<sup>101</sup> For example:

Alexander Hamilton: The Federalist No. 78, *supra* note 46, at 465, 470–71 (Alexander Hamilton) (noting that good-behavior tenure is necessary to the “inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice,” and that the good-behavior tenure of federal judges is “conformable to the most approved of the State constitutions and among the rest, to that of this State”); *id.* at 470 (“This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.”); The Federalist No. 81, *supra* note 46, at 486 (Alexander Hamilton) (“[T]he fitness and competency of [state] courts should be allowed the utmost latitude . . .”); *id.* at 484 (“Contrary to the sup-

liam Eskridge and others have noted, Alexander Hamilton defended the design of the federal judiciary by assuring his readers that federal judges would behave much like state judges.<sup>102</sup> Thus, to the extent we seek to rely on these statements as records of historical fact, these records may have been tainted by considerations other than accuracy.

In addition, there were any number of others in the Founding-era, Anti-Federalists,<sup>103</sup> to be sure, but Federalists as well,<sup>104</sup> who

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position of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to these models is highly to be commended.”).

James Madison: 3 Elliot’s Debates, supra note 100, at 488 (noting that, because Congress can leave judicial power “in the state courts, both inferior and superior” when “they find the tribunals of the states established on a good footing,” the “federal cognizance will be vested in the local tribunals”).

<sup>102</sup> See, e.g., Eskridge, supra note 45, at 1052 (“If state judges have behaved responsibly, as Brutus himself maintained, why should we expect federal judges to be usurpative in the way Brutus asserted? . . . Hamilton’s defense of the new federal ‘judicial Power’ was that it would be exercised the way Anglo-American courts had been responsibly exercising power . . . .” (citing *The Federalist* No. 81, supra note 46, at 482 (Alexander Hamilton))).

<sup>103</sup> For example:

Patrick Henry: 3 Elliot’s Debates, supra note 100, at 309 (celebrating the independence of Virginia’s judges—in particular, their “firmness to counteract the legislature” and “oppose unconstitutional acts”—and questioning whether the federal judiciary would be “so well constructed, and so independent of the other branches, as our state judiciary”); id. at 491 (considering the “independency” of the “Virginia judiciary as one of the best barriers against strides of power . . . [that have] threatened the destruction of liberty”).

James Jackson: 1 Annals of Cong., supra note 100, at 833–35 (arguing that there was no reason to be “suspicious of state judges” because they are “bound by oath to support [federal] law” and “[a]ssuredly they will”); id. at 831 (“We trust the State Judiciaries with jurisdiction in some cases, why cannot we trust them in all?”).

Luther Martin: 2 Records, supra note 46, at 45 (concurring in Pierce Butler’s remarks); 3 id. at 206 (noting opposition at the Constitutional Convention to granting Congress the power to create lower federal courts because “the different State judiciaries . . . would be competent to, and sufficient for, the cognizance, in the first instance, of all cases that should arise under the laws of the general government, which, being by this system made the supreme law of the States, would be binding on the different State judiciaries” (emphasis omitted)).

George Mason: 2 Records, supra note 46, at 46 (contending that lower federal courts need not be required but instead left to the discretion of Congress because circumstances “not now to be foreseen” might arise making lower federal courts necessary).

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Michael Stone: 1 *Annals of Cong.*, supra note 100, at 840–42 (arguing that it was unnecessary to vest federal courts with jurisdiction over many matters because there had not been “abuses” in state courts necessitating federal courts); id. at 856–57 (“[I]t appears to me that there is nothing but what the state courts are competent to, but certain cases specially designated [such as those between two states and admiralty cases].”).

Thomas Sumter: 1 *Annals of Cong.*, supra note 100, at 865 (“Is the licentiousness which has been complained of in our state courts, so great as to warrant [the creation of lower federal courts]? I cannot believe it is.”).

<sup>104</sup> For example:

Fisher Ames: 1 *Annals of Cong.*, supra note 100, at 839 (maintaining that state courts should not be “disrespect[ed]” because “[i]n some of the states, he knew the judges were highly worthy of trust” and that “they were safeguards to Government, and ornaments to human nature”).

Pierce Butler: 2 *Records*, supra note 46, at 45 (asserting there was “no necessity for [lower federal] tribunals” because “[t]he State tribunals might do the business”).

Samuel Livermore: 1 *Annals of Cong.*, supra note 100, at 813 (“I never heard it complained that justice was not distributed with an equal hand in all of [the state court systems]; I believe it is so, and the people think it is so.”); id. at 863 (asserting that “state courts” have been “adequate to decide all these questions [including federal claims] from the time the constitution was ratified till this day” and that they should continue to do so without interference by lower federal courts).

John Marshall: 2 *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* 738 (Bernard Bailyn ed., 1993) (1788) (“If a law be executed tyrannically in Virginia, to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the Federal Court?”); 3 *Elliot’s Debates*, supra note 100, at 502 (“What is it that makes us trust [Virginia’s] judges? Their independence in office, and manner of appointment. Are not the judges of the federal court chosen with as much wisdom as the judges of the state governments? Are they not equally if not more independent?”); id. at 504 (“There is no clause in the constitution which bars the individual member injured, from applying to the state courts to give him redress [against officers of the federal government].”).

Edmund Pendleton: 3 *Elliot’s Debates*, supra note 100, at 290 (“It will make no difference, as to the principles on which the decision will be made, whether it will come before the state court or the federal court. They will be both equally independent, and ready to decide in strict conformity to justice. I believe the federal courts will be as independent as the state courts. I should no more hesitate to trust my liberty and property to the one, than the other.”); id. at 499 (urging that federal jurisdiction be left in state courts because it will be more economical and will lead to “an honest interpretation from independent judges”).

John Rutledge: 1 *Records*, supra note 46, at 119 (“The State Tribunals <are most proper> to decide in all cases in the first instance.”); id. at 124 (asserting that lower federal courts would be an “unnecessary encroachment on the jurisdiction <of the States[]>”).

Roger Sherman: Id. at 125 (supporting motion to block creation of lower federal courts because they were unnecessary “when the existing State Courts would answer the same purpose”); 2 id. at 27 (“[T]he Courts of the States would not consider as valid any law contravening the Authority of the Union . . . .”); id. at 46 (stating that

heaped plenty of praise on the independence of state judges.<sup>105</sup> Again, to the extent we seek to rely on these statements as records of historical fact, surely we want the full record rather than only part of it.<sup>106</sup>

When the superficial appeal of the Founding-era statements are put to the side, the skeptical accounts of state court independence expressed by commentators appear to rest on three tenets. In my view none of them withstands scrutiny.

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the federal government could “make use of the State Tribunals” with “safety to the general interest”).

<sup>105</sup> See Carpenter, *supra* note 53, at 34 (noting that the Convention rejected creating lower federal courts in part because “the existing State courts would answer the same purpose”); Goebel, *supra* note 45, at 211 (noting that lower federal courts were defeated because state courts were “adequate”); *id.* at 312 (“In *Brutus*’ opinion the state courts were wholly adequate for the administration of justice.”); Eskridge, *supra* note 45, at 1048–49 (noting that, “[i]n Letter XIV, Brutus argued that the new federal judiciary . . . was charged with nothing that the state courts could not do just as well”—in particular, “that impartiality and protection of vested rights against state legislative usurpation were values that the state courts already enforced in full measure”—and that to support his point Brutus cited one of the first judicial review cases from Rhode Island, *Trevett v. Weeden* (R.I. 1786) (unreported), described in James M. Varnum, *The Case, Trevett Against Weeden* (Providence, John Carter 1787)); Eskridge, *supra* note 45, at 1056 (noting that Federalists “explicitly embraced judges’ ameliorative powers to argue that federal judges would—as state judges had been doing—mitigate the severity and confine the operation of ‘unjust and partial laws’” (emphasis added) (quoting *The Federalist* No. 78, *supra* note 46, at 470 (Alexander Hamilton))).

<sup>106</sup> Professor Amar has argued that we should credit only the views of the framers most solicitous of federal judicial power, whom he calls the “Neo-Federalists,” because it was they alone who prevailed in the debates over Article III. See Akhil Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. Pa. L. Rev. 1651, 1663–64 (1990) (“My theory . . . sought to interpret article III from the perspective of *federalists* who wrote, understood, and defended it, rather than those whose views were rejected in Philadelphia and the ratifying debates.”). Whatever the merit of such an approach as a matter of interpreting the Constitution, I doubt it has any merit as a matter of gleaning historical facts. But, even on its own terms, I am not sure the argument is a sound one. Not only did even the Neo-Federalists express conflicting views on the independence of state courts, see *supra* note 101, but it is not quite true that they always prevailed in the debates over Article III. For example, they lost the debate over whether lower federal courts should be obligatory, see Carpenter, *supra* note 53, at 34 (noting that the Convention rejected creating lower federal courts because it would be unpopular with the states and because they were unnecessary “when the existing State courts would answer the same purpose”), as well as the debate over Madison’s motion to further judicial independence by prohibiting Congress from increasing judicial salaries as well as decreasing them. See 2 Records, *supra* note 46, at 45.

First, some of these accounts have relied on the fact that the judges in some states did not share the good-behavior tenure that federal judges enjoyed.<sup>107</sup> As I have shown, however, such states were outliers. The vast majority of state judges enjoyed the exact same tenure as federal judges. Indeed, this was true not only of tenure, but of other structural protections as well, including selection by appointment rather than election and protection against salary diminution.<sup>108</sup> Needless to say, it does not paint an accurate picture of the whole to generalize from the few.

It is true that a majority of states permitted judges to be removed by joint address in addition to or instead of impeachment,<sup>109</sup> and that some framers thought that joint address was more permissive than impeachment.<sup>110</sup> Nonetheless, it is entirely unclear how

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<sup>107</sup> See, e.g., Wood, *supra* note 82, at 161 (“Not only did many of the early constitutions—New Jersey, Pennsylvania, Rhode Island, Connecticut, and Vermont—limit the judges’ term to a prescribed number of years, but even those states granting tenure during good behavior weakened any real judicial independence by legislative control over salaries and fees and by the various procedures for removal, including simply the address of the legislature.”); *id.* at 161 n.65 (“The judges in both Pennsylvania and New Jersey held office for seven years. In Vermont and the former corporate colonies of Connecticut and Rhode Island they were elected annually. In Georgia only the chief justice was appointed annually, while the assistant judges and the justices of the peace held office at the pleasure of the legislature.”); Amar, *supra* note 25, at 235 n.102 (“In many States, the judges are dependent for office and for salary on the will of the legislature.” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821))); Amar, *supra* note 33, at 1562 (citing Connecticut and Rhode Island); Clinton, *supra* note 6, at 850 (criticizing state court judges “who, in many instances, hold their places for a limited period” (quoting 1 *Annals of Cong.*, *supra* note 100, at 801 (statement of William Smith))); see also 1 *Annals of Cong.*, *supra* note 100, at 813 (statement of James Madison) (“In some of the States, it is true, [the courts] might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation.” (citing Connecticut, Rhode Island, Georgia, and Pennsylvania)); 2 *Records*, *supra* note 46, at 27–28 (citing Rhode Island and Georgia) (statement of James Madison).

<sup>108</sup> It is true, as I have noted, that there was some concern expressed at the Founding that state legislatures did not always abide their constitutional guarantees of fixed salaries, but I have seen no evidence that, to the extent they did not do so, it was for substantive as opposed to budgetary reasons. See *supra* note 72.

<sup>109</sup> See *supra* note 76.

<sup>110</sup> See 2 *Records*, *supra* note 46, at 428 (statement of Gouverneur Morris) (arguing that it was “fundamentally wrong to subject Judges to so arbitrary an authority”); *id.* at 428–29 (statement of Edmund Randolph) (opposing the motion that judges may be removed by the Executive on application by the Senate and House of Representatives

widespread these thoughts were, and, in any event, they do not appear to be very accurate. The thoughts were based on the notion that joint address could be invoked on more numerous grounds than impeachment,<sup>111</sup> but this was hardly clear as an abstract matter,<sup>112</sup> and it was certainly not clear in practice: federal judges were put through just as rough a time—and probably rougher—than their state counterparts in the early republic.<sup>113</sup> As Professor Alan

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“as weakening too much the independence of the Judges”); *id.* at 429 (statement of James Wilson) (arguing that “Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Gov[ernment]”); Pfander, *supra* note 76, at 1242–43 (“Impeachment was thus apparently chosen [over joint address] because it provided greater security for judicial tenure and ensured a trial-type proceeding at which the judge could mount a defense against claims of misbehavior.”).

<sup>111</sup> See Reid, *supra* note 72, at 59–60, 145, 158 (noting that it was understood in New Hampshire early on that “judicial removal by address of a judge could be made for any cause, or for no cause, and no reasons needed to be assigned,” but then noting that the legislature refused to exercise this power for political reasons in the early 1800s); *id.* at 12 (“[T]he Pennsylvania legislature clearly claimed the right to impeach judges for political reasons alone.”); Tarr, *supra* note 37 (manuscript at 24–25) (“[R]emoval by address offered an additional—and potentially more far-reaching—weapon for legislative control over the judiciary.”); Smith, *supra* note 76, at 1153–55 (surveying state removal provisions); Ziskind, *supra* note 47, at 139–47 (same).

<sup>112</sup> Compare Carpenter, *supra* note 53, at 104 (citing 2 Records, *supra* note 46, at 550) (noting that Madison opposed adding “maladministration” to the grounds for impeachment because “so vague a term would be equivalent to a tenure during . . . pleasure”), with *id.* at 106 (citing 5 Elliot’s Debates, *supra* note 100, at 341; 4 *id.* at 380) (noting that Madison believed “incapacity, negligence, or perfidy,” as well as “wanton removal of meritorious officers” should be grounds for impeachment), and *id.* at 118 (noting that many in Congress “accepted the theory of impeachments laid down during the debates on the repeal of the judiciary act of 1801 . . . [that] misbehavior and high crimes and misdemeanors [were] synonymous terms”), and *id.* at 122 (noting that during the Chase impeachment trial Randolph and Giles “supported the view . . . that the impeachment power is without limit”); see also Tuan Samahon, *Impeachment as Judicial Selection*, 18 Wm. & Mary Bill Rts. J. 595, 630–31 (2010) (discussing different interpretations of the permissible grounds for invoking impeachment, including “broad” interpretations in “English common law, Federalist No. 81, the state ratifying conventions, and the First Congress”).

<sup>113</sup> The Republicans used the impeachment and joint address mechanism against federal and state judges with equal vigor when they took political power in 1800. See Hurst, *supra* note 52, at 135–36 (describing the impeachment and removal of federal district court judge John Pickering in 1804 and the attempt to do the same—supported by a majority in each house of Congress—of Supreme Court Justice Samuel Chase); Samahon, *supra* note 112, at 627 (“Ideological impeachment, at least several good attempts, can boast a venerable pedigree stretching back to the Ninth Congress.”); *id.* at 605 (citations omitted) (noting that, although Judge Pickering was charged with “mental derangement and chronic intoxication,” it was not at all clear

Tarr has put it, “removal powers threatened the decisional independence of [state] judges only if they were used to influence the substance of decisions or to penalize judges for their rulings,” but “[o]ften this was not the case.”<sup>114</sup> Rather, “[t]he rise in the use of impeachment for political purposes occurred simultaneously at the state and federal levels during the first decade of the nineteenth century.”<sup>115</sup> In short, whatever can be made of the differences in state and federal removal practices that may or may not have existed, it is surely not enough to carry the criticism of Founding-era state court independence that has been leveled by some commentators.

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that such things constituted the impeachable “high crimes and misdemeanors,” and the vote was entirely partisan: “all Democratic-Republicans voted ‘guilty’ and all Federalists voted ‘not guilty’”; *id.* (“Although the impeachment [of Chief Judge Chase] is often remembered as unsuccessful, a partisan House majority did impeach Chase and a partisan Senate majority did vote in favor of conviction . . .”). By contrast, before 1800, virtually no judges—state or federal—had been the targets of removal. See Reid, *supra* note 72, at 11, 58–59, 144 (noting that “in all of New Hampshire’s history, [the legislature] did not oust a single judge by impeachment,” and that no judge had been addressed from office at least by the early 1800s, but recounting an effort to do so in 1796 for a judge who exceeded a new mandatory retirement age); G.S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809*, at 266 (1994) (Pennsylvania state judge Alexander Addison’s removal in 1803 was the first in Pennsylvania); Tarr, *supra* note 37 (manuscript at 26) (citing four removals of judges in New Jersey, New Hampshire, and Georgia before 1800); Louis A. Frothingham, *The Removal of Judges by Legislative Address in Massachusetts*, 8 *Am. Pol. Sci. Rev.* 216, 218 (1914) (suggesting no judge in Massachusetts had been removed before 1803). This was true even though state judges, but not their federal counterparts, had already been exercising judicial review by that time. See Carpenter, *supra* note 53, at 17–19 (explaining that judges in Rhode Island who had exercised judicial review were not removed by the Rhode Island legislature because it decided it could not do so without convicting them of criminal misconduct and because their terms would end soon in any event); *id.* at 21 (explaining that the North Carolina judges who had exercised judicial review were not removed despite the controversy their decision inspired); Reid, *supra* note 72, at 29 (same for New Hampshire judges); Tarr, *supra* note 37 (manuscript at 45–46) (noting that the attempts to remove some of the judges who exercised judicial review failed); see also Carpenter, *supra* note 53, at 161–62 (describing a Georgia court in 1815 that set aside a legislative act yet was supported by one house of the legislature over the objection of the other); Hamburger, *supra* note 72, at 462 (“Judicial decisions holding statutes unconstitutional often provoked local controversies, and these disputes are revealing. Rather than relatively even struggles between defenders and critics of the decisions, the controversies tended to be lopsided against the critics . . .”).

<sup>114</sup> Tarr, *supra* note 37 (manuscript at 26).

<sup>115</sup> *Id.*

Second, some of these accounts have relied upon the fact that in some states the legislature had the power to reopen judicial proceedings by granting new trials.<sup>116</sup> I acknowledged this practice in the prior Section, but, for the reasons I stated there, I believe these differences in state and federal legislative interference paled in comparison to the similarities in state and federal selection and tenure.

Third, some of these accounts have relied upon the fact that in many states the judges were selected by state legislatures alone rather than the legislature in combination with the executive.<sup>117</sup> Although this is true, it seems, again, of minor importance when compared to other considerations. Although it may be true that judicial independence is weaker in systems where one branch of elected officials appoints judges for life rather than two, surely it is vastly weaker in systems where judges are elected by voters without life tenure, as they are in the vast majority of states today.

If all of these reasons are not enough to rehabilitate the independence of state judges relative to their federal counterparts at the Founding, there is a further consideration that has been overlooked by scholars skeptical of Founding-era state court independence: the fact that state courts at the Founding were quite willing—even more so than their federal counterparts—to exercise judicial review. Professor Scott Gerber has called the exercise of judicial review “the ultimate expression of judicial independence,”<sup>118</sup> and state courts expressed it well before their federal counterparts did. By the time federal courts got around to it in the early 1800s, the

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<sup>116</sup> See *supra* note 83.

<sup>117</sup> See Carpenter, *supra* note 53, at 5, 155–56 (arguing that, “[i]n marked contrast to the independence enjoyed by the federal courts, the judiciary in the several States continued under the legislative domination beneath which they fell in the revolutionary constitutions” because “[i]n a majority of the States judges were chosen by the popular assemblies,” but then noting that “not even the action of the convention of 1787 in joining the executive and one branch of the legislature in the selection served to bring about reform in this respect,” and “[o]nly the tenure of office during good behavior assured the judges in most of the States contributed to erect the judiciary as a respectable branch”); Wood, *supra* note 82, at 402 (arguing that the judicial independence in Virginia and North Carolina was “only a measure” because “the legislatures elected the judges” in those states); Friendly, *supra* note 98, at 497 (“In every state, except Pennsylvania and Maryland, they were chosen either mediately or immediately by the legislature.”).

<sup>118</sup> Gerber, *supra* note 49, at xxi.

courts of nearly every state had already struck down legislation as unconstitutional.<sup>119</sup> All of this is quite inconsistent with, for example, Professor Amar's statement that "state judges . . . in 1787 often enjoyed virtually no independence from their state legislatures."<sup>120</sup>

In short, I think some scholars have unfairly maligned the relative independence of state judges at the Founding. It is true that the judges in a few states did not match the independence of their federal counterparts, but it is not true that they "often" enjoyed "virtually no independence." Indeed, precisely the opposite was true. Especially when compared to today, more often than not, state judges enjoyed much the same independence as their federal counterparts.<sup>121</sup> Indeed, as I show in the next Part, they were more often than not the exact same people.

### III. A PATH OVER THE SCHOLARLY IMPASSE

In the previous Part, I showed that the gap between the independence of state and federal judges has grown since the Founding.

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<sup>119</sup> Every state but Delaware, Georgia, Maryland, Massachusetts, and New York can claim one of these precedents, and courts in Maryland and New York can at least claim to have issued decisions making it clear that they had the power to strike down legislation in an appropriate case. These precedents are collected in *id.* at 62–67 (Virginia), 115–20 (New Hampshire), 140 (Maryland), 168–69 (Rhode Island), 223–24 (South Carolina), 243–45 (New Jersey), 286–87 (Pennsylvania), 339–40 (New York), 340 (Connecticut), 341–42 (North Carolina); see also Carpenter, *supra* note 53, at 11–22; Reid, *supra* note 72, at 29; Tarr, *supra* note 37 (manuscript at 45) ("According to one count, between 1780 and 1801 state courts in eight cases refused to give effect to state laws, and in at least four others they claimed the power of judicial review . . ."); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 *Chi.-Kent L. Rev.* 31, 39 (1998); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1134–35 (1987) (collecting cases showing that "long before *Marbury v. Madison*, state courts were passing on the validity of legislative enactments"); William Michael Treanor, *Judicial Review Before Marbury*, 58 *Stan. L. Rev.* 455, 473–517 (2005) (finding three state court cases before the federal convention holding statutes unconstitutional and four other cases exercising judicial review to prevent application of a statute, not to mention an additional twenty-one cases before *Marbury v. Madison* where at least one state court judge declared a statute unconstitutional); cf. Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 *Va. L. Rev.* 1421, 1445 (1999) (citing state court resistance to legislative attempts to "violate private and vested rights of property").

<sup>120</sup> Amar, *supra* note 33, at 1512.

<sup>121</sup> See Tarr, *supra* note 37 (manuscript at 28) (concluding that neither the states nor the federal government embraced "judicial independence as we understand it today").

In particular, state courts are no longer nearly as independent as their federal counterparts. Given the state judiciaries we live with today, it is easy, as I suggested at the outset of this Article, for commentators who dismiss original understanding to conclude that jurisdiction stripping is unconstitutional. In light of the hold that original understanding has had over federal courts scholars, however, the more interesting question—the question I take up in this Part—is whether the decline in the parity between state and federal judiciaries can persuade even those who give significant weight to original understanding to conclude that jurisdiction stripping is unconstitutional today even though it may not have been unconstitutional at the Founding. I think it can.

This is the case because the original meaning of the Constitution was, like the meanings of all texts, dependent on context. But contexts change, and the question is what to do with the Constitution when they do. As Professor Lawrence Lessig demonstrated many years ago, sometimes the way to remain most faithful to the original meaning of the Constitution is to change how it applies to a particular question. Professor Lessig called this “translation,”<sup>122</sup> and, as he explained, sometimes the words of the Constitution must be translated from one social context to another in order to keep its meaning constant in the same way that we must translate words from one language to another.<sup>123</sup> As Professor Lessig put it, in order to be most faithful to the author of a text, we sometimes must apply text differently than the author would have applied it—for example, when we believe that that the author would have written the text differently had the author written it in a different context.<sup>124</sup>

Professor Lessig’s work was directed toward an older form of originalism (one that focused on the original intentions of those who authored the Constitution) rather than toward the modern form (which focuses on the original public understanding of the Constitution).<sup>125</sup> But the translation idea is just as powerful when it

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<sup>122</sup> See Lessig, *supra* note 10.

<sup>123</sup> See *id.* at 1171–73.

<sup>124</sup> See *id.* at 1178–81.

<sup>125</sup> See Richard H. Fallon, *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 *Harv. J.L. & Pub. Pol’y* 5, 8–9 (2011) (describing “Originalism 1.0” and “Originalism 2.0”).

is invoked for the audience of a text as it is for the author. As with authors, in order to be most faithful to the original audience of a text, we must apply the text differently than the audience would have applied it if we believe that the audience would have understood it to operate differently had the audience read it in a different context. In short, when the background of the Constitution changes, sometimes what the Constitution requires can change as well.<sup>126</sup>

Properly understood, translation is an originalist-friendly method to account for changed circumstances in constitutional interpretation. As such, even those who give original understanding substantial weight in constitutional interpretation have been open to translation arguments. Indeed, a broad range of scholars has endorsed these arguments, from those who see original understanding as only one factor in constitutional interpretation among many, to those who consider themselves originalists but who apply the theory at a high level of generality (sometimes called “new originalists”<sup>127</sup>), to even those whom we might call “hardcore” originalists and who apply the theory at a very specific level of generality. It is therefore perhaps not surprising that federal courts scholars routinely make arguments that sound in translation. For example, Professor Fallon has argued that congressional power to withhold federal court jurisdiction should be reinterpreted in light of the expansion of “substantive constitutional” rights since the Founding.<sup>128</sup> Similarly, Professors Marty Redish and Curtis Woods

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<sup>126</sup> See Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 *Ohio St. L.J.* 919, 920, 932–33 (2010).

<sup>127</sup> See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Geo. L.J.* 713, 726–27 (2011) (“[M]any New Originalists have determined . . . that ‘the original meaning [of constitutional terms] is rather abstract, or at a higher level of generality.’” (quoting Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257, 263 (2005))); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *Hastings L.J.* 707, 709 (2011) (“[S]everal prominent and self-described new originalists have begun to contend that the objective original meaning of many of the Constitution’s provisions . . . should be ascertained at a very high level of generality.”).

<sup>128</sup> See Fallon, *supra* note 15, at 1050–51 (“[L]imitations on Congress’s power to preclude judicial jurisdiction to enforce [constitutional] rights . . . should be regarded as having expanded commensurately with the rights themselves.”). On the one hand, his translation argument—that, in light of the expansion of constitutional rights, most particularly the incorporation of the Bill of Rights against the states, judicial independence is more relevant today than it was at the Founding—is a strong one, and it

have argued that the same congressional power ought to be reinterpreted in light of a “radical change in political philosophy” since the Founding.<sup>129</sup> Likewise, Professor Ted Eisenberg has argued that Congress is now required to keep lower federal courts, despite the fact that it had no obligation at the Founding to create them in the first place, because the increase in volume of federal litigation has made it impossible for the Supreme Court to continue to supervise the interpretation of federal law without their aid.<sup>130</sup> Professor Amar has endorsed a similar argument.<sup>131</sup>

Many of the aforementioned translation arguments, and, indeed, even some of those made by Professor Lessig,<sup>132</sup> are based on weak or speculative evidence that the circumstances that have changed

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might be seen as a complement to the translation argument I have set forth in this Article. On the other hand, it is a bit difficult to assess how much of a change this really has been from Founding-era understandings and how relevant any such change would have been to the Founding generation. For example, it was not clear until several decades after the Founding that the Bill of Rights did not apply to the states, see generally Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 *Minn. L. Rev.* 1 (2007), and there were plenty of very important constitutional provisions for courts to enforce against state governments even outside the Bill of Rights. See, e.g., U.S. Const. art. I, § 10 (various restrictions on states, including prohibitions on passing bills of attainder, ex post facto laws, or laws impairing contracts); id. art. IV, §§ 1–2 (requiring states to extend full faith and credit to state judgments as well as the privileges and immunities of citizenship); id. art. VI (the Supremacy Clause).

<sup>129</sup> See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 *U. Pa. L. Rev.* 45, 71, 104 (1975).

<sup>130</sup> See Eisenberg, *supra* note 13, at 501.

<sup>131</sup> See Amar, *supra* note 25, at 268 n.213.

<sup>132</sup> See, e.g., Lessig, *supra* note 10, at 1204 (arguing that originalists may be unfaithful to proportionality limitations on prison sentences inherent in the protection guaranteed by the Eighth Amendment, which places “reasonable” limitations on bail and fines but not on prison sentences, if they fail to take into account that the framers wrote in a world where punishments were either death or fines with nothing remotely resembling “our current prison practice”); id. at 1234–37 (arguing that *Miranda v. Arizona*, 384 U.S. 436 (1966), can be viewed as an appropriate translation to preserve the original Fifth Amendment privilege envisioned by the framers because at the Founding “the primary locus of interrogation . . . was either at trial by the judge, or before trial by magistrates” and nothing like today’s organized police forces existed to conduct stationhouse interviews, the fruits of which would be admitted at trial); id. at 1237–38 (arguing that abandoning technical trespass as the test for Fourth Amendment violations was consonant with the original guarantee because “at the Founding the [Fourth] amendment’s protection” against eavesdropping “was quite wide” given the “crude state of surveillance technology” but that same protection would be insufficient now because “[n]ew technology permitted the state to extract all the information it could ever want without ever crossing trespass law’s barrier”).

since the Founding were circumstances the Founding generation would have deemed relevant.<sup>133</sup> For this reason, some hardcore originalists have balked at translation arguments. As I understand their objections, however, they are based less on the notion that translation is unfaithful to originalism, and more on the notion that, if translation is too easy to invoke, it can be abused by judges and scholars seeking to smuggle their own world views into the Constitution.<sup>134</sup> Thus, even hardcore originalists are willing to entertain translation arguments if the evidence of change and its relevance to the Founding generation is sufficiently compelling.<sup>135</sup>

It will be up to all of these scholars to judge for themselves, of course, whether the evidence is strong enough for translation on the question of jurisdiction stripping. As I explain below, however, I think the evidence and the inferences that can be drawn from it may very well be compelling enough to satisfy most, if not all, federal courts scholars that withholding all federal jurisdiction from a constitutional claim can be considered unconstitutional today despite the original expectation otherwise.

First, there is little doubt that judicial independence was relevant to the Founding generation's understanding of Article III. As Professor Amar and many others have shown, the framers cared deeply about the independence of the judges who would adjudicate

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<sup>133</sup> See, e.g., John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 *Wm. & Mary L. Rev.* 177, 178 (1999) (“[M]any of the facts Professor Lessig claims as changed facts justifying translations do not represent clear changes from the time the Constitution was framed.”).

<sup>134</sup> See *id.* at 178, 186–87, 190 (“If, in practice, theorists and judges cannot distinguish between changed social facts and changed social ideas, the translation theory is likely to be used simply as a rationalization for infidelity.”); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 *Const. Comm.* 371, 379–80 (2007) (requiring “strong reasons for believing the [original] applications were mistaken, rather than being merely applications modern interpreters happen to reject”).

<sup>135</sup> See Antonin Scalia, *A Matter of Interpretation* 44 (1997) (interpreting a constitutional provision in light of whether “extrinsic factors have changed since that provision was adopted in 1791”); Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 *Fla. L. Rev.* 1, 6–32, 42 (2011) (arguing that federal power should grow as the number of states increases because collective action problems increase accordingly); McGinnis & Rappaport, *supra* note 134, at 379–80 (“While expected applications are important evidence of the meaning of a provision, they are not always to be followed, even if they are widely held.”).

constitutional claims;<sup>136</sup> it is why they crafted the federal judiciary with all of the structural protections—appointment, life tenure, salary protections, impeachment—that they did.<sup>137</sup> I agree with Professor Amar that it would be inconceivable that the framers who had gone through so much trouble to wrap the federal judiciary in a blanket of independence did not also care about the independence of the state court judges who would hear the claims that federal courts did not.<sup>138</sup> And, indeed, there is evidence that the framers thought the contours of federal jurisdiction should be shaped to

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<sup>136</sup> This is not to say the framers might not have had other reasons for preferring to vest federal claims in the federal judiciary, such as a desire for uniform interpretation of federal law. Nor is this to say that implements of structural independence were the only tools they had to ensure the unbiased adjudication of such claims; they also adopted the Supremacy Clause for this reason. See Anthony J. Bellia Jr., *The Origins of Article III Arising Under Jurisdiction*, 57 *Duke L.J.* 263, 312–17 (2007).

<sup>137</sup> See 2 *Elliot's Debates*, supra note 100, at 480–81 (James Wilson) (arguing that “public happiness, personal liberty, and private property, depend essentially upon able and upright determinations of independent judges,” and, in particular, judges appointed with tenure during “good behavior”); Gerber, supra note 49, at 37; *The Federalist No. 78*, supra note 46, at 469–70 (Alexander Hamilton) (arguing that “the independence of the judges” is an “essential safeguard against” the “immediate mischiefs” of “occasional ill humors in the society”); id. at 465 (“The standard of good behavior for continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. . . . [I]n a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.”); Amar, supra note 25, at 235 (showing that the framers adopted these protections for federal judges in order to assure “structural independence to interpret and pronounce the law impartially”); Clinton, supra note 6, at 768 (arguing that the debates over whether to grant federal judges salary protection “demonstrated [the] strong insistence [of the framers] upon the independence of the national judiciary from legislative control”); Eskridge, supra note 45, at 1010–11 (noting that the framing generation “appreciated the role of judges . . . as the guarantors of . . . liberty” and that an “independent judiciary . . . [was] a needed check against legislative excesses”); Sager, supra note 25, at 64–67 & n.151 (“[T]he Framers of the Constitution believed that [the tenure and salary provisions] were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke.” (quoting *United States v. Radatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting))); Wood, supra note 119, at 1435, 1445 (noting that some framers thought it was “crucial” to remove “issues of individual rights” from “the hands of the popular legislatures and place[] [them] in the hands of some other institution, which turned out to be the courts”).

<sup>138</sup> See Amar, supra note 25, at 238 (“It would have been grossly out of character for the Framers to have committed ‘ultimate’ trusteeship of the Constitution to state judges, whose appointment, tenure and removal were nowhere even mentioned in, much less prescribed by, the document . . .”).

compensate for gaps that might later arise between state and federal judges.<sup>139</sup>

Second, the fact that the Founding generation did not extend federal jurisdiction to every constitutional claim—despite their concern for judicial independence—strongly suggests that the Founding generation believed that the judicial independence that existed in the states at that time was close enough to that guaranteed by Article III that it would not offend Article III to leave such claims in state courts. This is known as the “traditional view” of the original understanding of Article III for good reason.<sup>140</sup> It is true that there are now revisionist accounts of the original understanding of Article III that call this proposition into question.<sup>141</sup> Professors Amar, Clinton, Robert Pushaw, and a few others believe that framers (they cast their arguments more as original-intent originalism than original-public-understanding originalism) who so cared about independent judges would not have tolerated leaving constitutional claims (indeed, in their view, statutory claims as well) in the hands of state judges who did not share *precisely* the same structural independence as the federal judiciary.<sup>142</sup> As I explained

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<sup>139</sup> See 1 Annals of Cong., *supra* note 100, at 840–42 (Michael Stone) (arguing that federal jurisdiction should be expanded only once “abuses may happen in State courts”); The Federalist No. 81, *supra* note 46, at 486 (Alexander Hamilton) (noting that if Congress leaves jurisdiction to hear constitutional claims in state courts, the right to appeal to the Supreme Court should be fashioned “[i]n proportion to the grounds of confidence in or distrust of the subordinate tribunals”); 2 Records, *supra* note 46, at 46 (statement of George Mason) (contending that lower federal courts need not be required but left to the discretion of Congress because circumstances “not now to be foreseen” might arise and make lower federal courts necessary).

<sup>140</sup> See *supra* note 27.

<sup>141</sup> Again, the “traditional” and “revisionist” terminology is somewhat controversial. See Pushaw, *supra* note 27, at 854–55 n.38.

<sup>142</sup> See Amar, *supra* note 25, at 238; *id.* at 250 (“It would have been insufficient simply to empower, but not oblige, Congress to give federal courts jurisdiction . . . [S]tate courts could not guarantee the necessary independence or competence to protect individuals from constitutional encroachments by the political branches of federal and state government.”); Clinton, *supra* note 6, at 749–50 (“[T]he framers, by providing that ‘[t]he judicial Power . . . shall be vested . . .,’ intended to mandate that Congress allocate to the federal judiciary as whole each and every type of case or controversy defined as part of the judicial power . . . excluding, possibly, only those cases that Congress deemed to be . . . trivial . . .”); *id.* at 778 (“[T]he congressional power . . . granted by the exceptions and regulations clause, was at most an authority to delete a class of cases from the jurisdiction of the Supreme Court *in favor of exercise of power by an inferior federal court.*”); *id.* at 814 (noting that “many . . . federalists . . . doubted the ability of state judges, appointed by state gov-

in the last Part, however, I think these scholars may have found the revisionist thesis attractive in large part because they did not fully appreciate the extent to which state judges did in fact share the structural independence of federal judges at the Founding. Once this error is corrected, the revisionist thesis becomes less tenable. In order to believe it, one must believe that the very first Congress and every single one thereafter until 1875 violated Article III. In my view, it is much easier to believe that the Founding generation thought that state court judges at the Founding were close enough to federal judges than it is to believe that Congress violated its own understanding of the Constitution when it enacted the Judiciary Act of 1789.

I certainly concede that my version of events would have been cleaner had all state judges matched the independence of federal judges at the Founding as opposed to merely most of them. But just because those who ratified the Constitution thought independent adjudication of constitutional rights was a good practice does not mean that they thought it was necessary in every instance. Rather, they very easily could have believed that constitutional rights could be vindicated so long as those rights were litigated before independent judges the vast majority of the time, or more often than not, or at some other level less than 100% of the time.<sup>143</sup> It obviously would have been impractical to have the constitutional requirements of federal jurisdiction vary state by state. As a practical matter, the early Congresses surely could not have vested lower federal courts with jurisdiction over constitutional claims in some states (such as the outlier states of Connecticut, Rhode Island, and Georgia) but not others. The choice at the Founding was therefore whether to require federal court jurisdiction in every state despite the fact that state courts were adequate in most states, or not to require federal court jurisdiction in every state because state courts were adequate in most states. The early Congresses chose the latter

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ernments often for fixed terms of office and sometimes dependent on state legislatures for their salaries, to enforce federal interests”); *id.* at 845 (“The antifederalists generally took the position that article III . . . was self-executing and mandatory.”); Pushaw, *supra* note 27, at 858–59.

<sup>143</sup> Where the framers would have drawn this line is unclear, but it is also unimportant: wherever the line would have been drawn, we are well beyond it because, as I have noted, virtually no state judges today exhibit the structural independence of their Founding-era counterparts.

(importantly, more frugal<sup>144</sup>) alternative, and that choice is not inconsistent with a due—if not perfect—regard for judicial independence. It bears repeating that, when Congress finally decided to extend federal jurisdiction to all constitutional claims, it did so only once the majority of state judges had lost their appointed and life-tenured characteristics. Although the Reconstruction Amendments and related legislation were no doubt the catalysts for the new jurisdiction, we cannot say for certain that Congress would not have trusted state judges with the new federal rights had those judges been selected and tenured as they had been at the Founding—that is, much more like their federal counterparts.

A word should be said here about the jurisdiction that Congress did extend to federal courts from the very beginning: diversity jurisdiction. It is often thought that Congress did this because it was concerned that out-of-state citizens would not receive a fair shake in state courts.<sup>145</sup> But if the Founding generation believed—as I have argued—that state court judges in the main were nearly as independent as federal judges, why would they worry that state judges would be biased in favor of their own citizens? The answer to this question is that Congress did not extend diversity jurisdiction to federal courts because they were concerned about state judges; rather, they did it because they were concerned about state legislatures (the laws of which many framers thought could be disregarded in federal diversity cases)<sup>146</sup> and state court juries (which could be replaced by more urban and pro-creditor federal jury pools).<sup>147</sup> Thus, there is no anomaly presented by Congress's decision, on the one hand, to vest federal courts with diversity jurisdiction but not, on the other hand, with constitutional claims.<sup>148</sup>

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<sup>144</sup> Saving money was among the most prominent reasons many in the Founding generation sought to limit the jurisdiction of the federal judiciary. See, e.g., Michael G. Collins, *The Federal Courts, The First Congress, and the Non-Settlement of 1789*, 91 Va. L. Rev. 1515, 1527 (2005) (noting that one of the “first justification[s]” for rejecting broader jurisdiction of lower federal courts “was cost savings”).

<sup>145</sup> See Fallon et al., *supra* note 1, at 1356.

<sup>146</sup> See Friendly, *supra* note 98, at 495–97 (“[T]he real fear was not of state courts so much as of state legislatures.”).

<sup>147</sup> See Robert L. Jones, *Finishing A Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. Rev. 997, 1026–91 (2007).

<sup>148</sup> See *id.* at 1010 (“[H]ad the architects of the federal judiciary been so concerned about the neutrality or competency of the state benches, it seems illogical that they

In any event, perhaps the greatest weakness in the revisionist thesis—the best evidence of all that the Founding generation would have been happy to leave constitutional claims in the hands of those who served as state judges—is the fact that state and federal judges at that time were, more often than not, the very same people. As I show in Table 3—in something of the ultimate measure of the parity between state and federal judges—of the forty-two federal judges who were confirmed before 1800, a full twenty-four, or nearly 60%, served as state court judges either before, after, or both before and after their federal position.<sup>149</sup> No scholar of the federal judiciary has uncovered this data before.

**Table 3: State Court Experience of Federal Judges Confirmed before 1800**

Federal Judge	State Court Experience
Gunning Bedford (D. Del.)	None
Bee Thomas (D.S.C.)	None
Blair John (S. Ct.)	Va. General Court Va. High Court of Chancery First Va. Court of Appeals Va. Supreme Court of Appeals
Benjamin Bourne (D.R.I.)	Justice of the Peace (Providence, R.I.)
David Brearley (D.N.J.)	N.J. Supreme Court
Samuel Chase (S. Ct.)	Baltimore County Court (Md.) Md. General Court
Nathaniel Chipman (D. Vt.)	Vt. Supreme Court Vt. Supreme Court*
Joseph Clay (D. Ga.)	None
William Cushing (S. Ct.)	Mass. Superior Court
William Drayton (D.S.C.)	S.C. Admiralty Court S.C. Supreme Court
James Duane (D.N.Y.)	None
Oliver Ellsworth (S. Ct.)	Conn. Superior Court
Cyrus Griffin (D.Va.)	None
Samuel Hitchcock (D. Vt.)	None

would have entrusted the state courts with the exclusive power to interpret the U.S. Constitution and the laws of Congress at the trial level.”).

<sup>149</sup> This is perhaps unsurprising given that some in the Founding generation expected state judges to simultaneously serve as federal judges. See Collins, *supra* note 144, at 1525 (discussing proposals in the first Congress to continue “a version of the Confederation-era practice of authorizing state courts to serve as federal courts”).

John Sloss Hobart (D.N.Y.)	N.Y. Supreme Court
Francis Hopkinson (D. Pa.)	Pa. Admiralty Court
Harry Innes (D. Ky.)	Va. Supreme Court of Judicature
James Iredell (S. Ct.)	N.C. Superior Court
John Jay (S. Ct.)	N.Y. Supreme Court of Judicature
Thomas Johnson (S. Ct.)	Md. General Court
John Laurance (D.N.Y.)	None
Richard Law (D. Conn.)	New London County Court (Conn.) Conn. Superior Court
William Lewis (D. Pa.)	None
John Lowell (D. Mass.)	Mass. Court of Appeals
Henry Marchant (D.R.I.)	None
John McNairy (D. Tenn.)	Davidson County Superior Court of Law and Equity (Tenn.)
Alfred Moore (S. Ct.)	N.C. Superior Court
Robert Morris (D.N.J.)	N.J. Supreme Court
William Paca (D. Md.)	Md. General Court
William Patterson (S. Ct.)	None
Nathaniel Pendleton (D. Ga.)	Dutchess County Court (N.Y.)*
Richard Peters (D. Pa.)	None
John Pickering (D.N.H.)	N.H. Superior Court of Judicature
John Rutledge (S. Ct.)	S.C. Chancery Court S.C. Court of Common Pleas*
David Sewell (D. Me.)	Mass. Superior Court
John Sitgreaves (D.N.C.)	None
John Stokes (D.N.C.)	None
John Sullivan (D.N.H.)	None
Robert Troup (D.N.Y.)	None
Bushrod Washington (S. Ct.)	None
James Wilson (S. Ct.)	None
James Winchester (D. Md.)	None

SOURCE: [www.fjc.gov](http://www.fjc.gov). NOTE: \*post-federal experience

Third, at some point none of this held true anymore. While federal courts stayed the same, state courts changed dramatically. Indeed, state judges became so different from federal judges that it finally became easy to believe the historical inference that Professor Amar and others sought to draw from 1789: a Founding generation with the regard it had for judicial independence would not have felt about the new state judges the way that it had felt about the old ones. That point is still with us. In other words, in light of the chasm that now exists between state and federal judges, it is

hard to believe that those present at the Founding would not have understood the requirements of Article III differently had they lived within our chasm rather than within their small crevice.

All of this means that the dilemma that has left jurisdiction-stripping scholars mired in a stalemate for many years can be overcome. There is no reason, after all, to take sides between text and history on the one end, and constitutionalism and judicial independence on the other. We can have both because, in light of the history of state court selection and tenure, they both point in the same direction: jurisdiction stripping today is unconstitutional.

#### CONCLUSION

Few questions in the field of federal courts have captivated scholars like the question of whether Congress can simultaneously divest both lower federal courts and the U.S. Supreme Court of jurisdiction to hear federal constitutional claims and thereby leave those claims to be litigated in state courts alone. Scholars have been deeply conflicted over whether jurisdiction-stripping legislation of this sort is constitutional. Until now, scholars have largely been left to choose between embracing the constitutionality of jurisdiction stripping and depriving constitutional claims of adjudication by independent judges or barring jurisdiction stripping and ignoring the relatively clear text and original understanding of the Constitution.

In this Article, I have explained why I think the choice between judicial independence on the one hand and text and history on the other has been a false one. In particular, something important has changed since the Founding: the relative independence of the state judges who hear constitutional claims when federal judges do not. At the time of the Founding, no state judges were elected and the vast majority of them enjoyed life tenure; the opposite is true today. As such, the consequences of withholding federal constitutional claims from federal courts were much different then than they are now. This history makes it possible to reconcile the modern aversion to entrusting state judges with federal constitutional claims and the original understanding of the Constitution permitting it. The background against which Article III of the Constitution was written and ratified has changed, and this change enables the answer to the question of whether jurisdiction stripping is con-

stitutional to change as well. In other words, just because jurisdiction stripping was constitutional in 1789 does not mean it must be constitutional today, and it does not mean we must ignore the original understanding of the Constitution to reach that conclusion.

It should be noted that the changed circumstances I have identified in this Article may have repercussions beyond the jurisdiction-stripping debate. This is the case because there are a number of other contexts in which scholars and courts have shaped the scope of federal jurisdiction over constitutional claims in light of Founding-era understandings of the ability of state and federal judges to serve as substitutes for one another. Thus, for example, there are common law doctrines and federal statutes that require federal courts to abstain from deciding cases and to forgo entering injunctions so that litigation on certain matters can proceed in state courts—even if they involve federal constitutional claims.<sup>150</sup> It may very well be that the gap that has arisen between state and federal judges since the Founding requires a reassessment of these doctrines and the constitutionality of these statutes.

It is also possible that the widened gap between state and federal judicial independence when combined with other changed circumstances—such as the fact that Supreme Court review of state court decisions is so much more unlikely today in light of the increased volume of litigation since the Founding—calls into question more doctrines still. Thus, for example, there is a long practice of allowing state courts to adjudicate constitutional issues that arise only by way of a defense rather than by way of a cause of action.<sup>151</sup> When state judges shared the independence of their federal counterparts or Supreme Court review of these state court decisions was realistically available, this practice did not threaten the independent adjudication of constitutional rights. But now that neither of these conditions holds, it may be that this practice, too, needs reassessment.

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<sup>150</sup> See Fallon, *supra* note 15, at 1094 & n.242.

<sup>151</sup> See *id.* at 1094. In civil cases, this is by virtue of the fact that the statute conferring federal question jurisdiction on the federal courts has been interpreted to embody a “well-pleaded complaint” rule. See *id.* at 1066 n.95. In criminal cases, this is by virtue of the abstention doctrine from *Younger v. Harris*, 401 U.S. 37, 49–53 (1971). See Fallon, *supra* note 15, at 1094 n.240.

It is beyond the scope of this Article to resolve all these questions, of course, but I hope that future scholarship will elaborate on the history that I have uncovered in this Article and how it might fully reshape the constitutional metes and bounds of the jurisdiction of the federal courts.

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