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ARTICLE

ARTICLE III AND THE SCOTTISH JUDICIARY

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## ARTICLE III AND THE SCOTTISH JUDICIARY

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*Historically minded scholars and jurists invariably turn to English law and precedents when attempting to recapture the legal world of the Framers. Blackstone's famous Commentaries on the Laws of England offers a convenient reference for moderns looking backward. Yet the generation that framed the Constitution often relied on other sources, including Scottish law and legal institutions. Indeed, the Scottish judicial system provided an important, but presently overlooked, model for the Framing of Article III. Unlike the English system of overlapping and primarily original jurisdiction, the Scottish judiciary featured a hierarchical, appellate-style judiciary, with one supreme civil court sitting at the top and an array of inferior courts of original jurisdiction below. What is more, the Scottish judiciary operated within a constitutional framework — the so-called Acts of Union that combined England and Scotland into Great Britain in 1707 — that protected the role of their supreme court from legislative remodeling.*

*This Article explores the heretofore invisible influence of the Scottish judiciary on the language and structure of Article III. Scotland provided a model for a single “suprem” court and multiple inferior courts, and it defined inferior courts as subordinate to, and subject to the supervisory oversight of, the sole supreme court. Moreover, the Acts of Union entrenched this hierarchical judicial system by limiting Parliament to “regulations” for the better administration of justice. Practice under this precursor to Article III's Exceptions and Regulations Clause established that a supreme court's supervisory authority over inferior courts would survive restrictions on its as of right appellate jurisdiction. The Scottish model thus provides an important historical perspective on the scholarly claim that unity, supremacy, and inferiority in Article III operate as textual and structural limits on Congress's jurisdiction-stripping authority.*

### I. INTRODUCTION

Jurists and scholars often view Article III of the Constitution through the lens of the eighteenth-century English legal system, particularly as refracted by William Blackstone's *Commentaries on the Laws of England*.<sup>1</sup> Supreme Court Justice Felix Frankfurter gave

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<sup>1</sup> First published in England between 1765 and 1769, when Blackstone held the Vinerian chair at Oxford, the *Commentaries on the Laws of England* enjoyed remarkable success in America. On the appearance and publication of the *Commentaries* in America, see M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 26, 131–34 (2010), describing the model of sale by subscription that was used in marketing the *Commentaries* and treating its appearance as the beginning of the growth of a national market for law books in antebellum America. On

voice to this preoccupation with England when he drew on the practice of the courts of Westminster in defining the judicial power of the United States.<sup>2</sup> Generations of American lawyers, before and since, have turned to the *Commentaries* for insights into the content of the common law and the structure of the English court system familiar to the Framers of the Constitution.<sup>3</sup> Today, as a result, Blackstone and English legal structure provide essential starting points for scholars attempting to explain the Framing of Article III.<sup>4</sup>

Although inquiries understandably begin with Blackstone's England, we hope to show that they should not end there. As participants in a transatlantic marketplace with ties to the commercial nations of the British Empire and Europe, the citizens of the newly independent states were exposed to a broad range of ideas and influences.<sup>5</sup> Among these many influences, we have found evidence that the legal system of Scotland provided an important — and thus far overlooked — model for the creation of Article III's one Supreme Court, with jurisdiction in law, equity, and admiralty, protection from legislative control, and a hierarchical superiority over inferior courts.<sup>6</sup> Unlike the English court

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Blackstone's life, before and after the *Commentaries* appeared, see generally WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* (2008). On his jurisprudence as a judge of Common Pleas, see generally Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553 (2009). On the place of the *Commentaries* in English legal history, see generally 12 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1938). For a nicely balanced account of Blackstone's work and of his influence in America, see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 545 & n.104, 546–49, 560–63 (2005), which also collects commentary on the *Commentaries*.

<sup>2</sup> See *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting); see also Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969) (arguing that “it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation” of Article III).

<sup>3</sup> See, e.g., WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 32 (Wythe Holt & L.H. LaRue eds., 1990).

<sup>4</sup> On Blackstone's importance to scholarly work on the federal judiciary, see *id.* See also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400–07 (1996) (relying extensively on Blackstone and English legal authorities in exploring Founding-era attitudes toward the separation of powers and the judicial role).

<sup>5</sup> For recent attempts to situate the Framers in the context of a more cosmopolitan world, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934–46 (2010), describing the Framers as aspiring to membership in the European community of civilized nations. See also Richard J. Ross, *Legal Communications and Imperial Governance: British North America and Spanish America Compared*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815)*, at 104, 108–09, 122–25 (Michael Grossberg & Christopher Tomlins eds., 2008) (describing many points of contact between colonial governors, assemblies, and courts and their counterpart administrators in England, including a lively trade in legal books and information).

<sup>6</sup> See U.S. CONST. art. III, §§ 1–2; *id.* art. I, § 8. We do not claim that Scottish legal thinking was more important to the Framers than that of England, but only that the Scottish legal system

system, which parceled out judicial power to multiple superior courts with overlapping and coordinate jurisdiction and which aspired to a judicial hierarchy that it often failed to achieve,<sup>7</sup> the Scottish system had a single supreme civil court, the Court of Session, which presided over all inferior civil jurisdictions.<sup>8</sup> The Court of Session combined a supervisory authority with the power to hear cases on appeal in law, equity, and admiralty.<sup>9</sup> In describing their legal system, Scottish legal writers, including the influential Henry Home (Lord Kames), consistently emphasized the importance of the supremacy of the Court of Session, its power to supervise and correct the decisions of inferior tribunals, and the hierarchical relationship between the supreme court and subordinate courts.<sup>10</sup>

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may have had a greater impact than has thus far been recognized in the scholarship on Article III. Cf. GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* 20–21 (2008) (cautioning historians against too quickly proposing to isolate a single decisive influence on the thinking of the Framers). In discussing the “Scottish model” and the “Scottish system,” we focus primarily on the post-Union Scottish court system of the eighteenth century, though some of the features of those institutions on which we focus are continuations of the pre-Union courts. We also acknowledge that the courts of Scotland cannot be considered in their entirety without also considering their relationship to English courts and the broader institutions of Great Britain, particularly the House of Lords. In addition, as Professor Alison LaCroix has explored in detail, the Founding generation also drew heavily on the Scottish governmental institutions and political thought of the period between the accession of James I to the throne of England in 1603 and the Union of 1707. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 24–29, 87–88, 120–24 (2010).

<sup>7</sup> See 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*30 (distinguishing between “courts of common law and equity . . . and courts maritime”); 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 194–264, 395–476 (6th ed. 1938); DAVID M. WALKER, *THE SCOTTISH JURISTS* 229–30 (1985). See generally 3 BLACKSTONE, *supra*, at \*37–56, \*68–70 (describing the superior courts of law, equity, and admiralty). Despite the coordinate quality of the superior courts, England displayed some interest in judicial hierarchy. Thus, King’s Bench enjoyed relatively broad supervisory authority over inferior tribunals, the Court of Exchequer Chamber sat as a college of all the superior court judges to clarify difficult legal questions, and the House of Lords exercised appellate jurisdiction over all the superior courts. Cf. JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 39–41 (2009) (describing the comparative contributions of these tribunals in clarifying the law of England). But England lacked a single superintending supreme court separate from Parliament until October 2009, when the House of Lords gave way to the new Supreme Court under the Constitutional Reform Act 2005. See Jo Lennan, *A Supreme Court for the United Kingdom: A Note on Early Days*, 29 CIV. JUST. Q. 139 (2010); Lord Mance, *Constitutional Reforms, the Supreme Court and the Law Lords*, 25 CIV. JUST. Q. 155 (2006).

<sup>8</sup> See 1 HENRY HOME, *LORD KAMES, HISTORICAL LAW-TRACTS* 329 (Edinburgh, A. Kincaid & J. Bell 1758); 5 DAVID M. WALKER, *A LEGAL HISTORY OF SCOTLAND* 455–65 (1998); *Sketch of the History of the Court of Session*, 16 J. JURISPRUDENCE 561, 561 (1872). As discussed in greater detail below, the High Court of Justiciary exercised supreme judicial authority in criminal matters.

<sup>9</sup> See 1 KAMES, *supra* note 8, at 327–28, 391–95; HENRY HOME, *LORD KAMES, PRINCIPLES OF EQUITY* 50 (Edinburgh, A. Kincaid & J. Bell 1760).

<sup>10</sup> See *infra* Part IV, pp. 1656–84. These texts include 1 ANDREW MCDOUALL, *LORD BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS* (Edinburgh, R. Fleming 1751); JOHN DALRYMPLE, *AN ESSAY TOWARDS A GENERAL HISTORY OF FEUDAL*

Apart from its hierarchical structure, the Scottish legal system also differed from its English counterpart in its relationship to the British Parliament. English courts, though creatures of royal prerogative,<sup>11</sup> acknowledged the sovereign power of Parliament to remake the law and remodel English institutions.<sup>12</sup> Blackstone, in particular, spoke of Parliament's authority in sweeping terms.<sup>13</sup> By way of contrast, the Scottish courts operated within a constitutional framework that was meant to shield them from parliamentary control and alteration. Indeed, when between 1706 and 1707 the separate nations of England and Scotland negotiated and adopted a Treaty of Union that would dissolve their respective Parliaments and form a single, united Parliament and nation of Great Britain,<sup>14</sup> they included in their implementing Acts of Union a series of provisions aimed at ensuring the constitutional status of the Court of Session as the supreme civil court of Scotland.<sup>15</sup> Although scholars debate the degree to which one can regard the Acts of Union as a constitution in American terms,<sup>16</sup> they certainly were meant to provide a lasting framework that would protect

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PROPERTY IN GREAT BRITAIN (Dublin, Sarah Cotter, 4th ed. 1759) (1757); JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND (James Badenach Nicolson ed., Edinburgh, Bell & Bradfute 1871) (1773); 1 KAMES, *supra* note 8; and KAMES, *supra* note 9.

<sup>11</sup> 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 386 (Sir Henry Gwillim ed., London, A. Strahan, 7th ed. 1832) (1736).

<sup>12</sup> See 1 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–48, 58–68 (6th ed. 1902).

<sup>13</sup> See 1 BLACKSTONE, *supra* note 7, at \*49, \*156, \*160–61.

<sup>14</sup> See ROBIN M. WHITE & IAN D. WILLOCK, THE SCOTTISH LEGAL SYSTEM 26–28 (Total Publ'g Ltd. 4th ed. 2007). For most of the seventeenth century, England and Scotland were ruled by the same monarch but were otherwise separate countries with separate Parliaments and administrative systems. The Acts of Union of 1707 united both Parliaments as a new Parliament of Great Britain, which sat in London but legislated for all of the island. *Id.* For background on the negotiation and adoption of the Treaty and Acts of Union, see generally J.D. Ford, *The Legal Provisions in the Acts of Union*, 66 CAMBRIDGE L.J. 106 (2007).

<sup>15</sup> See Union with Scotland Act, 1706, 6 Ann., c. 11, art. XIX (Eng.); Union with England Act, 1707, c. 7, art. XIX (R.P.S.) [collectively hereinafter Acts of Union (1707)]; Ford, *supra* note 14, at 118–28.

<sup>16</sup> Under the American conception of constitutionalism, the written Constitution represents the nation's highest law and invalidates any inconsistent enactments by state and federal legislatures. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By contrast, British courts were understood to possess no such power of judicial review; the British "constitution" consists merely of the laws that define the institutions of the British government, as well as certain fundamental laws and guarantees that are important but that cannot be entrenched against later parliamentary revision. See, e.g., 1 DICEY, *supra* note 12, at 21–31. The constitutional status of the Acts of Union in the British system of government has largely escaped the attention of American scholars. For one notable exception, see John O. McGinnis & Michael B. Rappaport, Essay, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 401–02 (2003), observing that the Acts of Union could more readily be regarded as having entrenched their norms if viewed as a treaty binding both England and Scotland than if viewed as domestic legislation binding future Parliaments.

the Court of Session (and the hierarchical Scottish legal system) from parliamentary remodeling.<sup>17</sup>

In language remarkable for its similarity to Article III of the United States Constitution, the nineteenth article of the Acts of Union first provided that the Court of Session would remain “in all time coming” one of two supreme courts of Scotland (along with the High Court of Justiciary, the supreme criminal court).<sup>18</sup> Second, the Acts of Union declared that “all Inferior Courts within the said Limits do remain Subordinate, as they are now to the Supream Courts of Justice within the same in all time coming.”<sup>19</sup> The Acts achieved this arrangement in part by forbidding any English court from reviewing the judgments of the lower courts in Scotland, thereby securing the Court of Session’s place at the top of a judicial hierarchy.<sup>20</sup> Third, the Acts of Union expressly insulated the Court of Session itself from any further review by the English courts at Westminster, thus equating the Court of Session’s supremacy with finality.<sup>21</sup> Finally, the Acts of Union adopted an early precursor to the Exceptions and Regulations Clause of Article III,<sup>22</sup> declaring that the Court of Session was to remain as “now Constituted” by the laws of Scotland, subject “to such Regulations for the better Administration of Justice, as shall be made by the *Parliament of Great-Britain*.”<sup>23</sup> Taken together, these provisions specify that although Parliament enjoys the power to organize and regulate the Scottish court system, its regulations cannot alter the traditional “Authority

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<sup>17</sup> See, e.g., J.D.B. MITCHELL, CONSTITUTIONAL LAW 95–96 (2d ed. 1968); Ford, *supra* note 14, at 128–34; Neil MacCormick, *Does the United Kingdom Have a Constitution? Reflections on MacCormick v. Lord Advocate*, 29 N. IR. LEGAL Q. 1, 11–12 (1978); cf. Denis J. Edwards, *The Treaty of Union: More Hints of Constitutionalism*, 12 LEGAL STUD. 34, 37–38 (1992) (examining the extent to which the Articles of Union have been treated as binding in recent British jurisprudence).

<sup>18</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* In an important omission, the Acts of Union did not foreclose review of the judgments of the Session by the British House of Lords. Historians debate the reason for the omission; some argue that the English commissioners wished to downplay the issue to avoid a renewal of an English controversy over the Lords’ power to hear appeals from courts of equity. See A.J. MacLean, *The 1707 Union: Scots Law and the House of Lords*, 4 J. LEGAL HIST. 50, 70–72 (1983). Others note that the Scots themselves could not agree on whether to permit House of Lords review. See Ford, *supra* note 14, at 124–25. Importantly, historians do agree that a relatively vibrant practice of seeking parliamentary review had arisen in Scotland in the late seventeenth century, just prior to the Treaty of Union. See J.D. Ford, *Protestations to Parliament for Remeid of Law*, 88 SCOT. HIST. REV. 57 (2009). In all events, shortly after the Union, the British House of Lords began accepting appeals from Scotland. See *id.* at 99–107.

<sup>22</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>23</sup> Acts of Union (1707), *supra* note 15, art. XIX.

and Privileges” of the Court of Session or undermine its role at the top of the Scottish judicial hierarchy.<sup>24</sup>

We think the Acts of Union and Scottish legal architecture deserve a more central place in the ongoing scholarly debate over the origins and meaning of Article III. For starters, the Acts of Union provided an important precedent for the creation of entrenched limitations on the power of the legislative branch to remodel the judiciary. Such entrenched or constitutional limitations were unknown in England; although the courts arose through the exercise of royal prerogative, Parliament had long claimed the power to alter the English central courts by ordinary legislation.<sup>25</sup> As a result, judicial independence in England as solidified under the Act of Settlement (1701) was understood to mean independence from the Crown rather than independence from Parliament.<sup>26</sup> Understanding this precedent, Scottish commissioners secured treaty-based protection against similar remodeling of their Court of Session.<sup>27</sup> The Acts of Union thus provided the Framers with a model for how to craft fundamental protections for judicial structure and independence.

In addition to establishing a general model of judicial independence from legislative tinkering, the Scottish experience under the Acts of Union makes clear that an evidently hierarchical and pyramidal judi-

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<sup>24</sup> See 5 WALKER, *supra* note 8, at 455; John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation, 1600–1830*, 22 TUL. EUR. & CIV. L.F. 1, 27 (2007); Ford, *supra* note 14, at 119.

<sup>25</sup> Consider, for example, the fate of the prerogative Courts of Star Chamber and High Commission, which wielded the judicial power of the Privy Council and were abrogated by acts of Parliament between 1640 and 1642. For an account, see HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 309–15 (2003).

<sup>26</sup> The Act of Settlement (1701) set the terms of royal succession and specified that the judges of the English superior courts were to have their salaries “ascertained and established,” Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), and were to serve “during good behavior,” subject to removal upon parliamentary address and royal assent. *Id.* For an overview, see James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1235–36 (2007). This provision substituted life tenure and parliamentary control of judicial removals for the seventeenth-century practice of subjecting superior court judges to removal at the pleasure of the Crown. See generally Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 621–23 (1977) (describing seventeenth-century developments as a change from judicial mastery by the Crown to that by Parliament).

<sup>27</sup> The Treaty of Union represented the culmination of a series of negotiations between Scottish and English commissioners that began shortly after the accession of Scotland’s James V to the English crown (as James I in 1603) and continued, by fits and starts, through the seventeenth century. See Ford, *supra* note 14, at 122–23 (evaluating the meaning of the Treaty of Union of 1707 by reference to unsuccessful negotiations that took place in 1604 and 1670). For an overview of the history preceding adoption of the Acts of Union, see BRIAN P. LEVACK, *THE FORMATION OF THE BRITISH STATE* (1987), which highlights such considerations as religious turmoil, the English conquest of Scotland during the commonwealth period, the restoration of Scottish rule, and the question of royal succession that followed the abdication of James II and the Glorious Revolution.

cial system was available as a model to the Framers of Article III. Not only were lower courts in Scotland bound to comply with the decisions of the Court of Session, but they were also subject to that court's ongoing supervisory oversight and control.<sup>28</sup> Even where the Court of Session lacked the power to review lower court decisions by way of appeal, its supervisory powers allowed the Court of Session to correct serious errors and to prevent lower courts from exceeding the boundaries of their own jurisdictions.<sup>29</sup> The Scottish judiciary thus exemplified the model of judicial structure that no less a figure than James Wilson — himself a Scottish native — described as inherent in Article III.

An able lawyer, an active participant in the Philadelphia Convention that framed the Constitution, and one of the first Justices of the Supreme Court, Wilson argued in his 1791–1792 Lectures on Law that a properly constituted judicial system should resemble a pyramid, with a broad base of inferior jurisdictions and a single supreme court on top.<sup>30</sup> Wilson evidently believed that the Article III he had helped to craft as a member of the Philadelphia Committee of Detail met this standard.<sup>31</sup>

Notwithstanding Wilson's careful explication, American scholars have doubted that Article III establishes an inherently hierarchical relationship between the Supreme Court and any inferior tribunals Congress chooses to establish. Perhaps the most ardent exponent of such a view, Professor David Engdahl, rejects the claim that Article III requires Congress to fashion a judicial pyramid and derides "[a]ny notion that the Constitution requires a particular hierarchy — or any judicial hierarchy at all" as "simply uninformed."<sup>32</sup> Anticipating Engdahl, Professor Wilfred Ritz has questioned whether Americans, operating

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<sup>28</sup> See *Countess of Loudon v. Trustees*, No. LV (Scot. 1793), in DECISIONS OF THE COURT OF SESSION, FROM NOVEMBER 1792 TO JULY 1796, at 115, 117–18 (Robert Davidson & David Douglas eds., Edinburgh, Bell & Bradfute 1798) [hereinafter *Countess of Loudon*]; 1 KAMES, *supra* note 8, at 394–95. Indeed, the best known exponent of this conception of the Scottish judiciary, Lord Kames, explained that the power of ongoing supervisory control resulted from the Court of Session's supremacy. See 1 KAMES, *supra* note 8, at 327–28, 429.

<sup>29</sup> See *infra* section III.B, pp. 1653–56.

<sup>30</sup> James Wilson, Lectures on Law Part 2 No. III: Of the Judicial Department, in 2 THE WORKS OF JAMES WILSON 446, 495 (Robert Green McCloskey ed., Belknap Press 1967) (1804). On Wilson's fascination with the pyramid, see JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS 47–59 (2007).

<sup>31</sup> For an account of Wilson's many contributions to the Constitution's Framing, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008) [hereinafter Ewald, *Drafting*]. See also William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053 (2010) [hereinafter Ewald, *Scottish Enlightenment*] (describing Wilson's education in Scotland and his exposure to leading figures in the Scottish Enlightenment).

<sup>32</sup> David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 157–58.

without an obvious English hierarchical model to guide them, would have understood Article III's provision for a single supreme court as a significant feature of a hierarchical judicial system.<sup>33</sup> More likely, Ritz argues, the Framers were drawing on horizontal judicial models, such as those in England, in which superior courts exercised primarily a trial rather than an appellate jurisdiction.<sup>34</sup> Engdahl argues that Congress could have implemented Article III by creating separate supreme courts of law, equity, and admiralty, in keeping with the English conception that a judicial system might have multiple supreme courts of overlapping jurisdiction, and dismisses Wilson's pyramidal model as chimerical and unprecedented.<sup>35</sup>

Not only does it provide a decidedly unchimerical precedent for hierarchy, but Scottish experience under the Acts of Union may have also provided a template on which the Framers relied in choosing words and phrases to secure the role of the Supreme Court of the United States as the head of the judicial system. Just as Article III vests the judicial power in one supreme court,<sup>36</sup> so too do the Acts of Union guarantee the authority and privileges of the Court of Session as the "Supream" court of Scotland.<sup>37</sup> Just as Articles I and III allow Congress to ordain, establish, and constitute only courts and tribunals that remain inferior to the one Supreme Court,<sup>38</sup> so too do the Acts of Union specify that inferior courts must remain "Subordinate" to the Scottish supreme court.<sup>39</sup> Just as Article III contemplates finality,<sup>40</sup> so

<sup>33</sup> RITZ, *supra* note 3, at 33, 41.

<sup>34</sup> *Id.* at 35, 44.

<sup>35</sup> David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 463, 466–68, 491, 504 (1991); *see also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that Congress could implement Article III by assigning jurisdiction to lower federal courts and largely depriving the Supreme Court of appellate jurisdiction). Professor William Van Alstyne echoed this view in memorable language: "By reposing finality of such decisions in a number of other courts, [Congress] might thereby give the Constitution a number of different heads on the order of the mythical Hydra, however peculiar we might think the result to be in the dimming twilight of federalism." William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 269 (1973).

<sup>36</sup> U.S. CONST. art. III, § 1; *see also* U.S. CONST. art. I, § 8, cl. 9 (requiring any tribunals Congress "constitute[s]" to remain "inferior to" the Supreme Court).

<sup>37</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>38</sup> U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

<sup>39</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>40</sup> *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) ("[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power . . . to render dispositive judgments." (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (internal quotation mark omitted)); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 785–86 (1998). As a formal matter, Article III vests the entire judicial power in federal courts and seemingly forecloses the assertion of such power by other institutional actors. But

too do the Acts of Union foreclose judicial review of the decisions of the Court of Session.<sup>41</sup> The close similarity of the concepts and implementing language suggests that the Acts of Union and the Scottish legal system provided the Framers with a precedent for how to use such concepts as supremacy and inferiority to structure, and afford constitutional protection to, a hierarchical judicial system.<sup>42</sup>

Perhaps most provocatively, the Acts of Union and the Scottish legal experience may shed important new light on the ongoing debate over the power of Congress to curtail the Supreme Court's appellate jurisdiction. Although the Court derives its jurisdiction, both original and appellate, from the Constitution, Article III confers appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."<sup>43</sup> Conventional wisdom views this Exceptions and Regulations Clause as a plenary grant of authority to Congress to curtail virtually any aspect of the Court's appellate role (subject to the requirement that Congress not overstep any other external constitutional limitations).<sup>44</sup> Until now, scholars have been unable to chart the origins of the Exceptions and Regulations Clause, to identify any historical precursors in English law, or to explain based on the Clause's sparse drafting history why the Framers included it or how they expected it to operate.<sup>45</sup> Without any precursors to provide guidance, adherents of the orthodox account have simply assumed that the text confers an unqualified exceptions and regulations power.

In contrast to the orthodox account, a growing chorus of scholars (including one of us) argues that Article III's related requirements of unity, supremacy, and inferiority impose textual limits on Congress's

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the task of defining the essential features of the judicial power has proven elusive. Compare *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (prohibiting non-Article III bankruptcy judges from hearing common law claims), with *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855–57 (1986) (permitting administrative agencies to hear common law counterclaims). See generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) [hereinafter Pfander, *Article I Tribunals*] (describing the relationship between Article I tribunals and Article III courts and calling for a new method of distinguishing the two that would secure the Supreme Court as the final arbiter of decisions made by Article I tribunals).

<sup>41</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>42</sup> On the importance of the Scottish political experience to the Founding generation, see LACROIX, *supra* note 6, at 24–29, 87–88, 120–24; and David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119 (2004).

<sup>43</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>44</sup> See, e.g., Van Alstyne, *supra* note 35, at 230–33, 264–67; Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–06 (1965).

<sup>45</sup> As Professor Leonard Ratner explains: "The Committee on Detail kept no record of its proceedings, and there is no evidence apart from the draft itself as to how the language [of the Exceptions and Regulations Clause] originated." Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 172 n.69 (1960).

court-stripping power by securing the Supreme Court's role at the top of the federal judicial hierarchy.<sup>46</sup> On this view, the Constitution requires Congress to ensure that all inferior courts remain subordinate to the one Supreme Court specified in Article III. This duty of subordination means that lower courts must respect the precedents of the Supreme Court and must remain subject to a degree of supervisory oversight sufficient to ensure lower court compliance with jurisdictional boundaries and federal law.<sup>47</sup> Under what one of us has dubbed the supervisory account, subordination does not require appellate review in every case; the Court must simply retain the power to spot check decisions. Congress can fashion exceptions and regulations to the Court's *as of right* appellate jurisdiction (in keeping with the terms of Article III), but it cannot deprive the Court of the *discretionary* oversight that inheres in its supremacy.<sup>48</sup> In other words, the Article III requirements of supremacy and inferiority operate as textual limits on Congress's power to curtail the Court's supervisory role.

The Acts of Union provide important support for this revisionist account of the Exceptions and Regulations Clause. Not only do the two provisions bear an obvious family resemblance, but the Court of Session also conducted supervisory review of inferior tribunals in the wake of jurisdictional restrictions, and it repeatedly voiced a conviction that Parliament's regulations power was circumscribed by the requirements of supremacy and inferiority in the Acts.<sup>49</sup> Drawing on a

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<sup>46</sup> For examples, see PFANDER, *supra* note 7, at 126–50, 152–56; Steven G. Calabresi & Gary Lawson, Essay, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); Pfander, *Article I Tribunals*, *supra* note 40, at 697–747; James E. Pfander, Essay, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007) [hereinafter Pfander, *State Court Inferiority*] (contending that when Congress confers jurisdiction on state courts to adjudicate federal claims, it constitutes those courts as inferior Article I tribunals subject to the Supreme Court's oversight); and James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1508–11 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*]. *But cf.*, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 360 (2006) (concluding that neither constitutional text nor constitutional structure explicitly creates a hierarchical relationship among federal courts).

<sup>47</sup> PFANDER, *supra* note 7, at 38–44; Pfander, *State Court Inferiority*, *supra* note 46, at 234; Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1505–08.

<sup>48</sup> See Pfander, *State Court Inferiority*, *supra* note 46, at 200; Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1511–12. On the distinction between appellate and supervisory jurisdiction, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1532–49, 1560–74 (2001).

<sup>49</sup> In one well-known case, for example, the Court of Session intervened to overturn an inferior court decision that was inconsistent with its own earlier determination about the status of a particular public way. See *Countess of Loudon*, *supra* note 28, at 115, 117–18; see also *The Supreme Courts—Excluded Jurisdiction*, 3 J. JURISPRUDENCE 14, 17 (1859). The Court of Session did so

variety of supervisory proceedings that bore some resemblance to the prerogative writs in England,<sup>50</sup> the Court of Session insisted throughout the eighteenth century that its power to correct the work of inferior tribunals survived parliamentary restrictions on its exercise of routine appellate review.<sup>51</sup> The Court of Session's insistence on maintaining its supervisory authority in the face of legislation that curtailed its appellate jurisdiction illustrates how the constitutional requirements of supremacy and inferiority in Article III act to confine Congress's jurisdiction-stripping authority.

Although we cannot quantify Scottish influence precisely, we do know that the Exceptions and Regulations Clause first appeared in an August 1787 Committee of Detail draft written by the Scottish-born James Wilson.<sup>52</sup> If, as seems likely, the Framers drew on Scottish practice under the Acts of Union, then the Court of Session's eighty years of experience may help to illuminate the Framers' conception of an exceptions power circumscribed by the requirements of unity, supremacy, and inferiority in Article III and Article I. Far from an inexplicable aberration or an unqualified grant of power, we argue, the Exceptions and Regulations Clause was drawn from a vibrant legal culture and can be better understood in light of its historical antecedents.

In identifying the influence of Scottish thinking on Article III, this Article contributes to three currents in the scholarly literature.<sup>53</sup> First, and of central importance to our jurisdictional argument, we hope to show that the Acts of Union and the Scottish notion of hierarchy informed the Framers' view that Article III limits congressional control of the Supreme Court's appellate jurisdiction. In doing so, we offer a historical predicate for the unitary and hierarchical judicial system that has been missing from debates over federal jurisdiction, as well as evidence of the origins of the Exceptions and Regulations Clause that can explain its meaning and context. Second, we offer a partial solution to the puzzle of how Scottish legal thought left its mark on the law of the early American republic. Historians have long recognized

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despite the fact that the British Parliament had adopted legislation conferring final decisionmaking authority on the lower court. *Countess of Loudon*, *supra* note 28, at 115–18.

<sup>50</sup> On the prerogative writ system in England, see generally S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

<sup>51</sup> See *infra* pp. 1653–56, 1657–61, 1677–83.

<sup>52</sup> See Ratner, *supra* note 45, at 172.

<sup>53</sup> We acknowledge the many contributions of contemporary scholars, on whose work we have drawn in attempting to understand the influence of Scots thinking on the Framing. This Article differs from other works in its focus on the practice in the Scottish Court of Session, on the specific language of the Acts of Union, on the way that language operated to constitutionalize the hierarchical structure of the Scottish legal system, and on the implications of the Scots system for the meaning of Article III.

that Scottish thinking profoundly influenced the American lawyers of the early republic,<sup>54</sup> but they have been struck by the relatively modest Scottish influence on the developing common law of the early nineteenth century.<sup>55</sup> We think that Scottish thought had a greater impact on structural matters than it did on the common law (as to which Blackstone's account of English law reigned supreme). Finally, our study of Scottish legal structure may shed some light on the controversial debate over the place of comparative constitutional law in the interpretation of the Constitution. We think Scotland, under the Acts of Union, may provide a source of comparative insight to supplement the English precedents to which today's historically minded scholars so frequently turn.<sup>56</sup>

Our attempt to uncover the Scottish precursors to Article III proceeds in five parts. Part II explores the influence of Scottish thinking on the Founding generation. Although earlier scholars have demonstrated various connections to Scottish legal thought, we document a wider Scottish influence than has been previously recognized. The widespread influence of the legal writers of the Scottish Enlightenment suggests that one cannot look exclusively to Blackstone for insight into the legal culture and political ideology of the Founding generation.<sup>57</sup>

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<sup>54</sup> See, e.g., GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) [hereinafter WILLS, *EXPLAINING*]; GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978) [hereinafter WILLS, *INVENTING*]; Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957); Arnaud B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394 (1942).

<sup>55</sup> See R.H. Helms, *Scots Law in the New World: Its Place in the Formative Era of American Law*, in 52 THE STAIR SOC'Y, MISCELLANY FIVE 169 (Hector L. MacQueen ed., 2006); C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205 (1990); David M. Walker, *The Lawyers of the Scottish Enlightenment and Their Influence on the American Constitution*, 1988 JURID. REV. 4.

<sup>56</sup> Although many originalists condemn the use of foreign laws and constitutions to interpret the U.S. Constitution, they tend to make an exception for foreign materials that were available in 1787 and familiar to the Framers, such as writings on the common law of England. See, e.g., John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 307 (2006) ("For originalists, using foreign or international law from the time a provision was framed can advance our understanding of the original meaning of the Constitution if it bears on the understanding of those who framed the provision. In fact, the Framers may themselves have used international and foreign law as policy arguments when they debated the ratification of the Constitution." (footnote omitted)); Justice Antonin Scalia, *Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts* (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305, 306 (2004).

<sup>57</sup> We should say a word about methodology. We have collected a good deal of evidence of Scottish influence on the generation that framed the Constitution. We think it appropriate, then, in attempting to recapture the ideas that animated the Framers, to concentrate on sources of Scottish law that were widely available in America and were known to have influenced members of the Philadelphia Convention. Ritz warned scholars not to assume that everything we know today was also known to the Framers. As Ritz put it, careful scholarship must demonstrate a nexus between "an eighteenth-century information source . . . and accessibility to the same information in

Part III begins our analysis of the Scottish legal system by comparing it to the system in England, circa 1770. In England, a number of superior courts of law, equity, and admiralty competed for business and encroached on one another's jurisdiction.<sup>58</sup> England thus lacked any institutional analogue to the Court of Session, which acted as the only supreme civil court of Scotland and exercised supervisory review over all inferior courts of any jurisdiction.<sup>59</sup> More strikingly, English courts owed their existence to royal prerogative and were subject to the sovereign power of Parliament.<sup>60</sup> The Court of Session, by contrast, enjoyed a measure of constitutional protection from parliamentary control in the provisions of the Acts of Union that secured its place atop the Scottish judicial hierarchy.<sup>61</sup>

Part IV then explains the significance of the Framers' knowledge of the Scottish legal system for the ongoing debate over the meaning of the spare and oft-mooted words of Article III. Contrary to those who view the hierarchical structure of Article III as unprecedented, we think the Scottish court system's hierarchical judiciary and single supreme civil court provided a concrete model for the Framing of Article III, including the Exceptions and Regulations Clause. In addition, we explore ways in which the Court of Session invoked its supervisory powers to ensure its supremacy in a range of cases that appeared to have been, at least nominally, placed beyond the Court's purview by legislative action.

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the United States." RITZ, *supra* note 3, at 32. We hope to meet this standard of demonstrable accessibility by confining ourselves to the materials that were both familiar to the Framers and actively used by them. Our emphasis on Lord Kames's *Historical Law-Tracts* and *Principles of Equity* and on the Acts of Union satisfies both of these criteria; as we shall explain, Wilson and Madison were both well versed in Kames and in Scottish institutions more generally, and Kames's works circulated widely throughout North America well before and well after the arrival of Blackstone's *Commentaries*. We have not yet found evidence that the Framers actively consulted Scottish precedents as they set quill to parchment in the summer of 1787, although they certainly had the opportunity to do so. But we invite attention to two facts: first, the important role that James Wilson played in drafting the judiciary article, and second, the striking similarity between Article III and the Acts of Union, with their use of supremacy, inferiority, and qualified legislative power to secure a hierarchical judicial system. If it does not quite prove a Scottish connection conclusively, the evidence certainly points to northern Britain.

<sup>58</sup> Jurisdictional competition may have been fueled to some extent by the English tradition of fee-paid judges, whose compensation was dependent on the amount of business they attracted. For accounts, see Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1182 (2007); James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 8-14 (2008) [hereinafter Pfander, *Judicial Compensation*].

<sup>59</sup> The closest analogue was King's Bench, which exercised broad supervisory authority over inferior tribunals through the prerogative writs of mandamus and habeas corpus, among others. We evaluate the hierarchical aspirations of some English jurists and the somewhat mixed reality below. See *infra* section III.A, pp. 1650-53.

<sup>60</sup> See *infra* note 239 and accompanying text.

<sup>61</sup> See Acts of Union (1707), *supra* note 15, art. XIX.

Part V briefly concludes with reflections on the place of English and Scottish precedents in debates over constitutional meaning.

## II. UNDERSTANDING SCOTTISH INFLUENCE DURING THE FOUNDING ERA

Many scholars and jurists today consider it axiomatic that the Framers derived their expectations for the practical operation of the federal judicial department primarily from the model of the English courts.<sup>62</sup> Justice Felix Frankfurter provided a well-known articulation of this view:

[T]he framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster . . . .<sup>63</sup>

Professor Raoul Berger echoed Justice Frankfurter's view thirty years later, capturing the overriding sentiments of contemporary scholars: "Given a document which employed familiar English terms — e.g., 'admiralty,' 'bankruptcy,' 'trial by jury,'" Berger argued, "it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation" of Article III.<sup>64</sup>

<sup>62</sup> See, e.g., Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 466 (1994) (highlighting "contemporaneous English legal dictionaries and abridgements, treatises, and judicial opinions" as informing the Framers' understanding of "legal words and concepts of adjudication" (footnotes omitted)); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 614 (2009) (describing Blackstone and Coke as the two "most influential English sources to which the Framers turned in shaping American law"). See generally George Jarvis Thompson, *The Development of the Anglo-American Judicial System* (pts. 1–3), 17 CORNELL L.Q. 9, 35–42, 203, 206–12, 395, 432–45 (1931–1932) (tracing the development of the English legal system and describing the English House of Lords as the precursor to the U.S. Supreme Court).

<sup>63</sup> *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

<sup>64</sup> Berger, *supra* note 2, at 816. As support, Berger quoted a strongly worded statement from Chief Justice Taft that bears mention here:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

*Id.* at 816 n.6 (quoting *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925)). Notably, Chief Justice Taft's reference to British institutions sweeps broadly enough to encompass the Scottish courts of Great Britain.

Along with Frankfurter and Berger, generations of American scholars and jurists have turned to Blackstone's *Commentaries* for insights into the Framers' understanding of the English legal heritage.<sup>65</sup> Blackstone's importance cannot be gainsaid. In contrast to the antiquated and abstruse *Coke on Littleton*,<sup>66</sup> Blackstone offered early Americans a straightforward and easily digestible summary of English law.<sup>67</sup> Moreover, the *Commentaries* influenced a period of rapid Anglicization of American common law in the late eighteenth and early nineteenth centuries.<sup>68</sup> Its timely appearance in the United States in 1770, on the eve of the American Revolution, makes the *Commentaries* a natural touchstone for modern efforts to understand English legal institutions at the time of the Framing. Supreme Court opinions, particularly those by originalist-minded Justices, often treat the *Commentaries* as a primary source for understanding the Framers' legal milieu.<sup>69</sup>

Yet the emphasis on English law as depicted in the *Commentaries* fails to capture the breadth of ideas and institutions that influenced the Framers' legal thought. The legal system in British North America during the colonial period did not simply reproduce in miniature the judicial institutions in England. Colonial legal institutions developed over a century and a half, and they often differed in material respects from the courts at Westminster and from each other.<sup>70</sup> Histo-

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<sup>65</sup> See, e.g., Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 561 (2006); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 731–32 (1976); Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 631–34 & n.15 (1933). For an account of the colonial appearance of English editions of the *Commentaries* in 1770, see HOEFLICH, *supra* note 1, at 26, 131–34. Blackstone published the four volumes of the *Commentaries* between 1765 and 1769, Nolan, *supra*, at 735, and over one thousand copies had sold in the colonies by the printing of the first American edition in 1771, *id.* at 737.

<sup>66</sup> Though he later held Coke in great esteem, when Thomas Jefferson was a law student he found Coke severely frustrating. "I do wish the Devil had old Cooke [sic]," Jefferson wrote, "for I am sure I never was so tired of an old dull scoundrel in my life." EDWARD DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 11 (1978) (internal quotation marks omitted). Justice Story described his own encounter with *Coke on Littleton* thusly: "[A]fter trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped upon the book, and stained its pages." GEORGE DARGO, *LAW IN THE NEW REPUBLIC* 51 (1983) (quoting ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 20 (1953)) (internal quotation mark omitted).

<sup>67</sup> See Nolan, *supra* note 65, at 764; Waterman, *supra* note 65, at 632 n.18.

<sup>68</sup> See Nolan, *supra* note 65, at 759–67; G. Edward White, *Law in American History: The Colonial Years* 63, 67 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2009-18, 2009), available at <http://ssrn.com/abstract=1471953>. On the Anglicization trend of the eighteenth and nineteenth centuries, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 5–6 (1977).

<sup>69</sup> For assessments of the influence of Blackstone, see Meyler, *supra* note 65, at 561, which discusses the central importance of Blackstone to Justice Scalia's method of originalism, and Nolan, *supra* note 65.

<sup>70</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 35 (2d ed. 1985); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE* 237 (2005); Julius Goebel, Jr., *King's Law and*

rians have shown that colonial lawyers had relatively few law books and only the most rudimentary system of legal education.<sup>71</sup> Under such conditions, early colonial Americans took the law where they could find it, often looking to whatever sources were available,<sup>72</sup> and often explicitly rejecting or altering the English legal system where it was found unsuitable to American conditions or unnecessarily complex and forbidding.<sup>73</sup> Even lawyers of the later colonial period, including such American patriots as Thomas Jefferson, John Adams, James Wilson, and George Wythe, did not study the law exclusively through Blackstone and had indeed completed their legal studies before the *Commentaries* arrived in America.<sup>74</sup> Instead, they drew upon a wide

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*Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 95 (Harry W. Jones ed., 1976) ("When the people of a particular colony set up simple legal institutions along the general lines of what they remembered from 'back home,' their model was not necessarily the Court of Common Pleas; it might have been some local tribunal in the English county or neighborhood from which that group of settlers had come. So law and legal institutions were very different from colony to colony in the seventeenth century, reflecting differences in historical experience, in soil and climate and in the religious and social views of the people." (citation omitted)); Rogers, *supra* note 55, at 234 n.163 (citing G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 6 (1960)); see also Ross, *supra* note 5, at 123 (noting that the English system of administrative oversight tended to respect the internal integrity of each body of colonial law instead of attempting to impose a continent-wide uniformity).

<sup>71</sup> See HOEFLICH, *supra* note 1, at 33–35 (describing the scarcity of law books and of legal booksellers in colonial America); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 157–87 (1911); Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 130–31 (1976); Waterman, *supra* note 65, at 631 n.14.

<sup>72</sup> See McKirdy, *supra* note 71, at 130 ("A shortage of law books stemming from the high price of importation from England plagued Massachusetts for most of the Eighteenth Century. For every Jeremy Gridley whose will revealed a library of almost 700 titles studded with the best English, ancient and continental authorities, there was a Nathan Tyler who could stuff his entire legal library in his saddlebags."); Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 684–85 (1914) (describing the heavy use of civil law authorities in early American case reports).

<sup>73</sup> See ROBERT B. KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE 54 (1986); Goebel, *supra* note 70, at 417–20; 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, 262–63 (Donald Fleming & Bernard Bailyn eds., 1971); L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250, 253 (1962) (describing the "selective adaptations of English practices" carried out in colonial New England); Herbert Alan Johnson, *John Jay: Colonial Lawyer* 121 (1965) (unpublished Ph.D. dissertation, Columbia University) (on file with the Harvard Law School Library).

<sup>74</sup> See, e.g., DUMBAULD, *supra* note 66, at 10; Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace (1763)*, 39 ARIZ. ST. L.J. 317, 319–20 (2007). While studying law, Wilson and Adams had read Blackstone's *Analysis of the Laws of England* (1754), a short work that preceded Blackstone's Vinerian lectures and the *Commentaries*, but they seemed to draw far more on other sources. See Letter from John Adams to Richard Rush (Feb. 16, 1814), in J.H. Powell, *Some Unpublished Correspondence of John Adams and Richard Rush*,

and diverse group of writers, ranging from Coke and Bacon to Hale and Kames,<sup>75</sup> from civil and Roman law writers to historians and political theorists.<sup>76</sup>

Central to legal study in the eighteenth century were such Roman law authorities as Cicero and Justinian and such natural and civil lawyers as Pufendorf, Grotius, Thomas Wood, and Vattel. When the young lawyer John Adams, for example, presented himself as a candidate for the bar, one of his interlocutors asked him what he had “lately read” in Latin.<sup>77</sup> The civil law — which formed the basis of admiralty law and the law of nations in England and the colonies<sup>78</sup> — had an enormous impact upon the Framers,<sup>79</sup> as did accounts of the Saxon

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1811–1816, Part II, 61 PA. MAG. HIST. & BIOGRAPHY 26, 39–40 (1937); James Wilson, Commonplace Book (unpublished James Wilson Papers) (located at the Historical Society of Pennsylvania, copies on file with the Harvard Law School Library); cf. Coquillette, *supra*, at 334 n.76 (“The first volume of Blackstone’s *Commentaries* did not appear until 1765, and there is no mention of it in Quincy’s *Law Commonplace*. There is a reference to Blackstone’s more rudimentary *Analysis of the Laws of England . . .*, but Quincy made little use of it, apparently preferring Wood’s ‘divisions’ and Hale’s system.” (citations omitted)).

<sup>75</sup> Cf. Meyler, *supra* note 65, at 582–84 (describing the frequent appearance of works by Coke, Hale, Wood, and Saint-Germain in eighteenth-century American libraries).

<sup>76</sup> See, e.g., DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION (2008); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 5–8 (1985).

<sup>77</sup> Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775*, in 62 PUBL’NS OF THE COLONIAL SOC’Y OF MASS., LAW IN COLONIAL MASSACHUSETTS 1630–1800, at 359, 363 (Daniel R. Coquillette et al. eds., 1984); see also John Adams, Diary Entry (Jan. 24, 1765), in 2 THE WORKS OF JOHN ADAMS 146–47 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1850) (describing the study of civil law in Adams’s legal circle); Coquillette, *supra*, at 363 (recounting Gridley’s emphasis of the civil law, Grotius, and Pufendorf in conversation with Adams). For an account of the extensive influence of the civil law upon Adams, see generally Coquillette, *supra*.

<sup>78</sup> See Coquillette, *supra* note 74, at 326; Joanne Mathiasen, *Some Problems of Admiralty Jurisdiction in the 17th Century*, 2 AM. J. LEGAL HIST. 215, 216 (1958) (describing some of the continental and civil law origins of admiralty law). On the origins of English admiralty law, see generally Lionel H. Laing, *Historic Origins of Admiralty Jurisdiction in England*, 45 MICH. L. REV. 163 (1946). On the development of admiralty jurisdiction in the colonies and in the early United States, see generally William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993); and Wroth, *supra* note 73. On the practices of the early federal courts applying civil law in admiralty cases, see STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING 57–59 (1991).

<sup>79</sup> See, e.g., GEORGE C. GROCE, JR., WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION 27 (1937) (cataloging the extensive collection of civil law books in the library of Federal Convention delegate W.S. Johnson); M.H. HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 51 (1997) (describing the connection between scholars and lawyers in America and civil and continental law); FORREST MCDONALD, ALEXANDER HAMILTON 52–53 (1979) (describing Vattel’s influence on Hamilton); Coquillette, *supra* note 74, at 322 (explaining that the eighteenth-century legal apprenticeship often included study of Roman law); *id.* at 326 (describing use of the civil law in the education of Josiah Quincy, Jr.); McKirdy, *supra* note 71, at 129 (describing William Smith’s suggested legal study program, which began with Wood’s *Civil Law*, Pufendorf, Grotius, and Domat’s *Civil Law*).

law.<sup>80</sup> Despite the focus of today's scholars on the common law, one cannot fully understand the Framers' legal studies without examining their interaction with non-common law sources. In many ways, the lawyers of the Founding generation saw these alternative legal models as complementary to English common law, rather than as competing with it, and they incorporated doctrines from these other models into American law whenever the occasion to do so arose.<sup>81</sup>

Scotland provided the Framers with a particularly influential collection of ideas and institutions. For starters, the great thinkers of the Scottish Enlightenment were closely read and studied in North America. In addition, Scots tutors and professors were central to the education of many of the most important members of the Founding generation. Finally, the patriots who theorized America's separation from England were intimately familiar with the way in which the Acts of Union framed Scotland's ties with England and drew freely on earlier forms of governmental structure in thinking through alternatives to parliamentary supremacy. This Part explores the nature and extent of Scottish influence in some detail and then reassesses Blackstone's role in the early republic.

#### A. *Scottish Influences on the Founding Generation*

Numerous scholars have explored the role played by the Scottish Enlightenment in the thinking of the Founding Fathers. Professor Garry Wills, for example, traces both the Declaration of Independence and Madison's writings in *The Federalist Papers* to Scottish intellectual origins.<sup>82</sup> Professor Douglass Adair similarly attributes Madison's *Federalist No. 10* to the influence of the Scot David Hume.<sup>83</sup> Several writers have noted James Wilson's use of Scottish "Common Sense" philosophy in developing his theories of natural law, popular sov-

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<sup>80</sup> Dating from the period before the Conquest in 1066, Saxon law was thought to offer an authentic source of common law ideas and exerted a powerful influence on such patriots as Thomas Jefferson, John Adams, and James Wilson. See, e.g., James Wilson, Lectures on Law Part 1 No. XII: Of the Common Law, in 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 334, 337–38, 347–52; James Wilson, Lectures on Law Part 2 No. I: Of the Constitutions of the United States and of Pennsylvania — Of the Legislative Department, in 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 399, 408; Gilbert Chinard, *Introduction to THE COMMONPLACE BOOK OF THOMAS JEFFERSON* 57 (Gilbert Chinard ed., 1926); David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in THE MANY LEGALITIES OF EARLY AMERICA 97, 114 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

<sup>81</sup> For some examples of such borrowing, see Coquillette, *supra* note 77, at 382–95, which chronicles John Adams's use of civil law in his private practice.

<sup>82</sup> WILLS, EXPLAINING, *supra* note 54 (describing influence on *The Federalist Papers*); WILLS, INVENTING, *supra* note 54 (describing influence on the Declaration of Independence).

<sup>83</sup> Adair, *supra* note 54.

ereignty, and political institutions.<sup>84</sup> Although Professor Gordon Wood has rightly cautioned against attempting to isolate a single influence from the array of ideas in play at the time,<sup>85</sup> no one doubts that Scottish Enlightenment philosophers and social scientists had earned a prominent place in the thinking of Framing-era Americans.<sup>86</sup>

Part of that influence stemmed from an influx of Scottish immigrants and royal officials during the eighteenth century and the proliferation of Scottish teachers in colonial American universities, primary schools, and private homes. According to Adair, the works of the major figures of the Scottish Enlightenment, such as David Hume, Adam Smith, Francis Hutcheson, Thomas Reid, Lord Kames, and Adam Ferguson, “had become the standard textbooks of the colleges of the late colonial period.”<sup>87</sup> At Princeton, the Scottish parson John Witherspoon, university president and later a delegate to the federal Constitutional Convention, steeped his students, including James Madison, in both Scottish social science and Whig politics.<sup>88</sup> At William and

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<sup>84</sup> See, e.g., Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind,"* 84 NW. U. L. REV. 186, 206 (1989); Leavelle, *supra* note 54; Arthur E. Wilmarth, Jr., *Evasive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 117 (2003).

<sup>85</sup> See Gordon S. Wood, *Heroics*, N.Y. REV. BOOKS, Apr. 2, 1981, at 16, 16 (reviewing WILLS, EXPLAINING, *supra* note 54).

<sup>86</sup> A previous study has concluded that the development of — and kinship between — the Enlightenment in Scotland and in America owed something to the fact that both places were essentially outlying provinces of England, the political, economic, and cultural hub of the British empire. On this view, folks in the province must attempt to make sense of both their provincial selves and their images of the world, leading perhaps to new views and new approaches that helped to foster creativity and originality. See John Clive & Bernard Bailyn, *England's Cultural Provinces: Scotland and America*, 11 WM. & MARY Q. 200 (1954). Although Scottish Enlightenment thinking played no direct role in the Framing of Article III, various features of the Enlightenment doubtless influenced the Framers. First, Scottish writers thought deeply about matters of governmental structure, and Francis Hutcheson, for example, reflected at some length about the obligations owed by the mother country to its colonies and dependencies. See Caroline Robbins, *"When It Is that Colonies May Turn Independent": An Analysis of the Environment and Politics of Francis Hutcheson (1694–1746)*, 11 WM. & MARY Q. 214 (1954). LaCroix has posited a Scottish influence on American thinking about federalism, see LACROIX, *supra* note 6, at 24–29, 87–88, 120–24, and we have found a similar influence on the structure of the judicial branch. Second, Scots law and legal institutions themselves drew heavily on Roman and civil law traditions. See Ewald, *Scottish Enlightenment*, *supra* note 31, at 1070–75, 1096–98 (tracing the influence of civil and Roman law in Scotland). Scots lawyers were often educated on the Continent, and they learned how to frame arguments based on principle rather than relying on the precedent-driven arguments of the English common lawyers. See *id.* at 1083, 1092–99. Wilson's own contributions to the Framing and early implementation of Article III reflect his Scottish legal training. For example, his most famous opinion as a Justice of the Supreme Court, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), appealed at greater length to first principles than to text, precedent, and history in rejecting the state's claim of sovereign immunity.

<sup>87</sup> Adair, *supra* note 54, at 345; see also Rogers, *supra* note 55, at 221 n.5.

<sup>88</sup> RALPH KETCHAM, *JAMES MADISON* 45 (1971) (describing the large number of Scottish books Witherspoon brought to Princeton); WILLS, EXPLAINING, *supra* note 54, at 18. On the heavily Scottish-focused nature of the education prevailing at Princeton and the influence of Wi-

Mary, another Scottish immigrant, Dr. William Small, exerted a similar influence upon the education of Thomas Jefferson.<sup>89</sup> As noted, James Wilson was born in Scotland and educated at St. Andrews University before emigrating to America.<sup>90</sup> Although Wilson's biographers have provided conflicting accounts of Wilson's education in Scotland,<sup>91</sup> new research from Professor Martin Clagett seems to establish that Wilson also attended the University of Glasgow, where he could have sat in on lectures given by Thomas Reid, Adam Smith, and John Millar, and where he apprenticed at law for three years.<sup>92</sup> Andrew Hamilton, attorney to John Peter Zenger in the famous Zenger Trial of 1735, was also a Scottish-educated immigrant.<sup>93</sup> Hamilton and Wilson were but two among many Scotsmen occupying important positions in the political life of the colonies.<sup>94</sup> And Jefferson, Madison, John Marshall, and Alexander Hamilton all were tutored from their earliest years largely at the hands of Scots.<sup>95</sup>

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therspoon and Scotland on Madison, see also Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AM. J. LEGAL HIST. 453, 458 n.15 (2010).

<sup>89</sup> See DUMBAULD, *supra* note 66, at 4–5.

<sup>90</sup> Professor Max Farrand describes Wilson's role at the convention as “[s]econd to Madison and almost on a par with him.” MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913). For a critique of Farrand's view and an argument that Wilson's contribution should be considered as distinct from and in many respects stronger than Madison's, see generally Ewald, *Drafting*, *supra* note 31.

<sup>91</sup> In the past, Wilson's biographers have disputed whether he also studied at Glasgow and Edinburgh. See GEOFFREY SEED, *JAMES WILSON* 3–4 (1978). Had he done so, he would have numbered some major Enlightenment figures among his teachers. See Walker, *supra* note 55, at 12–13 (speculating that Wilson may have been taught by John Millar or have attended Adam Smith's lectures on jurisprudence, and may have even encountered Kames and Hume); cf. Lord Mackenzie-Stuart, *Benjamin Franklin in Scotland*, 6 DENNING L.J. 119, 124 (1991) (conjecturing that Wilson may have met Benjamin Franklin at St. Andrews in 1759). Despite this disagreement, it has always been acknowledged that Wilson became acquainted with the philosophy of his countrymen. See Ewald, *Drafting*, *supra* note 31, at 902–03. After finishing his law apprenticeship to John Dickinson in Philadelphia, Wilson moved to Carlisle, Pennsylvania, a community flush with Scottish immigrants, to begin his law practice. SEED, *supra*, at 5, 192 n.13; see also CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742–1798*, at 205 (1956) (describing Wilson's involvement in the Scottish St. Andrew's Society in Philadelphia).

<sup>92</sup> Ewald, *Scottish Enlightenment*, *supra* note 31, at 1114. We are in Professor Clagett's debt for sharing with us his discoveries, which he will publish in a forthcoming book.

<sup>93</sup> See BURTON ALVA KONKLE, *THE LIFE OF ANDREW HAMILTON, 1676–1741*, at 5–8 (1941); Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY*, *supra* note 70, at 3, 27.

<sup>94</sup> See LACROIX, *supra* note 6, at 122 (“[T]hroughout the eighteenth century a corps of Scots and Scots-Irish officials had been involved in imperial administration, both at home in Great Britain and in North America. . . . This class of imperial middlemen brought with them a special appreciation for the many varieties of union, as well as a confederal vocabulary that was crucial for American federal thought.”).

<sup>95</sup> See 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 53, 57 (1916); DUMBAULD, *supra* note 66, at 3–4 (describing Jefferson's early education under William Douglas and James Maury); WILLS, *EXPLAINING*, *supra* note 54, at 63; *id.* at 66 (noting that King's College relied heavily upon Scottish social science and philosophy and that Hamilton's tutor

In addition, during the colonial era many wealthy colonial families sent their children abroad to study law and medicine.<sup>96</sup> Some students went to England — to study law as John Dickinson did at the Middle Temple, for example<sup>97</sup> — but a surprising number went to Scotland to study at the universities at Edinburgh and Glasgow.<sup>98</sup> In particular, many young men from the area of Virginia that was home to Jefferson, Madison, Marshall, George Washington, George Mason, and Patrick Henry were educated at Scottish universities.<sup>99</sup> For example, the Virginian Cyrus Griffin — a judge on the Federal Court of Appeals in *Cases of Capture*, president of the final Continental Congress from 1788–1789, and a United States district judge — studied law at the University of Edinburgh.<sup>100</sup> Benjamin Rush, who signed the Declaration of Independence and who was a member of the Pennsylvania constitutional ratifying convention, studied medicine there.<sup>101</sup>

Despite its acknowledged influence upon the Framers' philosophical and political thinking, Scotland's contributions to the legal systems of early America have attracted little scholarly attention.<sup>102</sup> Yet Scottish Enlightenment figures — many of whom were lawyers and jurists — were concerned to a large degree with public law, private law, and government.<sup>103</sup> Adam Smith and David Hume, for example, both wrote on the law: Smith delivered an important series of lectures on jurisprudence,<sup>104</sup> and Hume's *A Treatise of Human Nature* and *An Enquiry Concerning the Principles of Morals* treated natural law and

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there had attended the University of Glasgow); Rogers, *supra* note 55, at 221 n.7. The son of Marshall's Scottish tutor, Archibald Campbell, was "among the most distinguished lawyers of Virginia." 1 BEVERIDGE, *supra*, at 57.

<sup>96</sup> See 1 BEVERIDGE, *supra* note 95, at 24; FRIEDMAN, *supra* note 70, at 97.

<sup>97</sup> See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 547 n.152 (1990).

<sup>98</sup> See 1 BEVERIDGE, *supra* note 95, at 24; Walker, *supra* note 55, at 11 (describing Benjamin Franklin's role in sending American students to study in Scotland). With their growing commitment to free inquiry, Scottish universities were thought to offer a better education than the more hidebound and scholastic universities at Oxford and Cambridge. See Ewald, *Scottish Enlightenment*, *supra* note 31, at 1082–83.

<sup>99</sup> See 1 BEVERIDGE, *supra* note 95, at 24, 32.

<sup>100</sup> See HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT 117–18* (1977); Henry S. Rorer, *Cyrus Griffin: Virginia's First Federal Judge*, 21 WASH. & LEE L. REV. 201, 201–02, 206 (1964). Griffin left Scotland after eloping with the daughter of a Scottish earl, and he completed his legal education in England. Rorer, *supra*, at 202.

<sup>101</sup> Rogers, *supra* note 55, at 221 n.5.

<sup>102</sup> See *id.* at 205. *But see* Walker, *supra* note 55, at 25 ("[I]t is a reasonable inference from the evidence that the thinking and teachings and writings of some of the jurists and philosophers of the Scottish Enlightenment were among the influences on the minds of the draftsmen of the Constitution and of those who by their comments helped to settle that document.").

<sup>103</sup> See, e.g., Adair, *supra* note 54, at 345; Mackenzie-Stuart, *supra* note 91, at 119; Walker, *supra* note 55, at 4; Bertha Wilson, *The Scottish Enlightenment: The Third Shumiatcher Lecture in "The Law as Literature,"* 51 SASK. L. REV. 251, 253 (1987).

<sup>104</sup> Walker, *supra* note 55, at 13–14.

theories of justice extensively.<sup>105</sup> To be sure, Scottish private law never took hold in the United States during the nineteenth century in the way that Blackstone and the English common law did.<sup>106</sup> Nevertheless, Scottish legal writers had a significant impact upon the generation that wrote and ratified the Constitution.

To begin with, the large influx of Scottish immigrants, commerce with the mother isle, and a linguistic kinship nurtured connections between American and Scottish law throughout the colonial period. When James Alexander immigrated to New York from Scotland in 1715, for instance, he brought with him the largest law library in the colony.<sup>107</sup> Alexander, who went on to become a prominent attorney and a teacher to a number of New York's lawyers, made the library available to lawyers throughout the colony. Many of the important lawyers, judges, and government officials in the colony were frequent borrowers from Alexander's library, which included several books on Scottish law and government.<sup>108</sup>

The Scotsman Sir John Dalrymple's *An Essay Towards a General History of Feudal Property in Great Britain*<sup>109</sup> (*Feudal Property*), a history of the development of the feudal system in Great Britain and the legal systems of Scotland and England, sat on the bookshelves of many prominent lawyers and libraries in America.<sup>110</sup> Thomas Jeffer-

<sup>105</sup> See KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR* 9–10, 20 (1981).

<sup>106</sup> See Rogers, *supra* note 55, at 220. A variety of factors may have contributed to the comparative absence of Scottish influence on American common law. For one thing, in keeping with its civil law origins, the Court of Session tended to issue simple rulings as opposed to reasoned explanations of law of the kind that formed the backbone of the common law system of precedent. Law was more a matter of reasoning from first principles than applying a body of prior judicial opinions. See John W. Cairns, *Scottish Law, Scottish Lawyers and the Status of the Union, in A UNION FOR EMPIRE* 243, 261–62 (John Robertson ed., 1995). For another, Scots law itself tended to borrow English precedents in the wake of the Acts of Union, influenced both by the review of Session decisions in the House of Lords and by the ready availability of English decisional law. *Id.* at 248–50. English common law thus tended to capture both Scottish and American private law.

<sup>107</sup> PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 76 (1939).

<sup>108</sup> *Id.* at 77–78. In 1732, for example, Alexander purchased from Governor Montgomerie's estate *Acts of Parliament in Scotland, Stair's Institutes*, Sir Thomas Craig's *De Feudis, Scots Acts of Parliament*, "Craig of Homage," and *Old Laws and Constitutions of Scotland*. *Id.* app. VII at 193. At the same sale, John Miln purchased "Acts General Assembly of Scotland," "Acts &c. Meeting of the Estates in Scotland," and "Minutes of Parliament in Scotland." *Id.* app. VII at 194. A Scottish bookseller sold the first subscribed edition of Blackstone in 1770. See HOEFELICH, *supra* note 1, at 26, 131–34.

<sup>109</sup> DALRYMPLE, *supra* note 10.

<sup>110</sup> See, e.g., 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 317–18 (E. Millicent Sowerby ed., 1953); CATALOGUS BIBLIOTHECAE HARVARDIANAE CANTABRIGIAE NOV-ANGLORUM 83 (Boston, Thomae & Johannis Fleet 1790); THE CHARTER AND BYE-LAWS OF THE NEW-YORK SOCIETY LIBRARY 20 (New York, H. Gaine 1773); STEPHEN CLARK, A CATALOGUE OF THE ANNAPOLIS CIRCULATING LIBRARY 22 (Annapolis, Stephen Clark 1783); COX & BERRY, A CATALOGUE OF A VERY LARGE ASSORTMENT OF THE MOST ESTEEMED BOOKS 9, 30 (Boston, Cox & Berry 1772) (listing two copies of *Feudal Property* as well as a copy

son, for example, made extensive excerpts from *Feudal Property* in his commonplace book<sup>111</sup> and later included it in his recommended course of law studies for his cousin.<sup>112</sup> John Adams and his friends in the Sociability Club, a society formed by Adams, James Otis, and Jeremy Gridley to study the law, also read and discussed the work,<sup>113</sup> and James Wilson began his legal commonplace book (compiled under the tute-

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of Dalrymple's *Military Essays*); GARRAT NOEL & CO., A CATALOGUE OF BOOKS 9 (New York, H. Gaine 1759); NOEL & HAZARD, A CATALOGUE OF BOOKS 12 (New York, Inslee & Car. 1771). Dalrymple's *Memoirs of Great Britain and Ireland*, a history of the relationship among England, Scotland, and Ireland in the seventeenth century, was also available. See, e.g., *Books in Williamsburg*, 15 WM. & MARY Q. 100, 101 (1906) (listing Dalrymple's *Memoirs* among books for sale in Virginia in 1775).

<sup>111</sup> THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 80, §§ 569–584, at 135–62; Walker, *supra* note 55, at 23. A commonplace book was a journal kept by law students that kept a record of excerpts from, and comments upon, the books that the student read. See Coquillette, *supra* note 74, at 325. Jefferson made excerpts from Dalrymple's account of the Scottish court system in *Feudal Property*. See THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 80, § 584, at 160–62.

<sup>112</sup> W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA, 1779–1979, at 25–26 (1982) [hereinafter BRYSON, LEGAL EDUCATION] (citing Letter from Thomas Jefferson to John Garland Jefferson (June 11, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 480–82 (Julian P. Boyd ed., 1961)); see also Chinard, *supra* note 80, at 19–20 (“In [Dalrymple], Jefferson was able to find, historically established, the same principles as in Kames, with a much more precise and emphatic condemnation of the system of entails and primogeniture.”). Indeed, Jefferson's library contained an impressive number of books related to Scottish law and government, including Sir Robert Spottiswood's *Practicks of the Laws of Scotland* (1706), William Forbes's *Journal of the Sessions* (1714), Sir Thomas Craig's *Jus Feudale* (1732), and *Judgment of the Lords of Session in the Case of Hamilton and Douglass* (1768). See 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 110, at 210, 394–96. These and other works on Scottish law were also more widely available in America. See WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA No. 176, at 26 (1978) [hereinafter BRYSON, CENSUS] (listing *Laws of Scotland* (1744), probably one of the institutional works, see *infra* notes 118–122 and accompanying text); SAMUEL CAMPBELL, SALE CATALOGUE FOR 1787 No. 452, at 20 (New York, Samuel Campbell 1787) (listing Maclaurin's *Arguments and Decisions, in Remarkable Cases, Before the High Court of Justiciary in Scotland*); CATALOGUS BIBLIOTHECAE HARVARDIANAE, *supra* note 110, at 83 (listing Craig's *Jus Feudale* (1732) and Adam Ferguson's *Essay on the History of Civil Society* (1768)); CATALOGUS BIBLIOTHECAE LOGANIANAE 20 (Philadelphia, Peter Miller & Co. 1760) (listing Robert Brady's *Historical Treatise of English Cities and Boroughs and Their Constitution, with a Brief Account of the Burgh Laws of Scotland* (1722)); DAVID HALL, IMPORTED IN THE LAST VESSELS FROM EUROPE (Philadelphia, David Hall 1763) (listing Robertson's *History of Scotland* and Buchanan's *History of Scotland*); EDWIN WOLF II & KEVIN J. HAYES, THE LIBRARY OF BENJAMIN FRANKLIN 708 (2006) (listing *Scotland, Laws and Statutes* (1704)); *Books in Williamsburg*, *supra* note 110, at 102, 106 (listing Buchanan's *History of Scotland* and Robertson's *History of Scotland*); THE JOHN ADAMS LIBRARY, <http://www.johnadamslibrary.org/book/?book=2214489Adams> 91.5 Folio (last visited Mar. 26, 2011) (listing Murray's *The Laws and Acts of Parliament Made by King James the First, Second, Third, Fourth, Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second Who Now Presently Reigns, Kings and Queens of Scotland* (1681)); *The Library of George Wythe, Page Six*, THOMAS JEFFERSON'S LIBRARIES, <http://tjlibraries.monticello.org/transcripts/wythelibrary/6.html> (last visited Mar. 26, 2011) (listing Craig's *Jus Feudale*).

<sup>113</sup> John Adams, Diary Entry (Jan. 24, 1765), in 2 THE WORKS OF JOHN ADAMS, *supra* note 77, at 147.

lage of John Dickinson, a Philadelphia lawyer and Federal Convention member) with an excerpt from a chapter in *Feudal Property* entitled “Jurisdiction,”<sup>114</sup> which provides a sketch of the development of the Court of Session.<sup>115</sup>

Later, in his law lectures, Wilson made extensive use of Scottish works, such as those by Thomas Reid and Adam Smith,<sup>116</sup> and the writings on civil government and public law by John Millar.<sup>117</sup> Wilson’s lectures also referred to Lord Bankton’s *Institutes of the Law of Scotland*.<sup>118</sup> *Institutes* was one among a long series of “institutional” works on the Scottish law. These works are general treatises, ranging from Viscount Stair’s byzantine seventeenth-century tome, which was available and read in the colonies,<sup>119</sup> to the later, more streamlined works by Bankton, William Forbes, and John Erskine. The institutional works resemble (and generally precede) Blackstone’s *Commentaries*,<sup>120</sup> but they were not prominent in America in the eighteenth century.<sup>121</sup> Erskine’s work, however, gained more influence in the nineteenth century; Justice Story and James Kent both cited him ex-

<sup>114</sup> James Wilson, *Commonplace Book*, *supra* note 74 (quoting DALRYMPLE, *supra* note 10, at 308).

<sup>115</sup> See DALRYMPLE, *supra* note 10, at 295–300.

<sup>116</sup> See Robert Green McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 1, 15–16; James Wilson, *Considerations on the Bank of North America*, in 2 THE WORKS OF JAMES WILSON, *supra* note 30, at 824, 835–37.

<sup>117</sup> See Robert Green McCloskey, *A Note on the Text*, 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 49, 50; Walker, *supra* note 55, at 18. Millar’s writings were widely available in America. See Walker, *supra* note 55, at 23–24.

<sup>118</sup> BANKTON, *supra* note 10; see James Wilson, *Lectures on Law Part 2 No. VI: Of the Constituent Parts of Courts — Of Juries*, in 2 THE WORKS OF JAMES WILSON, *supra* note 30, at 503, 505; Robert Green McCloskey, *Bibliographical Glossary* to 2 THE WORKS OF JAMES WILSON, *supra* note 30, at 849, 853. Wilson cites the work as “M’D,” referring to Bankton’s given name of Andrew McDouall (or MacDowell).

<sup>119</sup> See, e.g., WARREN, *supra* note 71, at 181 (recounting Judge Parker’s reading list). A catalog from 1770 of the books in the library of Judge William Smith includes Dalrymple’s *Laws of Scotland*, which is probably Viscount Stair’s *Institute* (Stair’s given name was James Dalrymple). See HAMLIN, *supra* note 107, app. VII at 185.

<sup>120</sup> On the formal roots of the *Commentaries* and the Scottish institutional works, see John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 O.J.L.S. 318 (1984).

<sup>121</sup> Professor David Walker asserts that the institutional works were largely unavailable in America in the eighteenth century, though he appears to have missed Wilson’s use of Bankton. See Walker, *supra* note 55, at 9. In fact, as Wilson’s lectures suggest, the institutional works were known in America, albeit less widely or influentially than the works of Kames and Dalrymple. See ROBERT BELL, A CATALOGUE BOOKS OF A LARGE COLLECTION OF NEW AND OLD BOOKS No. 1514, at 54 (Philadelphia, Robert Bell 1783) (advertising Mackenzie’s *Institutions of the Law of Scotland*); CAMPBELL, *supra* note 112, No. 448, at 20 (advertising Erskine’s *Institute of the Law of Scotland*).

tensively, which led to modest use of his work as authority in American courts.<sup>122</sup>

Foremost among the Scottish legal writers read in America was Lord Kames, a leading figure in the Enlightenment and one of the most famous judges ever to sit on the Court of Session.<sup>123</sup> Kames's interests ranged widely, from agriculture to zoology, but one of his chief areas of study was the law. Through a series of works on Scottish and English law, primarily *Historical Law-Tracts*,<sup>124</sup> *Principles of Equity*,<sup>125</sup> and *Essays upon Several Subjects Concerning British Antiquities*<sup>126</sup> (*British Antiquities*), Kames melded legal doctrine with history, political science, and metaphysics in an attempt to provide a scientific explication of the law as it was and as he conceived it should be.<sup>127</sup>

Kames was well regarded in England, and his works were familiar to and admired by England's major legal figures.<sup>128</sup> Blackstone's *Commentaries*, for example, cites to *Historical Law-Tracts* and discusses *Principles of Equity*.<sup>129</sup> Lord Mansfield, the Scottish-born Chief Justice of King's Bench, read widely in Kames and other Scottish legal writers, and he attempted to emulate Scotland's merger of law and equity by importing equitable principles into his common law decisions.<sup>130</sup> And Jeremy Bentham, echoing the sentiments of many of the Founding Fathers, "viewed Kames's writings as a 'vital corrective' to Blackstone."<sup>131</sup>

Although Kames has been largely forgotten by American legal scholars today, his works were widely read in revolutionary America<sup>132</sup>

<sup>122</sup> Helmholz, *supra* note 55, at 178–80; Rogers, *supra* note 55, at 207–08, 224 nn. 40–43; see also HOEFLICH, *supra* note 79, at 30 (noting that Story cited Erskine and Viscount Stair).

<sup>123</sup> For descriptions of Kames's life and works, see generally IAN SIMPSON ROSS, LORD KAMES AND THE SCOTLAND OF HIS DAY (1972); and WALKER, *supra* note 7, at 220–47.

<sup>124</sup> 1 KAMES, *supra* note 8.

<sup>125</sup> KAMES, *supra* note 9.

<sup>126</sup> HENRY HOME, LORD KAMES, ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES (London, M. Cooper, 2d ed. 1749).

<sup>127</sup> See ROSS, *supra* note 123, at 202–46; WALKER, *supra* note 7, at 227–30.

<sup>128</sup> See, e.g., MICHAEL C. MESTON ET AL., THE SCOTTISH LEGAL TRADITION 52 (Scott Crichton Styles ed., new enlarged ed. 1991); WALKER, *supra* note 7, at 229, 232.

<sup>129</sup> See 3 BLACKSTONE, *supra* note 7, at \*49 (citing 1 KAMES, *supra* note 8, at 325, 330; KAMES, *supra* note 9, at 44); *id.* at \*430, \*433, \*441 (contesting Kames's arguments in *Principles of Equity*); see also Julian S. Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549, 561 (1934) ("[Blackstone] did not believe, as did Lord Kames whose statements he was refuting, that it was the business of a court of equity to abate the rigor and harshness of the common law nor did he believe that the common law courts were characterized by harsh and illiberal principles." (footnote omitted)); cf. Sir W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1929) (critiquing Blackstone's understanding of equity).

<sup>130</sup> ROSS, *supra* note 123, at 237–42; Waterman, *supra* note 129, at 559, 562–63, 566–67.

<sup>131</sup> Peter Charles Hoffer, Book Review, 11 LAW & HIST. REV. 183, 185 (1993) (reviewing and quoting DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 145 (1989)).

<sup>132</sup> *Historical Law-Tracts*, *Principles of Equity*, and *British Antiquities* were widely available in America, through booksellers and libraries and in private collections, from the early 1760s

and exerted a profound influence during the period surrounding the formation of the American republic.<sup>133</sup> In the era before Blackstone's *Commentaries* and Justice Story's *Commentaries on Equity Jurisprudence*, many American lawyers and students turned to Kames's works and seemed to view them not as an interesting specimen of foreign law, but as a part of the law as received from the mother country.

During his trips to Scotland in 1759 and 1771, Benjamin Franklin became acquainted with most of the major figures of the Scottish Enlightenment, and he forged a personal friendship with Lord Kames. Indeed, Franklin stayed at Kames's estate, and the two maintained a long correspondence.<sup>134</sup> As a result of this friendship, Franklin, a delegate to the Federal Convention, brought *Historical Law-Tracts* and

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through the time of the Framing. See, e.g., John Adams, Diary Entries (Jan. 24 & Feb. 21, 1765), in 2 THE WORKS OF JOHN ADAMS, *supra* note 77, at 146–49 (noting discussions in the private legal club Sodalitas of *Historical Law-Tracts* and *British Antiquities*); ROBERT BELL, SALE CATALOGUE OF A COLLECTION OF NEW AND OLD BOOKS No. 272, at 14 (Philadelphia, Robert Bell 1773) (listing *Historical Law-Tracts*); BRYSON, CENSUS, *supra* note 112, No. 59, at 8 (listing Kames's *Decisions of the Court of Sessions*); *id.* Nos. 430, 431, at 59 (*Historical Law-Tracts* and *Principles of Equity*); CAMPBELL, *supra* note 112, No. 458, at 21 (*Principles of Equity*); A CATALOGUE OF THE BOOKS, BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA No. 225, at 223 (Philadelphia, Zachariah Poolson 1789) (listing *Principles of Equity*); *id.* No. 615, at 231 (listing *Historical Law-Tracts*); CATALOGUS BIBLIOTHECAE HARVARDIANAE, *supra* note 110, at 80 (listing *Historical Law-Tracts*); *id.* at 85 (listing *Principles of Equity*); THE CHARTER, LAWS, AND CATALOGUE OF BOOKS, OF THE LIBRARY COMPANY OF PHILADELPHIA No. 192, at 29 (Philadelphia, B. Franklin & D. Hall 1764) (listing *Principles of Equity*); GARRAT NOEL & CO., A CATALOGUE OF BOOKS 21 (New York, H. Gaine 1762) (listing *Historical Law-Tracts*); HALL, *supra* note 112 (listing *Historical Law-Tracts*); HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700–1799, at 34–35 (1978) (listing *British Antiquities* in the libraries of Adams, Jefferson, and St. George Tucker; *Historical Law-Tracts* in the libraries of Adams and Jefferson; and *Principles of Equity* in the libraries of Jefferson and Jasper Yeates); NOEL & HAZARD, *supra* note 110, at 12 (listing *Historical Law-Tracts*); JAMES RIVINGTON, A CATALOGUE OF BOOKS SOLD BY RIVINGTON AND BROWN No. 732, at 64 (Philadelphia, James Rivington 1762) (listing *Historical Law-Tracts*). The library that Jefferson sold to Congress in 1815 included *Historical Law-Tracts* and *British Antiquities*, as well as Kames's *Remarkable Decisions of the Court of Session*, *Scotch Acts*, *Dictionary of Decisions*, and three editions of *Principles of Equity*. CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 110, at 192–93, 200, 318–19, 394, 395–96. The extant catalogs of private and public collections are but a portion of the books actually in America at the time, as many records were lost or destroyed. See BRYSON, CENSUS, *supra* note 112, at x–xi; *Inventory of Books Received by Thomas Jefferson from the Estate of George Wythe, Circa September 1806*, MASS. HIST. SOC'Y, [http://www.masshist.org/database/img-viewer.php?item\\_id=1768&img\\_step=1&nmask=24&tpc=&mode=large&tpc=#page1](http://www.masshist.org/database/img-viewer.php?item_id=1768&img_step=1&nmask=24&tpc=&mode=large&tpc=#page1) (last visited Mar. 26, 2011) (listing *Principles of Equity* among George Wythe's legal books).

<sup>133</sup> WALKER, *supra* note 7, at 241; Rogers, *supra* note 55, at 209 & n.55 (citing WILLIAM C. LEHMANN, HENRY HOME, LORD KAMES, AND THE SCOTTISH ENLIGHTENMENT 217–18 (1971); ROSS, *supra* note 123, at 218–19).

<sup>134</sup> Mackenzie-Stuart, *supra* note 91, at 123–28. In fact, Franklin's appellation "Dr. Franklin" came from the honorary degree of Doctor of Laws bestowed upon him by the Scottish University of St. Andrews — James Wilson's alma mater — upon Franklin's visit in 1759. *Id.* at 121.

*Principles of Equity* with him when he returned to America in 1762.<sup>135</sup> In a letter to Kames, Franklin wrote:

I am now reading with great pleasure and improvement your excellent work, *The Principles of Equity*. It will be of the greatest advantage to the judges in our colonies, not only in those which have Courts of Chancery, but also in those which, having no such courts, are obliged to mix equity with the common law. It will be of more service to the colony judges, as few of them have been bred to the law. I have sent a book to a particular friend, one of the Judges of the Supreme Court in Pennsylvania.<sup>136</sup>

Kames's influence in America widened throughout the 1760s. Wilson, Madison, Jefferson, and Adams all referred to Kames in their writings on law and government, and all engaged deeply with his work during their legal studies. In a diary entry from 1765, for example, John Adams referred to Kames in a manner suggesting that he and his colleagues in the Sodality Club had studied Kames's writings extensively. Of particular note is Adams's recollection of his statement to the group that "Kames has given us the introduction of the feudal law into Scotland."<sup>137</sup> In the course of his discussions in the Club, Adams recalled, "I quoted to my brothers the preface to the *Historical Law Tracts*,"<sup>138</sup> and later, he "might have quoted Lord Kames's *British Antiquities*" on the oppressiveness of the theory underlying the British feudal system.<sup>139</sup> Adams's *Dissertation on the Canon and the Feudal Law* also quotes *British Antiquities* approvingly.<sup>140</sup>

As a law student under George Wythe (a judge on the Chancery Court of Virginia and a member of the Federal Convention), Jefferson devoted a considerable portion of his legal commonplace book to Kames's discussions in *Historical Law-Tracts* of criminal law, property, promises and covenants, securities, inheritance, and courts, and he devoted almost half of his equity commonplace to gleanings from *Principles of Equity*.<sup>141</sup>

<sup>135</sup> *Id.* at 125.

<sup>136</sup> WALKER, *supra* note 7, at 233 (quoting Letter from Benjamin Franklin to Henry Home, Lord Kames (May 3, 1760), in 1 ALEXANDER FRASER TYTLER (LORD WOODHOUSELEE), MEMOIRS OF THE LIFE AND WRITINGS OF THE HONOURABLE HENRY HOME OF KAMES 269 (Edinburgh, William Creech 1807)).

<sup>137</sup> John Adams, Diary Entry (Jan. 24, 1765), in 2 THE WORKS OF JOHN ADAMS, *supra* note 77, at 147. Adams also refers to Robertson's *History of Scotland* and to Dalrymple. *Id.*

<sup>138</sup> John Adams, Diary Entry (Feb. 21, 1765), in 2 THE WORKS OF JOHN ADAMS, *supra* note 77, at 148.

<sup>139</sup> *Id.* at 149.

<sup>140</sup> John Adams, A Dissertation on the Canon and the Feudal Law (Aug. 1765), in 3 THE WORKS OF JOHN ADAMS 454 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851).

<sup>141</sup> THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 80, §§ 557–568, at 95–135; Douglas L. Wilson, *Thomas Jefferson's Early Notebooks*, 42 WM. & MARY Q. 433, 446 (1985) (describing Jefferson's use of *Historical Law-Tracts*); *id.* at 449–50 (stating that Jefferson "copied over 30,000 words, or nearly half the entire manuscript," *id.* at 450, of his equity commonplace

Kames's influence persisted even after the arrival of Blackstone's *Commentaries*, the first American edition of which was published in 1771.<sup>142</sup> In a series of letters and papers, Jefferson advised young lawyers to study Kames in their preparation for the law, recommending both his philosophical works and *Principles of Equity*, *Historical Law-Tracts*, and *British Antiquities*.<sup>143</sup> Another reading list, prescribed by Judge Parker of New Hampshire for Ezra Stiles, Jr., in 1778, included "Kames' *History of Law*" (*Historical Law-Tracts*) and Stair's *Institutions of the Law of Scotland*.<sup>144</sup> As a practicing attorney in 1784, Alexander Hamilton wrote a brief in the case of *Rutgers v. Waddington* that cited almost exclusively to *Principles of Equity*.<sup>145</sup> And when John Marshall, who briefly attended George Wythe's law lectures before completing his legal studies alone,<sup>146</sup> was establishing his law practice, three of the first law books that he purchased were Blackstone's *Commentaries*, Montesquieu's *The Spirit of Laws*, and *Principles of Equity*.<sup>147</sup> Still later, Justice Story made extensive use of *Principles* in a number of his commentaries.<sup>148</sup>

Most importantly, Kames's legal writings were well known to and were used by Madison and Wilson, the two central architects of the Constitution. Following his education at Princeton under Witherpoon, James Madison referred to the works of Kames in his corres-

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book from *Principles of Equity*); see also GILBERT CHINARD, THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM 28-32, 50 (1929) ("[Jefferson] carefully went through Lord Kames' 'Historical Law Tracts' and studied from him the history of criminal law, promises and covenant, property, securities upon land, courts, briefs. It is in Kames that he found a definition of society which he could have written himself and which expresses his political individualism and subordination to law . . . ." *Id.* at 29.); WILLS, INVENTING, *supra* note 54, at 173 ("Most of [Jefferson's] later ideas on private property (107-20), entail (137-49) and inheritance (149-68) are traceable to the passages quoted here from Lord Kames and Sir John Dalrymple."); Chinard, *supra* note 80, at 16-20, 57 ("[I]t cannot be doubted that the Scottish Lord was for [Jefferson] a master and a guide." *Id.* at 19.); Wilson, *supra*, at 446 ("[Kames and Dalrymple] no doubt influenced Jefferson's hostility to feudalism and to the law of entails, and Dalrymple was surely a prime source for the version of the 'Saxon myth' to which Jefferson wholeheartedly subscribed."). As professor of law at the College of William and Mary, Wythe instructed a large number of luminaries in the new republic, including John Marshall, St. George Tucker, John Breckenridge, John J. Crittenden, Henry Clay, and Spencer Roane. Morris, *supra* note 93, at 17-18. According to Chinard and Dumbauld, Jefferson's course of law study was guided (if not entirely dictated) by Wythe. See CHINARD, *supra*, at 27-28; DUMBAULD, *supra* note 66, at 5.

<sup>142</sup> See Nolan, *supra* note 65, at 737.

<sup>143</sup> Walker, *supra* note 55, at 23; see Letter from Thomas Jefferson to John Minor (Aug. 20, 1814), reprinted in Morris L. Cohen, Commentary, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 839-44 (1971).

<sup>144</sup> WARREN, *supra* note 71, at 181; Simeon E. Baldwin, *The Study of Elementary Law, the Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 3 n.\* (1903). On Stair, see *supra* note 119 and accompanying text.

<sup>145</sup> 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 338-39 (Julius Goebel, Jr., ed., 1964).

<sup>146</sup> 1 BEVERIDGE, *supra* note 95, at 154-61.

<sup>147</sup> *Id.* at 184-85.

<sup>148</sup> Rogers, *supra* note 55, at 225 n.51.

pondence “with that easy familiarity that assumes writer and reader have a thorough knowledge of the author[] mentioned.”<sup>149</sup> Two years after he began studying the law, Madison cited Kames’s *Principles of Equity* alongside Francis Bacon as guiding authority in a discussion of how to structure the judicial system of Kentucky.<sup>150</sup> Similarly, Wilson read Kames as a legal apprentice and returned to these works throughout his life.<sup>151</sup> In his law lectures, Wilson cites extensively to Kames, including to *Historical Law-Tracts* and *Principles of Equity*,<sup>152</sup> and he seems to have modeled the plan of his lessons — which blended law, history, and philosophy — after the former work in both inspiration and subject matter.<sup>153</sup> At the end of his opening lecture, in fact, Wilson stated that his instruction was intended to follow in large part the principles of law laid down by three men: Bacon, Bolingbroke, and Kames.<sup>154</sup>

### B. Reassessing Blackstone’s Influence

Blackstone’s omission from Wilson’s triad deserves special attention. Even though Americans of the Founding generation eagerly purchased and read Blackstone, they also registered their suspicions of his writings on public law and his effusive praise of the English government and legal system. In part this distrust was a manifestation of the newly independent American nation’s complex attitude toward England and English-derived common law.<sup>155</sup> Wilson’s suspicion reflected a commonly held view that Blackstone’s vision of sovereignty and par-

<sup>149</sup> KETCHAM, *supra* note 88, at 48.

<sup>150</sup> See Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 26, 29 (Marvin Meyers ed., Brandeis Univ. Press rev. ed. 1981) (1973).

<sup>151</sup> See SMITH, *supra* note 91, at 28; *id.* at 206 (stating that “of first importance to [Wilson] were the philosophers of the Scottish Renaissance,” including Kames, Archibald Campbell, Hutcheson, Hume, Stewart, Millar, and Thomas Reid); *id.* at 224 (describing Wilson’s use of Reid’s work during the convention debate on the method of choosing the President).

<sup>152</sup> *E.g.*, James Wilson, Lectures on Law Part 1 No. III: Of the Law of Nature, in 1 *THE WORKS OF JAMES WILSON*, *supra* note 30, at 126, 139 (citing *Principles of Equity*); Wilson, Lectures on Law Part 2 No. III, *supra* note 30, at 484–85 (discussing *Principles of Equity*); James Wilson, Lectures on Law Part 3 No. I: Of the Nature of Crimes; and the Necessity and Proportion of Punishments, in 2 *THE WORKS OF JAMES WILSON*, *supra* note 30, at 611, 613 (citing *Historical Law-Tracts*).

<sup>153</sup> *Cf.* Walker, *supra* note 55, at 18 (observing that “the general tenor of [Wilson’s] lectures suggests that he relied . . . on *Historical Law Tracts*”).

<sup>154</sup> James Wilson, Lectures on Law Part 1 No. I: Of the Study of the Law in the United States, in 1 *THE WORKS OF JAMES WILSON*, *supra* note 30, at 69, 91.

<sup>155</sup> See Pound, *supra* note 72, at 681 (noting that “the colonists had brought with them the common law, as a much-prized heritage,” but that in the postrevolutionary years “[p]olitical conditions gave rise to distrust of English law”); *id.* at 691 (“After the Revolution Jefferson insisted that the colonists had brought with them, not the common law, but the rights of man and the law of nature.”); Waterman, *supra* note 65, at 630 & n.12 (noting the political debate over the proper influence of English law).

liamentary supremacy was unsuited in many material respects to the creation of a republican system of government.<sup>156</sup>

This suspicion is clearly visible in Wilson's lectures. According to Wilson, "the principles of our constitutions and governments and laws are materially *better* than the principles of the constitution and government and laws of England."<sup>157</sup> To prove his point, Wilson launched into an extensive refutation of Blackstone's ideas on popular sovereignty, concluding: "I cannot consider him as a zealous friend of republicanism."<sup>158</sup> Although Blackstone provided a fine survey of the common law,<sup>159</sup> his writings on public law and government were built upon "unsound and dangerous principles"<sup>160</sup> and were primarily valuable as "materials of contrast."<sup>161</sup> Blackstone, Wilson wrote, "deserves to be much admired; but he ought not to be implicitly followed."<sup>162</sup> Wilson therefore criticized both Blackstone's writings and the judicial system's place within the English constitution, and he defended the institution of judicial review from Blackstone's notions of parliamentary supremacy.<sup>163</sup> John Adams also preferred other legal writers to Blackstone and — echoing Wilson — stated: "We should be grateful to Blackstone, without adoring him."<sup>164</sup>

Blackstone's most implacable enemy on this side of the Atlantic, however, was Thomas Jefferson, who distrusted Blackstone throughout his life and later came to despise him with an almost devotional furor.<sup>165</sup> In a series of letters, Jefferson lamented the influence of

<sup>156</sup> HULSEBOSCH, *supra* note 70, at 297–98; *see also id.* at 215 (noting that the Federalists drew upon a range of sources wider than English tradition). To be sure, many prominent Americans, including the author of the definitive Founding-era account of the new federal judiciary — Alexander Hamilton — regarded the English constitution as well balanced and deserving of emulation. *See* MCDONALD, *supra* note 79, at 57–62. Even as dedicated an Anglophile as Hamilton, however, desired to refashion the relationship between the legislature and the judiciary. *See id.* at 62.

<sup>157</sup> Wilson, Lectures on Law Part 1 No. I, *supra* note 154, at 77.

<sup>158</sup> *Id.* at 79.

<sup>159</sup> *See id.* at 80.

<sup>160</sup> James Wilson, Lectures on Law Part 1 No. V: Of Municipal Law, *in* 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 168, 193.

<sup>161</sup> Wilson, Lectures on Law Part 1 No. I, *supra* note 154, at 80.

<sup>162</sup> *Id.*

<sup>163</sup> *See* Wilson, Lectures on Law Part 1 No. V, *supra* note 160, at 168–94; James Wilson, Lectures on Law Part 1 No. XI: Comparison of the Constitution of the United States, with that of Great Britain, *in* 1 THE WORKS OF JAMES WILSON, *supra* note 30, at 309, 324–31. For a discussion of Wilson's views on Blackstone, *see* Conrad, *supra* note 84, at 197–203.

<sup>164</sup> Letter from John Adams to Richard Rush (Feb. 16, 1814), *supra* note 74, at 40.

<sup>165</sup> Konig, *supra* note 80, at 106 ("[Jefferson] came to regard the two giants of eighteenth-century common law, Mansfield and Blackstone, as twin demons whose judicial alterations violated the deepest principles of popular sovereignty and the legitimacy of the rule of law. Frustrated by resistance to more radical law reform in the 1780s, Jefferson blamed the 'sly poison' of Mansfield, which had been 'admirably seconded by the celebrated Dr. Blackstone.' But his misgivings had begun much earlier, with his law studies, and had intensified when his legal expertise

Blackstone, whose “honied Mansfieldism” Jefferson thought had made Tories of the members of the American legal profession.<sup>166</sup> To limit Blackstone’s reach, Jefferson frequently attempted to exclude the *Commentaries* (with the exception of St. George Tucker’s republica- nized version) from schools and courts.<sup>167</sup> In part, Jefferson’s animosi- ty was motivated by a feeling that the *Commentaries* were “nothing more than an elegant digest of . . . the real fountains of the law,” such as Coke.<sup>168</sup> But in greater part, as he expressed in an 1826 letter to James Madison, Jefferson feared that republican principles had been supplanted in legal education by Blackstone’s more conserv- ative views, a development that endangered the liberty of the new republic.<sup>169</sup>

With their shared distrust of Blackstone’s prescriptions on ques- tions of judicial review, legislative supremacy, and constitutionalism, Wilson, Adams, and Jefferson gave voice to a fundamental revolu- tionary American mindset that arose from a long-running colonial struggle to articulate limits on the power of Parliament.<sup>170</sup> Indeed, just as Blackstone was describing a view of parliamentary supremacy that was rapidly gaining orthodox status in the imperially minded England of the 1760s,<sup>171</sup> Americans were turning to a different model

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drew him into the imperial debate.” (quoting Letter from Thomas Jefferson to John Brown Cut- ting (Oct. 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 112, at 649; Letter from Thomas Jefferson to Philip Mazzei (Nov. 28, 1785), in 9 THE PAPERS OF THOMAS JEF- FERSON, *supra* note 112, at 67, 71). On the other side of the ocean, Jeremy Bentham was not particularly fond of Blackstone either. See Cairns, *supra* note 120, at 318–19.

<sup>166</sup> Waterman, *supra* note 65, at 635 (quoting Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in 12 THE WORKS OF THOMAS JEFFERSON 455, 456 (Paul Leicester Ford ed., Federal ed. 1905)).

<sup>167</sup> *Id.* at 634–38.

<sup>168</sup> *Id.* at 637 (quoting Letter from Thomas Jefferson to Judge John Tyler (May 26, 1810), in 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 166, at 142 n.1).

<sup>169</sup> *Id.* at 635. See also DUMBAULD, *supra* note 66, at 9 (“[Jefferson] deprecated the prevalent view ‘that . . . everything which is necessary is in [Blackstone], and what is not in him is not necessary. . . .’” (quoting Letter from Thomas Jefferson to Judge John Tyler, *supra* note 168)).

<sup>170</sup> See MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION 186–96 (2004); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 395–406 (2008); HULSEBOSCH, *supra* note 70, at 238 (“[W]hile parliamentary supremacy was becoming orthodox in Great Britain, it was never so throughout the British Empire. Most people in the new states remained devoted to the idea that there were fundamental restraints on all government, including legislatures.”). This mindset surfaced more prominently in Hamilton’s statements in *The Federalist No. 78* and in John Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>171</sup> For Blackstone and many others in England, the British constitution reached its zenith in the Glorious Revolution of 1688, which displaced forever the absolutist ambitions of the Stuart kings and erected in their place a model of parliamentary supremacy that achieved an ideal balance among the competing interests of the crown, the aristocrats, and commons. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 10–18 (2d ed. 1998); cf. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 20 n.115 (1996) (noting Blackstone’s statement “that the king, the lords spiritual and temporal, and the House of Com- mons ‘form a mutual check upon each other’ and ‘[l]ike three distinct powers in mechanics, they

more suited to their notions of autonomy: that of the Scottish government between the union of the crowns in 1603 and the union of the Parliaments in 1707. In 1603, James VI of Scotland inherited the English throne from Elizabeth I and became King James I of England. But although Scotland and England then shared a common monarch, their governments and national identities remained separate: “[E]ach nation retained its own parliament and thus its legislative sovereignty.”<sup>172</sup> With the exception of enforced union during Oliver Cromwell’s protectorate,<sup>173</sup> full incorporation between England and Scotland did not occur until the Parliaments of the two nations negotiated and implemented the Treaty of Union — through legislation known as the Acts of Union — in 1707, which reformed the separate legislative institutions as one Parliament of the new nation of Great Britain.<sup>174</sup>

In an important recent book, Professor Alison LaCroix argues that the Scottish model formed one of the conceptual foundations of both early notions of colonial independence and the federal system of divided sovereignty and authority across different levels and branches of government.<sup>175</sup> A vision of the “halcyon century” of Scottish legislative independence loomed large in revolutionary America, and indeed Wilson, Jefferson, and Adams made that precedent central to their insistence that, notwithstanding the allegiance owed to the Crown, their colonial legislative bodies were independent and not subject to parliamentary control.<sup>176</sup> For Wilson, Adams, Jefferson, and others, the question of Parliament’s power over the colonies was fundamentally about the possibility of divided sovereignty in a state, and two centuries of discussion about the relationship between Scotland and England before and after the Acts of Union formed the predicate for an alternative model to Blackstone’s assertions of legislative supremacy. The Scottish model helped the Framers to see that supremacy and sovereignty, far from being monolithic, might be divided between the federal and state governments and among legislative, executive, and judicial branches of government.<sup>177</sup>

With this more complete background, we can better appreciate the influence of Blackstone and of the Westminster model on the Constitution. The misgivings of Adams, Jefferson, and Wilson confirm that Blackstone was not met with universal acceptance among the Found-

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jointly impel the machine of government in a direction different from what either acting by itself would have done but at the same time in a direction partaking of each and formed out of all” (quoting 1 BLACKSTONE, *supra* note 7, at \*154–55) (alteration in original)).

<sup>172</sup> LACROIX, *supra* note 6, at 25.

<sup>173</sup> See 4 WALKER, *supra* note 8, at 153–63.

<sup>174</sup> See *supra* notes 14–15 and accompanying text.

<sup>175</sup> LACROIX, *supra* note 6, at 24–29, 87–88, 120–24.

<sup>176</sup> See *id.* at 120.

<sup>177</sup> *Id.* at 29.

ing generation, particularly on such subjects as sovereignty and parliamentary supremacy. Indeed, Professor Dennis Nolan concludes that Blackstone had little direct impact upon the formation of the Constitution. According to Nolan's careful study of Blackstone's influence, the members of the Federal Convention used the *Commentaries* less as a structural model or template and more as a law dictionary.<sup>178</sup> Nolan observes, however, that because Blackstone was so widely read in the early republic and in the nineteenth century, his work had an "indirect and delayed" influence upon the lawyers and judges who were to interpret the Constitution.<sup>179</sup> "If we read the Constitution today as if it were written by Blackstone," Nolan explains, "it is only because the Constitution has been interpreted by generations of judges trained on the *Commentaries*."<sup>180</sup>

In fact, it was not until well after the adoption of the Constitution, in part through the efforts of Justice Story and James Kent to create a uniform American private law jurisprudence modeled after the English common law,<sup>181</sup> that Blackstone attained his mythical status as expounder of the law as the Framers understood it.<sup>182</sup> Because of the need for a stable and well-developed body of legal principles, American private law in the nineteenth century ultimately embraced and followed — with some modifications — the path laid down by the English common law.<sup>183</sup> Thus, when it came to the basic principles of property or contract law, Blackstone's codification of the English common law claimed a dominant position in Americans' understandings, which in turn fueled the assumption that Blackstone was equally important at the time of the Framing. But as we have seen, the Framers felt free to depart from English structures; they not only distrusted the English, but also shared the heady notion that they were crafting a government that would assimilate and improve upon the wisdom of the ages.

In other words, although *private* law continued down the common law path, the Framers crafted a *public* law system that diverged mate-

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<sup>178</sup> See Nolan, *supra* note 65, at 745–47 (“[W]hen citation to the *Commentaries* was made, it was usually shorthand reference to a noncontroversial rule or to a point of history.” *Id.* at 746.).

<sup>179</sup> *Id.* at 747.

<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., HULSEBOSCH, *supra* note 70, at 277–95; Pound, *supra* note 72, at 682, 692.

<sup>182</sup> See Nolan, *supra* note 65, at 747.

<sup>183</sup> See DARGO, *supra* note 66, at 8 (“The American Revolution had a deep, abiding, and immediate impact on American public law. In terms of private law, however, its effects were less dramatic and direct.”); *id.* at 57; Jones, *supra* note 70, at 108 (“The American Revolution was receding into the past, and Blackstone, the Dr. Spock of early American law, had exerted his incomparable influence on American legal thought. To a lawyer brought up on Blackstone’s *Commentaries*, as practically all lawyers were in the frontier states, English law was almost the immutable law of nature, certainly nothing for a self-taught country lawyer to quarrel with.”) (citation omitted).

rially from the model of the English constitution.<sup>184</sup> The American Revolution and the ensuing developments that led to the adoption of the Constitution caused a significant break with the home country's conceptions of public law and government institutions. Professor Daniel Hulsebosch has captured the spirit of careful and judicious selection that animated the Framing:

All participants alternated between embracing and recoiling from conventional wisdom, defending precedents and proposing innovations. . . . Noah Webster, the Federalist lawyer who later compiled the first American dictionary, warned that Americans should not "receive indiscriminately the maxims of government, the manners and the literary taste of Europe and make them the ground on which to build our systems in America." Yet just as he did not abandon the English language, he did not jettison English law. There was "a mixture of profound wisdom and consummate folly in the British constitution; a ridiculous compound of freedom and tyranny in their laws."<sup>185</sup>

While drafting the Constitution, the Framers thus attempted to create a uniquely American system of government, one that borrowed from the English model but also improved upon it in important respects, by looking to reason, experience, history, and legal and political theory.<sup>186</sup> One can see this selective borrowing, refinement, and rejection nicely illustrated in the many ways in which the constitution of the federal courts in Article III departed from the English model.<sup>187</sup>

At the time of the ratification, many commentators recognized the extent to which the Constitution's provision for federal courts differed from its English predecessors. The Antifederalist Brutus argued that in many respects, including the fusion of law and equity in the Supreme Court and the provisions for judicial independence that dispensed with legislative review of judgments, the proposed federal

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<sup>184</sup> See Waterman, *supra* note 65, at 652 ("Wilson . . . approved [Blackstone] outside the field of public law.").

<sup>185</sup> HULSEBOSCH, *supra* note 70, at 215 (quoting 1 NOAH WEBSTER, A GRAMMATICAL INSTITUTE, OF THE ENGLISH LANGUAGE 3, 15 (Hartford, Hudson & Goodwin 1783)).

<sup>186</sup> James Madison opined that it was "the glory of the people of America" that they had "paid a decent regard to the opinions of former times and other nations" yet had "not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own sense, the knowledge of their own situation, and the lessons of their own experience." THE FEDERALIST NO. 14, at 99 (James Madison) (Clinton Rossiter ed., 2003); HULSEBOSCH, *supra* note 70, at 215–16 ("The key was selectivity. Webster, like many Federalists, assumed that Europe's political culture was a museum, the old world an estate auction, and postrevolutionary Americans privileged curators. 'It is the business of *Americans* to select the wisdom of all nations,' he wrote, 'as the basis of her constitutions, — to avoid their errors, — to prevent the introduction of foreign vices and corruptions and check the career of her own . . .'" (quoting 1 WEBSTER, *supra* note 185, at 15)). The presidency created by Article II, for example, rejects much of the English constitution and its embodiment in King George III. See Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 312–13 (2003).

<sup>187</sup> See MCDONALD, *supra* note 76, at 253–58.

courts “departed from almost every . . . principle of [English] jurisprudence.”<sup>188</sup> In England, Brutus wrote, the courts were “on a very different footing.”<sup>189</sup> Similarly, in attacking the proposal to lodge the power to decide cases in both law and equity in the Supreme Court, the Federal Farmer objected that “in the constitution of this supreme court, as left by the constitution, I do not see . . . a shadow of our own or the British common law.”<sup>190</sup>

An illustration from St. George Tucker’s influential republican edition of the *Commentaries* nicely captures the gap between Blackstone and the conception of judicial power that found its way into the Constitution. Writing in response to Blackstone’s assertion that the sovereign power lies in Parliament, the body that makes the laws, and that all other parts of the government “must conform to and be directed by it, whatever appearance the outward form and administration of justice may put on,” Tucker argued that the Constitution stood as the expressed will of the sovereign people.<sup>191</sup> Because the legislature was but one branch of that will, it could not alter the design of the judiciary outside the bounds created by the document. According to Blackstone, it was “at any time in the option of the legislature to alter [the] form and administration [of justice] by a new edict or rule, and to put the execution of the laws into whatever hands it pleases.”<sup>192</sup> According to Tucker, however, in the Constitution

the sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.<sup>193</sup>

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<sup>188</sup> *Essays of Brutus No. XV*, N.Y. J., Mar. 20, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 437, 438 (Herbert J. Storing ed., 1981). See also *Essays of Brutus No. XIV*, N.Y. J., Mar. 6, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 433, 437 (“This [Supreme] court is to have power to determine in law and in equity, on the law and the fact, and this court is exalted above all other power in the government, subject to no controul . . .”).

<sup>189</sup> *Essays of Brutus No. XV*, *supra* note 188, at 438.

<sup>190</sup> OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT, IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN NO. III (Oct. 10, 1787) [hereinafter LETTERS FROM THE FEDERAL FARMER], reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 234, 244.

<sup>191</sup> 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. Note A at 3–4 (Philadelphia, William Young Birch & Abraham Small 1803) (quoting 1 BLACKSTONE, *supra* note 7, at \*49).

<sup>192</sup> *Id.* app. Note A at 3.

<sup>193</sup> *Id.* app. Note A at 4.

Tucker's argument demonstrates the flaws in the notion that the Constitution's "one supreme Court" could be understood only by reference to Blackstone: For Blackstone, no court was truly supreme because every court was simply the outward manifestation of the supreme will of a sovereign Parliament. But for Tucker, the federal courts were an independent department of government with an institutional share of the sovereignty vested by the people. Blackstone cannot provide the sole reference for those seeking to interpret the constitutional relationship between Congress and the federal courts because his account of public law was in large part rejected by the Framers.

We do not mean to disparage Blackstone's importance or to downplay the influence of English institutions upon the American Constitution. Rather, we simply observe that forming a complete picture of the Framers' legal universe requires consideration of a wide variety of materials. Many voices contributed to the Framers' understanding of the law, and to focus exclusively on one may undercut our ability to understand the origins of the American judicial system. Perhaps, then, next to Justice Frankfurter's statement one should place Thomas Jefferson's statement that the *Commentaries*,

although the most elegant and best digested of our law catalogue, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of law. . . .<sup>194</sup>

The Framers, unlike many of the young lawyers Jefferson meant to criticize, were not the legal offspring of Blackstone: many of them learned the law before his work came to America, and, though they found his *Commentaries* edifying, they often ventured to disagree with him.

### III. ENGLAND, SCOTLAND, AND ARTICLE III

If Blackstone and Westminster did not stand alone as sources of the Framers' knowledge of law and legal institutions, and if Scottish institutions also brooked large in their thinking, then there may be some profit in exploring how the Scottish model informed the Framing of the federal judiciary. In this Part, we first sketch the institutional features of the English court system as a baseline for comparison. We next describe the Scottish legal system as depicted in the widely read Kames treatise *Historical Law-Tracts*. Then we consider several ways

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<sup>194</sup> Nolan, *supra* note 65, at 749 (quoting Letter from Thomas Jefferson to Judge John Tyler (June 17, 1812), in 6 THE WRITINGS OF THOMAS JEFFERSON 65, 66 (H.A. Washington ed., New York, Riker, Thorne & Co. 1854)).

in which prominent features of Scotland's judicial system, as secured by the Acts of Union, were replicated in the Framing of Article III.

A. *The English Legal System: A Brief Overview*

Although some English jurists of the eighteenth century aspired to hierarchy and frequently spoke of King's Bench as the supreme court of the common law,<sup>195</sup> England did not establish a hierarchical court system until much later.<sup>196</sup> In eighteenth-century England, the judicial power was divided among multiple superior courts of overlapping and coordinate jurisdiction.<sup>197</sup> There were three superior courts of common law — King's Bench, Common Pleas, and Exchequer — each with jurisdiction over claims throughout the realm.<sup>198</sup> Meanwhile, the Court of Chancery handled cases in equity,<sup>199</sup> the ecclesiastical courts managed family and probate law,<sup>200</sup> and the High Court of Admiralty primarily addressed matters that arose on salty water.<sup>201</sup> These coordinate courts exercised overlapping authority and competed to expand their jurisdiction at one another's expense.<sup>202</sup> Thus, King's Bench expanded its common law authority through the writ of trespass to poach on Common Pleas, and Exchequer adopted the fiction that

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<sup>195</sup> See 3 BLACKSTONE, *supra* note 7, at \*41 (labeling King's Bench "the supreme court of common law in the kingdom"); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 75–76, 140–41 (2010) (describing the views offered by Chief Justice Hale and other jurists of King's Bench's exalted role); PFANDER, *supra* note 7, at 26–27, 178–81 nn.1–21 (collecting accounts of King's Bench and its supervisory role).

<sup>196</sup> See RITZ, *supra* note 3, at 33–34 (citing ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976*, at 26 (1978)) (accepting the view that a modern, "hierarchical arrangement of appellate-review courts was established in England" in the early 1830s, when the Court of Exchequer Chamber became a mandatory intermediate court of appeal from the superior courts of common law).

<sup>197</sup> See *supra* note 7.

<sup>198</sup> See 3 BLACKSTONE, *supra* note 7, at \*37, \*41, \*43.

<sup>199</sup> See *id.* at \*46–55.

<sup>200</sup> See *id.* at \*61–68.

<sup>201</sup> See *id.* at \*68–70; see also Thompson (pt. 3), *supra* note 62, at 411–21 (describing the jurisdiction in admiralty and maritime affairs). Although the jurisdiction of the High Court of Admiralty in England reached only matters at sea, on salty water, and in the "main stream of the great rivers" where the tide ebbed and flowed, Americans extended the jurisdiction to matters of waterborne commerce on freshwater streams and rivers, so long as they met a test of navigability. See STEVEN L. SNELL, *COURTS OF ADMIRALTY AND THE COMMON LAW* 400–13 (2007) (describing the difference in the scope of admiralty jurisdiction between England and the United States). The jurisdiction of the admiralty courts was a source of frequent contention throughout English history, and it expanded and contracted as various competing factions restricted or enlarged it on often questionable grounds. See Mathiasen, *supra* note 78.

<sup>202</sup> 1 HOLDSWORTH, *supra* note 7, at 218–22; 5 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 423 (3d ed. 1945).

all debts are debts to the Crown to expand its authority over private litigation.<sup>203</sup>

King's Bench exercised a measure of supervisory oversight, but it did not act as the supreme court of England with final authority over all judicial disputes. King's Bench clearly did have the power to oversee inferior tribunals; parties could seek the removal of criminal proceedings into King's Bench through a writ of certiorari.<sup>204</sup> Writs of mandamus and habeas corpus would oblige inferior jurisdictions to explain their inaction or their decision to imprison, and writs of prohibition would compel lower courts to refrain from hearing matters outside their bailiwicks.<sup>205</sup> Nevertheless, the power of King's Bench to hear appeals and to supervise was somewhat haphazardly distributed: King's Bench could hear appeals from Common Pleas but not from Chancery or Exchequer.<sup>206</sup> It could issue writs of prohibition to the ecclesiastical courts and to Admiralty (along with the writ of habeas corpus to test a petitioner's entitlement to personal liberty), but it could not issue writs of prohibition to Chancery.<sup>207</sup> The judicial separation that flowed from the absence of systematic oversight produced a conceptual separation as well. Blackstone and the English viewed common law and equity as distinct bodies of law<sup>208</sup> and Chancery as the only forum in which any equitable claims or defenses might be raised.<sup>209</sup>

Two other institutions played judicial roles in England, further complicating the picture. First, the Court of Exchequer Chamber, which began not as a fixed court but simply as a college made up of all the judges of the superior courts at Westminster, exercised some degree of oversight.<sup>210</sup> Occasionally, divisive legal questions in Chancery or in one of the other superior courts would be adjourned to Exchequer

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<sup>203</sup> See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 47-48 (4th ed. 2002) (describing Exchequer's use of legal fictions to expand its jurisdiction); *id.* at 41-43 (describing King's Bench's use of the bill of Middlesex fiction); *id.* at 48-49 (describing quominus procedure in the Court of Exchequer); Konig, *supra* note 80, at 102 (describing the expansive use of the writ of trespass in King's Bench); Thompson (pt. 1), *supra* note 62, at 35-42 (describing the origins of the three superior courts of common law and their jurisdictional competition).

<sup>204</sup> See de Smith, *supra* note 50, at 45-48.

<sup>205</sup> 1 HOLDSWORTH, *supra* note 7, at 227-29. For a description of the various writs, see generally de Smith, *supra* note 50.

<sup>206</sup> See 3 BLACKSTONE, *supra* note 7, at \*40, \*46, \*55.

<sup>207</sup> See BAKER, *supra* note 203, at 144-45; John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127, 131-32 (1941).

<sup>208</sup> See 3 BLACKSTONE, *supra* note 7, at \*429, \*441.

<sup>209</sup> See KAMES, *supra* note 9, at 50.

<sup>210</sup> See PFANDER, *supra* note 7, at 40-41. The Court of Exchequer Chamber began its life as a common law college of jurists and was later formalized in a series of statutes enacted in the fourteenth, sixteenth, and nineteenth centuries. See Thompson (pt. 3), *supra* note 62, at 428-29. The 1830 reforms created a single court as an intermediate appellate body between King's Bench and the House of Lords. See *id.* at 429.

Chamber for collective deliberation and solemn resolution. English jurists viewed such decisions as the highest source of judicial authority in the realm and as providing a rule to govern the judicial disposition of the dispute by the court in question.<sup>211</sup> Such dispositions, however, were subject to the possibility of appeal to a second quasi-appellate judicial institution: the House of Lords. Exercising a portion of judicial power that remained as a vestige of the days when the High Court of Parliament would sit *curia regis* to hear petitions on a range of issues, the House of Lords in the eighteenth century would review matters by writ of error, but its forms were legislative, and it was not constituted as a judicial tribunal until the 1830s.<sup>212</sup> In addition, the House of Lords enjoyed no general supervisory authority such as that wielded by King's Bench and the other superior courts.<sup>213</sup> Finally, although a decision of the House of Lords controlled the resolution of the dispute on appeal, such a decision was based on a vote of all the Lords (legally trained and otherwise) and thus enjoyed little precedential weight among the superior courts.<sup>214</sup>

Colonial Americans also came into direct contact with English judicial forms by prosecuting appeals from their own courts to the Privy Council in London. With the demise of Star Chamber in the seventeenth century, the Privy Council lost its judicial role in matters originating in England.<sup>215</sup> Nevertheless, it retained judicial authority in cases coming from the colonies, assessing local decisions and colonial legislation to determine whether they were repugnant to British law.<sup>216</sup> Privy Council review entailed an element of hierarchy; it proceeded on the assumption that the Council had the final word on the matter under review and that the colonial courts were duty-bound to carry its decrees into effect.<sup>217</sup> Professor Mary Sarah Bilder has described repugnancy review by the Privy Council as an important precursor to the eventual development of the institution of judicial review in the United States.<sup>218</sup>

<sup>211</sup> PFANDER, *supra* note 7, at 41, 191 n.97 (citing THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 162–63, 347–48 (Little, Brown & Co. 5th ed. 1956) (1929)).

<sup>212</sup> See 1 HOLDSWORTH, *supra* note 7, at 375–77; Thompson (pt. 3), *supra* note 62, at 432–45.

<sup>213</sup> See Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1448–49.

<sup>214</sup> See 1 HOLDSWORTH, *supra* note 7, at 375–76.

<sup>215</sup> *Id.* at 479; see also Thompson (pt. 3), *supra* note 62, at 445–51 (describing the judicial role of the Privy Council).

<sup>216</sup> See BILDER, *supra* note 170, at 1–4; 1 HOLDSWORTH, *supra* note 7, at 516, 520–22; see also Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 *LAW & HIST. REV.* 451, 464–72 (2010) (describing Privy Council's dual function as a court of appeals reviewing decisions of colonial courts and as a council of revision reviewing colonial legislation for repugnancy).

<sup>217</sup> See Thompson (pt. 3), *supra* note 62, at 449 (describing the finality of Privy Council decisions).

<sup>218</sup> See BILDER, *supra* note 170, at 186.

From an American vantage point, then, perhaps as many as three different institutions could claim to act as the supreme court of England. King's Bench played that role with respect to many features of domestic litigation, exercising a supervisory power over lower courts that Blackstone described as "high and transcendent."<sup>219</sup> Yet the decisions of King's Bench, at least outside the supervisory context, were subject to further review in the Court of Exchequer Chamber<sup>220</sup> or in the House of Lords, an institution that was sometimes characterized as the highest court in the realm.<sup>221</sup> As for matters that originated in the colonies, Privy Council served as the court of final jurisdiction (though it often proposed to apply the law of the colonies themselves, rather than some uniform body of continental or imperial law).<sup>222</sup> No court, however, sat alone at the top of the heap.

*B. The Scottish Legal System Through  
the Eyes of the Framers*

A very different model existed to the north of Newcastle. In *Historical Law-Tracts*, a work that has gone unremarked by latter-day students of the federal judiciary in the United States, Lord Kames provided a comprehensive view of the Scottish court system and of the jurisdiction of the Court of Session, Scotland's one supreme civil court. The Court of Session stood at the zenith of the judicial system as the only supreme court of civil jurisdiction (a closely related High Court of Justiciary served as the supreme court in criminal matters).<sup>223</sup> In addi-

<sup>219</sup> 3 BLACKSTONE, *supra* note 7, at \*42; *see also* 1 HOLDSWORTH, *supra* note 7, at 212 (re-laying Coke's statement that the judges of King's Bench "are called *capitales* in respect of their supreme jurisdiction, and *generales* in respect of their general jurisdiction throughout England" (quoting SIR EDWARD COKE, *FOURTH INSTITUTE OF THE LAWS OF ENGLAND* \*75)).

<sup>220</sup> *See* Thompson (pt. 3), *supra* note 62, at 428–29.

<sup>221</sup> Chief Justice Hale's statements on Parliament reflect the contradictions and tensions inherent in the English judicial system. According to Hale, "The Parliament [was] the high and supreme court of this kingdom." 92 THE SELDEN SOC'Y, SIR MATTHEW HALE'S THE PREROGATIVES OF THE KING 135 (D.E.C. Yale ed., 1976). Yet it possessed "a double jurisdiction, *viz.* a supreme, consisting in the whole parliament, and a subordinate, ordinarily exercised in the house of peers." *Id.* at 181. To the latter belonged a "peculiar jurisdiction[,] though not the supreme yet superior to any other courts." *Id.* at 136.

<sup>222</sup> *See* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 656–58 (Octagon Books 1965) (1950). On the repugnancy standard that governed such appeals, *see* BILDER, *supra* note 170, at 1–4. On the application of the colony's own law, rather than uniform law, *see* Ross, *supra* note 5.

<sup>223</sup> 1 KAMES, *supra* note 8, at 318–19, 329–30. The Court of Session consisted of fifteen judges, the Lord President and fourteen Ordinary Lords, and an inner and outer chamber. *See* 5 WALKER, *supra* note 8, at 455–56. One of the Lords Ordinary sat on a rotating basis in the Outer House, taking evidence and deciding preliminary points and less important cases, while all of the judges sat together in the Inner House (called a gathering of the "hail Fifteen," *see* ROSS, *supra* note 123, at 123) to hear important cases and questions referred from the Outer House. *See id.* at 121–23; WHITE & WILLOCK, *supra* note 14, at 31. On the origins of the Court of Session, which was created by an act of (the Scottish) Parliament in 1532, *see* generally John W. Cairns, *Revisit-*

tion to having a robust original jurisdiction over suits for damages, the Court of Session reviewed decisions from inferior courts. Significantly, all inferior courts of civil jurisdiction were subject to its review, including the common law sheriff and baronial courts as well as the admiralty and ecclesiastical courts.<sup>224</sup>

As for the mode of review, the Court of Session initially relied on the appeal,<sup>225</sup> a proceeding familiar to civil law countries,<sup>226</sup> which Scotland to an extent was.<sup>227</sup> By Kames's time, however, the court had come to conduct review primarily through the homegrown supervisory processes of advocacy, suspension, and reduction.<sup>228</sup> As Kames described them, these three extraordinary processes served a function similar to that of the prerogative writ system in England. Kames equated advocacy with the writ of certiorari: when the Court of Session issued an advocacy, it called up to itself a case from an inferior court and then proceeded to try the case or review the decision of the lower court.<sup>229</sup> Suspension and reduction worked somewhat like the writ of prohibition: a reduction set aside the decree of a lower court, while an accompanying suspension prohibited the lower court from executing a judgment during the period of review.<sup>230</sup>

Another feature of the Court of Session provides an important distinction from the English model. Unlike the system in England, which viewed law and equity as separate remedies to be administered in separate courts, the Court of Session had the power to administer both remedies in a single case.<sup>231</sup> Scotland thus had no Court of Chancery to jostle with the common law courts for jurisdiction. According to Kames, the Session inherited the power to decide cases in equity by virtue of its supremacy: upon assuming the position of the Scottish Privy Council, the Court of Session used its extraordinary powers — called its *nobile officium* — to fashion new remedies where necessary to achieve justice.<sup>232</sup> Because all roads led to the Court of Session as

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*ing the Foundation of the College of Justice, in* 52 THE STAIR SOC'Y, *supra* note 55, at 27. Although some historians have contended that the Session was created primarily as part of a complex stratagem to tax the Catholic Church, Professor Cairns has concluded that the evidence favors the view that its creation actually represented a conscious policy choice on the part of Scottish leaders. *Id.* at 37.

<sup>224</sup> See 1 KAMES, *supra* note 8, at 327–28, 394, 429–30.

<sup>225</sup> See *id.* at 389–93.

<sup>226</sup> See Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 928 (1997).

<sup>227</sup> See Ewald, *Scottish Enlightenment*, *supra* note 31, at 1073–75.

<sup>228</sup> See 1 KAMES, *supra* note 8, at 385.

<sup>229</sup> See *id.* at 395–96; see also ROSS, *supra* note 123, at 123 (describing advocacy).

<sup>230</sup> For a description of these processes, see ROSS, *supra* note 123, at 123–24; and 4 DAVID M. WALKER, PRINCIPLES OF SCOTTISH PRIVATE LAW 270–77 (4th ed. 1989).

<sup>231</sup> See KAMES, *supra* note 9, at 50; ROSS, *supra* note 123, at 223.

<sup>232</sup> 1 KAMES, *supra* note 8, at 324–26; see ROSS, *supra* note 123, at 213.

the supreme civil court, that court necessarily required the ability to administer justice in whatever outward form a case took on.

Two Scottish courts acted outside the supervisory purview of the Court of Session. First, the High Court of Justiciary served as the supreme court in criminal cases.<sup>233</sup> Second, the Court of Exchequer, which was established after the union with England in 1707, used English law and was reviewable only by the English Court of Chancery and the House of Lords of Great Britain in order to facilitate uniform decisions on revenue cases throughout the kingdom.<sup>234</sup> An exchequer court of the English variety was unknown to Scotland before the Acts of Union, and it was viewed with some initial suspicion in Scotland as a foreign institution.<sup>235</sup> The House of Lords also heard appeals from the Court of Session after the Acts of Union. Prior to the union, litigants possessed a limited ability to protest to the Scottish King and Parliament, an avenue of review which had been instituted only in 1689, and which many maintained was confined to inquiring into excess of jurisdiction and judicial corruption.<sup>236</sup> In addition, many observers questioned the extent to which the Acts contemplated appellate review by the British House of Lords,<sup>237</sup> and even after such review was assumed, the decisions of the House of Lords remained unpublished and without binding precedential value in Scottish courts.<sup>238</sup>

<sup>233</sup> ROSS, *supra* note 123, at 18.

<sup>234</sup> See 5 WALKER, *supra* note 8, at 470–71.

<sup>235</sup> See ROSS, *supra* note 123, at 17.

<sup>236</sup> See 5 WALKER, *supra* note 8, at 445; Ford, *supra* note 14, at 123.

<sup>237</sup> See 5 WALKER, *supra* note 8, at 446; Ford, *supra* note 14, at 124–25. In a careful analysis of the origins of the process of “remeid of law,” Professor J.D. Ford has shown that litigants often relied on protests to the Scottish Parliament as a way to challenge decisions of the Court of Session during the run-up to the union with England. See Ford, *supra* note 21, at 84–99 (describing some fifty cases in which litigants sought review in the Scottish Parliament between 1690 and 1707).

<sup>238</sup> See Cairns, *supra* note 24, at 29. Ford traces the growth of the practice to the Claim of Right (1689), which proclaimed it to be the right and privilege of the nation’s subjects to protest for “remeid of law” against sentences pronounced by the Court of Session. Ford, *supra* note 21, at 57. During previous, failed negotiations in 1604 and 1670 on a potential union between England and Scotland, Scottish commissioners had insisted that parliamentary review of court judgments be foreclosed because such review was unknown in Scotland. See Ford, *supra* note 14, at 122–23. By the time of the 1707 union, however, protests for remeid of law to the unicameral Scottish Parliament had become a recognized feature of the Scottish legal system, likely making the prospect of House of Lords review more palatable. See *id.* at 123. Although the Acts of Union did not expressly provide for a shift of this practice from the Scottish Parliament to the British Parliament, it did not foreclose such a shift in terms. See *id.* at 123–24. Litigants dissatisfied with the Court of Session’s rulings naturally filed appeals with the House of Lords, the only parliamentary game in town following the post-union abrogation of the Scottish Parliament. See Ford, *supra* note 21, at 99–103. One can argue that this development violated the spirit of the Acts of Union, which foreclosed appellate review of Scottish decisions by English courts sitting in Westminster Hall. Acts of Union (1707), *supra* note 15, art. XIX. But one can also argue that the Acts of

The Scottish court system thus provides an eighteenth-century model of a hierarchical judiciary that closely resembled the perfect judicial pyramid described by James Wilson in his lectures. Multiple inferior courts spread throughout the kingdom conducted much of the judicial business in civil cases in the first instance. These courts were in turn regulated by either the Court of Session or, in admiralty actions, the intermediate High Court of Admiralty and then the Court of Session. In addition, even where separate remedies or types of action were administered in the inferior courts, supervisory review of all such civil causes merged in the Court of Session. As we shall explain, many of the important features of the Court of Session and of the Scottish judicial system were replicated in the U.S. Constitution. The next Part explores in more detail the way in which the structure of the federal judiciary in Article III came to resemble the Scottish model.

#### IV. HIERARCHY, INFERIORITY, AND THE SUPERVISORY POWER

##### A. *Constitutional Status for the Federal Courts*

The Framers readily agreed that the Constitution should include provisions for an independent judiciary. That familiar decision, now enshrined in Article III's declaration that the judicial power was to be vested in one supreme and perhaps several inferior federal courts, represented an important departure from the English model. In England, as we have seen, the courts enjoyed no special constitutional status. They had arisen through the exercise of royal prerogative, growing up over time and enjoying a customary jurisdiction that ebbed and flowed with the jurisdictional pretensions of their various judges and with the oversight of the Crown.<sup>239</sup> In the early seventeenth century, the Courts of King's Bench and Chancery conducted their well-known

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Union implicitly invited such review by saying nothing to foreclose appeals to the House of Lords (which did not meet in Westminster Hall). See Ford, *supra* note 21, at 98–99. Ford reports that although decisions of the House of Lords on appeal from the Session were conclusive on the parties, they were not regarded as good law in Scotland on the legal points in issue until much later. See *id.* at 105–07 (noting that Scottish lawyers in the post-union years of the eighteenth century viewed House of Lords appellate decisions as having “no bearing on the development of [Scots] law,” *id.* at 106). Elsewhere, Ford has conjectured that this outlook grew from the fact that the prior remeid of law was meant to check individual judicial corruption rather than to alter substantive law. See Ford, *supra* note 14, at 123–24. As such, after the union the House of Lords was meant to apply, not change, the preexisting law of Scotland. See *id.* at 140.

<sup>239</sup> See BAKER, *supra* note 203, at 37–51 (describing the jurisdictional evolution of the superior courts in England). As an example, see the description of the incessant creation, abolition, and remodeling of the English admiralty courts by the Tudor kings and their predecessors in R.G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 24 ENG. HIST. REV. 675, 680–84 (1909).

feud over the boundaries between law and equity; eventually, King James I intervened to umpire the relative authority of the two tribunals.<sup>240</sup> Although the English courts rose in stature and gained a measure of independence from the Crown during the course of that eventful century, they remained subject to broad parliamentary oversight and control, including review by the House of Lords. Perhaps not surprisingly, then, when Montesquieu wrote his famous discourse on the separation of powers, he treated the judiciary as an agency of the executive power, rather than as an independent branch or power of government.<sup>241</sup> More immediately for the Framers, prior to the Revolution the colonial courts had been merely functionaries of the royal will: the Crown used the prerogative to create the colonial courts, appointed and removed colonial judges at will, and subjected the decisions of these courts to review in the Privy Council.<sup>242</sup>

In Scotland, by contrast, the judicial system enjoyed a measure of constitutional protection, dating from the Acts of Union in 1707, that guaranteed the courts a degree of departmental independence both from the Crown and from Parliament. As we have explained, England and Scotland had been united through allegiance to a common monarch since 1603 but had remained separate nations with independent parliaments and governments. After the English Civil War and the Glorious Revolution of 1688, England and Scotland appointed commissioners to negotiate terms for a merger of the two nations.<sup>243</sup> These

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<sup>240</sup> For an account of the face-off between Coke and Chancery, see generally Dawson, *supra* note 207.

<sup>241</sup> See 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. 11, ch. 6, at 215–16 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1750) (1748) (treating the judicial power as one of the two elements of the executive power); see generally M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 86–88 (1967) (describing Montesquieu’s treatment of the judicial and executive powers). Montesquieu primarily understood the judicial power as being exercised by the jury. Cf. Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 *GEO. L.J.* 1061, 1063–64 (2007) (describing Montesquieu as longer on theory than on descriptive accuracy).

<sup>242</sup> LaCroix, *supra* note 216, at 467–68; Robert J. Reinstein, *The Limits of Executive Power*, 59 *AM. U. L. REV.* 259, 282–84 (2009). On the role of the governor in colonial justice, see Erwin C. Surrency, *The Courts in the American Colonies*, 11 *AM. J. LEGAL HIST.* 253, 260–62, 269 (1967) (characterizing the governor’s power to create colonial courts, and to sit on certain of the courts so created, as inconsistent with modern conceptions of the separation of powers).

<sup>243</sup> For an account of the “management” of the Scottish Parliament by representatives of the Crown urging ratification of the Union, see Karin Bowie, *Publicity, Parties and Patronage: Parliamentary Management and the Ratification of the Anglo-Scottish Union*, 87 *SCOT. HIST. REV. (SUPP.)* 78, 91–92 (2008) (describing the use of public arguments and such private incentives as secret payments and promises of post-union offices to secure majority support in the Scottish Parliament for implementation of the union). As Professor Christopher Whatley has noted, however, many Scots saw the union as providing political and financial benefits to Scotland, and the portrayal of the Union as the outcome of an “uneven contest between an all-conquering England on the one side and a poor defenceless Scotland, united in opposition, on the other is less persuasive

terms evolved into a Treaty of Union and were memorialized by the English and Scottish Parliaments in what scholars know today as the Acts (or Act) of Union of 1707. Most of the articles of the Acts of Union, which dissolved the two previous parliaments and created a new Parliament of Great Britain,<sup>244</sup> addressed such matters as commerce, trade, and guarantees for the Scottish aristocracy.<sup>245</sup> But in addition to these provisions, the Acts of Union included an article devoted entirely to the preservation of the hierarchical structure of the Scottish court system. Article XIX — which, like many of the other materials considered in this Article, has yet to enter the canon of federal jurisdiction scholarship in the United States — secured the position of the Scottish courts, particularly the Court of Session, from English interference. (The Scots understood that they were to be a minority in the newly formed Parliament of Great Britain.)

The terms of Article XIX aimed to confer constitutional status on the Court of Session, making it in some measure immune from the otherwise unchecked power of Parliament.<sup>246</sup> Remarkably, as we explore in more detail below, many of the article's specific provisions and concepts appear to have informed the drafting of Article III of the U.S. Constitution. But perhaps the most important idea expressed in the Acts of Union was that of using textual guarantees to secure the structure of Scotland's judicial system from Parliament's oversight and con-

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now than it may have been [previously]." Christopher A. Whatley, *The Issues Facing Scotland in 1707*, 87 SCOT. HIST. REV. (SUPP.) 1, 18 (2008).

<sup>244</sup> Acts of Union (1707), *supra* note 15, art. III.

<sup>245</sup> Cairns, *supra* note 24, at 26.

<sup>246</sup> The precise legal status of the provisions of the Acts of Union and the ability of courts to invalidate acts of Parliament in violation of them have been the subject of much debate continuing to the present day. But the Acts of Union at the very least possess something approaching constitutional status. See sources cited *supra* notes 16–17. Professor J.D.B. Mitchell's detailed examination of the subject leads to no firm conclusions, though he does note that the notion of unchecked parliamentary supremacy had by no means solidified by 1707 and that it was more likely the product of trends in the later eighteenth and the nineteenth centuries:

[I]t is not clear that in 1707 either that the English Parliament was accepted as "sovereign" in the sense in which the word is now used or that, alternatively, the Scottish Parliament could not, in legal theory, be said to be as "sovereign" then as was the English one. It is more probable that, in the modern acceptance of that term, the doctrine, if it exists, is a post-Union development closely linked with the ideas underlying the reforms of 1832. It is certainly possible that as constituent documents the Acts of Union could have imposed limitations, and it is equally clear that some of those responsible for them hoped so to do.

MITCHELL, *supra* note 17, at 70 (footnotes omitted). Pronouncements of the Court of Session in the twentieth century have treated some of the provisions of the Acts, such as limits on changes to Scottish private law unless for the "evident utility" of the people of Scotland, as essentially nonjusticiable. See *id.* at 86–87; Edwards, *supra* note 17, at 35. That said, some members of the court, in their separate opinions, have expressly reserved the question of whether an alteration of the Court of Session itself in violation of the Acts could be struck down. See MITCHELL, *supra* note 17, at 86–87; Edwards, *supra* note 17, at 35.

trol. The judicial article of the Acts of Union begins by declaring that the Court of Session will “remain in all time coming within *Scotland*, as it is now Constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the *Union*, subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the *Parliament of Great-Britain*.”<sup>247</sup> The phrasing is significant: the assurance that the Court of Session was to remain as presently “constituted” in “all time coming” was evidently meant to ensure against parliamentary remodeling.<sup>248</sup> In other words, the Acts of Union attempted to insulate the Scottish court system from the threat that ordinary legislation could pose to its independence, structure, or jurisdiction.

An incident that occurred early in the nineteenth century confirms that the Scottish courts viewed the protections of the Acts of Union as an affirmative check upon parliamentary regulations. In their 1807 Memorial to the House of Lords, the Senators of the College of Justice (which consisted of the Lords of Session and other high-ranking members of the Scottish judiciary) argued that some contemplated reforms of the Court of Session might contravene the protections of Article XIX:

We are of opinion that on fair bona fide construction, as between two independent nations, it cannot be held to have been in the contemplation of

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<sup>247</sup> Acts of Union (1707), *supra* note 15, art. XIX. In contrast to its review of the Court of Session, the House of Lords did not entertain appeals from the High Court of the Justiciary in the wake of the union. Perhaps the decisive opinion against such review was that rendered by Lord Mansfield in *Bywater v. Crown*, (1781) 2 Paton 563 (H.L.) 564–71, reprinted in 1 THE SCOTS REVISED REPORTS: HOUSE OF LORDS SERIES, 1707 TO 1797, at 548 (Edinburgh, William Green & Sons 1898). The Mansfield view was later confirmed in *Mackintosh v. Lord Advocate*, (1876) 3 R. 34 (H.L.). Mansfield rests his opinion both on the language of Article XIX and on the absence of any pre-Union practice of parliamentary review in Scotland. *Bywater*, 2 Paton at 565. For Mansfield, then, review of Court of Session decisions represented a continuation of existing practice, whereas review of the Justiciary would have been an innovation not allowed by the terms of the Acts of Union. See generally A.J. MacLean, *The House of Lords and Appeals from the High Court of Justiciary, 1707–1887*, 1985 JURID. REV. 192. Mansfield’s opinion and its confirmation in the House of Lords demonstrates that judicial interpretation of the Acts and their command to preserve the existing forms of the Scottish judicial system carried significant weight within the British constitution, whatever firm limits the Acts may or may not have imposed on parliamentary supremacy.

<sup>248</sup> Mitchell has cautioned against reading too much into the phrase “in all time coming,” given that such terminology was used with some frequency by the Scottish Parliament. MITCHELL, *supra* note 17, at 70. The standard position among most English scholars today adopts Professor A.V. Dicey’s view of “the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body.” 1 DICEY, *supra* note 12, at 62. All the same, Mitchell observes that the importance Scots have ascribed to the phrase and its specific use in the Acts to protect central institutions and Scottish equality are of no mean significance. MITCHELL, *supra* note 17, at 70 & n.34; see also Ford, *supra* note 14, at 128–39 (providing an extended discussion of the degree to which the Scots viewed the Acts of Union as immutable by future acts of the British Parliament).

either, that any law should, in future times, be considered as merely a regulation for the better administration of justice which goes to subvert the supreme jurisdiction of the Court of Session, and to render it subordinate to a new court, unknown to our ancestors.<sup>249</sup>

It appears, moreover, that Parliament took this admonition to heart in crafting subsequent legislation.<sup>250</sup>

In a second important feature, the Acts of Union specify and qualify legislative power over the Scottish court system. The Acts reject the tradition of royal control that characterized the English court system and colonial courts.<sup>251</sup> They deposit the power to make regulations and alterations for the better administration of justice in the “Parliament of Great Britain,” subject, however, to a number of qualifications.<sup>252</sup> In the U.S. Constitution, Article III and Article I follow this approach, depositing the power to ordain and establish lower federal courts (and the power to constitute inferior tribunals) in the Congress of the United States and thus implicitly disavowing any role for the President in the creation or reshaping of the judicial system beyond the appointment power.<sup>253</sup> Significantly, although the Framers looked to some of the reforms introduced by Parliament in England to secure the independence of judges (such as life tenure), they ultimately chose to reject both the despised colonial system and the English model of complete parliamentary control. Instead, they adopted the system prefigured by the Acts of Union, a system of legislative organization subject to constitutional safeguards, designed to ensure the independence of the judicial department.

The Framers displayed an easy familiarity with the provisions of and the circumstances surrounding the Acts of Union; John Jay, for example, made a discussion of the Acts one of the central features of *The Federalist No. 5*.<sup>254</sup> Indeed, Scotland’s political experience played a central role in the ideology underlying the Revolution and the Framing.<sup>255</sup> Significantly for our purposes, the entirety of the Acts was reproduced in *Statutes at Large*, a collection of English and British sta-

<sup>249</sup> MITCHELL, *supra* note 17, at 73 n.42.

<sup>250</sup> *Id.* at 73.

<sup>251</sup> See *supra* notes 239–242 and accompanying text.

<sup>252</sup> See Acts of Union (1707), *supra* note 15, art. XIX.

<sup>253</sup> See Pfander, *Article I Tribunals*, *supra* note 40, at 649 n.16 (quoting St. George Tucker, who celebrated the Framers’ decision to assign the court-making power to Congress and decried prerogative courts as “engines of oppression and tyranny,” 1 ST. GEORGE TUCKER, *supra* note 191, app. Note D at 267 (internal quotation marks omitted)); Reinstein, *supra* note 242, at 282.

<sup>254</sup> See Akhil Reed Amar, David C. Baum Memorial Lecture on Civil Liberties and Civil Rights: Abraham Lincoln and the American Union (Oct. 26, 1999), in 2001 U. ILL. L. REV. 1109, 1124.

<sup>255</sup> See LACROIX, *supra* note 6, at 24–29, 87–88, 120–24; Konig, *supra* note 42, at 144 (noting that “the Scottish experience had special resonance among British North Americans” in the revolutionary era).

tutes from the Magna Charta onward. *Statutes at Large* was part of the library made available to the delegates to the Federal Convention and thus would have been at the fingertips of Wilson and others.<sup>256</sup>

Third, the Acts of Union anticipate Article III in conferring only a qualified power on Parliament to reshape the Court of Session. Although Parliament could “Regulat[e]” the Court of Session to improve its administration, it was given no power to make any “Alterations” in the court’s power and authority. That omission appears quite significant in view of the fact that Article XIX elsewhere recognizes the power of Parliament to make “Regulations” of and “Alterations” to the jurisdiction of other Scottish courts, including the High Court of Admiralty. In addition, Article XIX explicitly required that all inferior courts in Scotland “remain Subordinate, as they are now to the Supreme Courts [of Session and Justiciary] . . . in all time coming,” thus ensuring that Parliament’s regulations would not disturb the Session’s supremacy over subordinate inferior courts.<sup>257</sup>

Seemingly, then, Article XIX anticipates the Exceptions and Regulations Clause of Article III and its provision for qualified legislative control of the Supreme Court’s appellate jurisdiction. Just as Article XIX allows housekeeping rules for the better administration of justice, and omits any authority to make more far-reaching alterations to the Court of Session, so too does Article III confer a qualified power on Congress to fashion exceptions to and regulations of the Supreme Court’s appellate jurisdiction. All of the evidence suggests that this exceptions and regulations power was meant to authorize Congress to

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<sup>256</sup> See THE CHARTER, LAWS, AND CATALOGUE OF BOOKS, OF THE LIBRARY COMPANY OF PHILADELPHIA #56, at 222 (Philadelphia, B. Franklin & D. Hall 1764). According to Edwin Wolf:

The offer of the use of the collections [to the First Continental Congress] was renewed when the Second Continental Congress met the following spring and again when the delegates to the Constitutional Convention met in 1787. In fact, for a quarter of a century, from 1774 until the national capital was established in Washington, D.C., in 1800, the Library Company, long the most important book resource for colonial Philadelphians, served as the *de facto* Library of Congress before there was one *de jure*. Unfortunately, no circulation records for the period exist, so we can never know which delegate or congressman borrowed or consulted what work. But virtually every significant work on political theory, history, law, and statecraft (and much else besides) could be found on the Library Company’s shelves, along with numerous tracts and polemical writings by American as well as European authors. And virtually all of the works that influenced the minds of the Framers of the nation are still on the Library Company’s shelves.

EDWIN WOLF 2ND, “AT THE INSTANCE OF BENJAMIN FRANKLIN”: A BRIEF HISTORY OF THE LIBRARY COMPANY OF PHILADELPHIA, 1731–1976, at 20–22 (rev. & enlarged ed. 1995); see also *The Statutes at Large: From Magna Charta, to the End of Last Parliament, 1761, in Eight Volumes*, THE JOHN ADAMS LIBRARY, <http://www.johnadamslibrary.org/book/?book=2221577Adams%2093.1%20v.9%20Folio> (last visited Mar. 26, 2011) (listing *Statutes at Large* among the books in John Adams’s library).

<sup>257</sup> Acts of Union (1707), *supra* note 15, art. XIX.

make federal justice more convenient by allowing lower courts to exercise final authority in many cases of modest significance.<sup>258</sup> This reading is also consistent with the arguments of some scholars that the Necessary and Proper Clause limits Congress to legislation aimed at carrying the judicial power into execution and thus obliges Congress to act for the better administration of justice rather than to hamstring one of its coordinate branches.<sup>259</sup> Notably, as the next section emphasizes, nothing in Article III authorizes Congress to countermand the requirement that the Court remain supreme in relation to inferior tribunals.

### B. Unity, Hierarchy, and Article III

In addition to building a constitutional foundation for an independent judicial system, the Framers chose to create a hierarchical judiciary with “one supreme Court” at the top of the heap. The decision was taken in the course of early deliberations on the terms of the Virginia plan, which had provided that a “National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals.”<sup>260</sup> This resolution teed up the question whether to adopt the English model of multiple superior courts of overlapping and duplicative jurisdiction or to adopt a unified, fundamentally pyramidal system, such as that prefigured by the Scottish courts. On June 4, 1787, the Convention answered that question in favor of the unitary model, opting for the vesting of judicial power in a single supreme court and such inferior courts and tribunals as Congress might establish or constitute.<sup>261</sup>

<sup>258</sup> See THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 186, at 484–86 (describing the power to institute inferior courts and tribunals as “obviate[ing] the necessity” for recourse to the Supreme Court in every case involving federal law). For a good account of the role of geographic convenience in the Framers’ decision to authorize Congress to fashion exceptions and regulations, see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469–78 (1989).

<sup>259</sup> See Calabresi & Lawson, *supra* note 46, at 1041; Engdahl, *supra* note 32, at 103–04; cf. Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993) (contending that the term “proper” “would require executory laws [passed under the Necessary and Proper Clause] to be laws that are peculiarly within the jurisdiction or competence of Congress — that is, to be laws that do not tread on the retained rights of individuals or states, or the prerogatives of federal executive or judicial departments”).

<sup>260</sup> James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND’S RECORDS].

<sup>261</sup> See Journal of the Convention (June 4, 1787), in 1 FARRAND’S RECORDS, *supra* note 260, at 95; James Madison, Notes of Committee of the Whole (June 4, 1787), in 1 FARRAND’S RECORDS, *supra* note 260, at 104–05.

In the past, one of us has argued that the Framers of Article III made a deliberate decision to create a hierarchical judicial system. In particular:

The inferiority requirement of Article[s] I [and III] operates as a limit on the power of Congress and of the tribunals to which Congress assigns federal jurisdiction: such tribunals must remain subordinate to the Supreme Court as the head of the judicial department of the federal government. This requirement of subordination to the Supreme Court may oblige inferior tribunals to give effect to the Court's precedents and submit to some form of supervisory oversight and control. While Congress may regulate the Court's appellate jurisdiction [under the Exceptions and Regulations Clause], it may not place inferior tribunals beyond the Court's supervisory authority as the Supreme Court of the United States. . . . Article I specifically states that any tribunals must remain inferior "to" the Supreme Court — a formulation that suggests subordination as the likely meaning of the provision.<sup>262</sup>

On such a view, which is sometimes called the supervisory account, inferior federal courts have wide authority to decide cases finally without being subject to as of right review, but must remain subject to the supervisory jurisdiction of the Supreme Court, which maintains its supremacy not through direct review in every case, but through discretionary intervention when necessary.

Some scholars have expressed sympathy for this conception of a unitary and pyramidal judicial system.<sup>263</sup> Other scholars have contended, however, that Article III contemplates the creation of a national judiciary that, as under the Westminster model, could have included multiple superior courts with final review over a large amount of federal judicial business. Engdahl, relying upon the system of coordinate superior courts used in England and in many of the states, has contended that inferior courts were simply those whose geographic or subject matter jurisdiction was more limited than that of supreme or superior courts.<sup>264</sup> According to Engdahl, when James Wilson stated in his law lectures that a proper judiciary should resemble a pyramid, he was not describing judicial systems of the day but was instead advocating for "fundamental change."<sup>265</sup> Consequently, for Engdahl the hierarchical federal judicial department we know today emerged by historical accident rather than from the plan of the Convention.<sup>266</sup>

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<sup>262</sup> Pfander, *State Court Inferiority*, *supra* note 46, at 199–200, 212 (footnotes omitted); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–34, 867–69 (1994) (interpreting inferiority as a duty to follow the precedents of higher courts).

<sup>263</sup> *See, e.g.*, Calabresi & Lawson, *supra* note 46, at 1022–23; Claus, *supra* note 46, at 69.

<sup>264</sup> Engdahl, *supra* note 35, at 466–72.

<sup>265</sup> *Id.* at 463.

<sup>266</sup> *Id.* at 503–04.

Congress would have been free, on this view, to implement Article III with a system of multiple supreme courts.<sup>267</sup> Ritz provides a measure of support for Engdahl's position, contending that none of the court systems with which the Framers were familiar featured a hierarchical judicial structure with a single supreme court that exercised predominantly appellate jurisdiction.<sup>268</sup> At the center of these arguments lies the notion that the Framers simply had no hierarchical model upon which to draw in fashioning the judiciary and therefore had little — if any — expectation for a hierarchical federal judicial system. As such, the arguments go, the choice of a single supreme court was a relatively trivial one with few implications for our understanding of Article III.<sup>269</sup>

The Scottish model provides an important test of these competing accounts, answers many of the objections raised by the supervisory account's critics, and helps to draw into focus the significance of the Framers' choice to create a single supreme court.

The English model of overlapping and coordinate superior courts was well known to the Framers and led to familiar problems. Two consequences flowed from the absence of a single judicial head. First, courts of overlapping jurisdiction competed for business with one another, indulging fictions to expand their jurisdiction.<sup>270</sup> King's Bench, for example, adopted the fiction that all claims amounted to a trespass, whereas the Court of Exchequer treated all debts as owing to the Crown.<sup>271</sup> Second, judges contended over which tribunal's judgment was decisive of a dispute that touched the jurisdiction of two or more courts. As a result, King's Bench and Chancery often heard the same dispute and often disagreed as to which court's judgment should take precedence.<sup>272</sup> The dispute between Lord Coke and his adversaries Lords Bacon and Ellesmere illustrated the unfortunate consequences of festering jurisdictional conflicts.<sup>273</sup> We believe that, in

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<sup>267</sup> See *id.* at 504 (“The same legislative branch that pyramided the judiciary may refashion it . . . without doing violence to the Constitution.”).

<sup>268</sup> See RITZ, *supra* note 3, at 33–41; cf. Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 38 nn.200–01 (2009) (contrasting Engdahl's position that the American judicial model was largely premised on the English model with Ritz's position that “the Framers sought to create a different judicial structure” than that of England and that “the national judiciary was not modeled on the then-existing judicial systems of the states” (quoting RITZ, *supra* note 3, at 35) (internal quotation marks omitted)).

<sup>269</sup> For an example of the influence of Engdahl and Ritz, see DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 14–21 (2d ed. 2006), which quotes Ritz and Engdahl at length in describing the origins of the federal judiciary.

<sup>270</sup> See Pfander, *Judicial Compensation*, *supra* note 58, at 10–11.

<sup>271</sup> *Id.* at 4 n.14. On the use of legal fictions in the English courts, see Konig, *supra* note 80, at 99–103.

<sup>272</sup> See Dawson, *supra* note 207, at 130–46.

<sup>273</sup> See generally 5 HOLDSWORTH, *supra* note 202, at 423–41; Dawson, *supra* note 207.

choosing to avoid the nettlesome problems arising from the English-style dispersal of jurisdictions, the Framers made a significant decision to emphasize uniformity through final review in a single court of last resort, a decision that creates a framework within which to interpret Article III.<sup>274</sup>

In contrast to the English model emphasized by Engdahl, the Scottish judiciary featured all of the elements of hierarchy that one finds in Article III. The Scottish Court of Session was known as the “Supream”<sup>275</sup> (as an adjective rather than as a title) civil court of Scotland and was so described in *Historical Law-Tracts, Principles of Equity*, and the Acts of Union.<sup>276</sup> As we shall explore below, the supremacy of the Court of Session consisted of three features: its power to supervise the work of inferior courts, its own freedom from oversight or supervision, and its power to decide all civil causes regardless of whether the cause arose in law, equity, or admiralty.

Indeed, important structural provisions in Article XIX of the Acts of Union were designed to safeguard the traditional hierarchy of the Scottish judiciary, preserving supervisory review by the Court of Session and protecting the Session itself from supervision. To be sure, the British House of Lords assumed the power to conduct writ of error review of the Court of Session from 1708 onward. But whatever the bona fides of the practice of appellate oversight by the House of Lords, the treaty had expressly ruled out a much more intrusive form of review. Article XIX expressly prohibits the courts at Westminster from reviewing any judgment of the Court of Session or of any other Scottish court: “[N]o Causes in *Scotland* [shall] be Cognoscable by the Courts of *Chancery, Queens-Bench, Common-Pleas*, or any other Court in *Westminster-Hall*; And that the said Courts, or any other of the like Nature, after the Union, shall have no Power to Cognosce, Review, or Alter the Acts or Sentences of the Judicatures within *Scotland*, or Stop the Execution of the same . . . .”<sup>277</sup>

This limitation accomplishes two things: First, it confirms the linkage between the supremacy of the Court of Session and its finality, preventing English courts from subordinating the Session by subjecting it to any form of review. Second, the provision equates supremacy with hierarchy: by prohibiting the Westminster superior courts from interfering with any inferior jurisdiction in Scotland, the Acts of Union

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<sup>274</sup> Cf. RITZ, *supra* note 3, at 41 (“The English judicial system, with its plethora of courts, obscure jurisdictions, and unclear hierarchical arrangements, was patently unsatisfactory, and was a model rather to be avoided than emulated.”); GROVE, *supra* note 268, at 38 nn.200–01 (discussing Ritz’s remarks on the English court system).

<sup>275</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>276</sup> See *id.*; 1 KAMES, *supra* note 8, at 318–19, 329–30; KAMES, *supra* note 9, at 50.

<sup>277</sup> Acts of Union (1707), *supra* note 15, art. XIX.

forestalled parliamentary or judicial circumvention of the Session's supervisory role and ensured that the Session's supremacy with respect to the Scottish inferior civil courts would remain intact. Combined with its guarantee that all inferior courts within the realm would remain "Subordinate . . . to the Supreme Court[]" of Session, the Acts of Union gave voice to an understanding of the importance of unity, finality, supremacy, and inferiority to the workings of a hierarchical judicial system, concepts that ultimately found expression in Article III.

The Scottish background may also inform an important but heretofore inscrutable episode from the Federal Convention: the combination of jurisdiction over cases in law and equity in the Supreme Court, a combination that implemented — at least as a practical matter — unity as a defining feature of the federal judicial system. Article III ultimately extended the judicial power of the United States "to all Cases, in Law *and* Equity," and "to all Cases of admiralty and maritime Jurisdiction."<sup>278</sup> The former phrase arose out of a proposal by William Samuel Johnson of Connecticut, regarded by his contemporaries as one of the foremost authorities on law among the Framers.<sup>279</sup> Madison's notes describe the episode as follows: "Docr. Johnson suggested that the judicial power ought to extend to equity as well as law — and moved to insert the words 'both in law and equity' after the words 'U. S.' in the 1st line of sect 1."<sup>280</sup> One delegate, George Read of Delaware, "objected to vesting these powers in the same Court,"<sup>281</sup> but the motion passed with the approval of both the Virginia (Madison) and Pennsylvania (Wilson) delegations.<sup>282</sup> The Convention records provide no further information about why the phrase was proposed or why the delegates voted in favor of it. Moreover, the structural choice has received little scholarly attention, perhaps in part because, like the switch to a unitary supreme court, it seemed to have no analogue in the Westminster model.<sup>283</sup>

<sup>278</sup> U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

<sup>279</sup> GROCE, *supra* note 79, at 148–49.

<sup>280</sup> James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FARRAND'S RECORDS, *supra* note 260, at 428.

<sup>281</sup> *Id.*

<sup>282</sup> See *id.* On the political controversies provoked by courts of equity in colonial America, see Katz, *supra* note 73.

<sup>283</sup> At the time, many Antifederalists decried the vesting of law and equity in a single court as both unprecedented and as a failure to adhere to the English model. See, e.g., HULSEBOSCH, *supra* note 70, at 245; LETTERS FROM THE FEDERAL FARMER NO. III, *supra* note 190, at 237–38; *Essays of Brutus No. XIII*, N.Y. J., Feb. 21, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 428; *Essays of Brutus No. XIV*, *supra* note 188, at 437; *Essays of Brutus No. XV*, *supra* note 188, at 438; Notes of the Virginia Ratification Convention Proceedings (June 21, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1440, 1445–46 (John P. Kaminski & Gaspare J. Saladino eds., 1993), available at

Yet our evidence demonstrates that the Framers were deeply familiar with a Scottish court that blended law and equity, as well as with a lengthy debate across the Atlantic regarding the merits of a unitary court system. This debate centered to a large degree on the reasoning of Kames. In the Introduction to his widely read *Principles of Equity*, Kames made an extensive case for the unitary model of his own court.<sup>284</sup> Kames recognized that courts should be careful to remember in which mode they were proceeding and not to let the rules of equity and law become too intertwined. But he argued that the Scottish system was superior because it avoided both the complexity of multiple proceedings and the unjust results often dictated in English courts by their inability to administer certain forms of relief and to entertain certain claims and defenses.<sup>285</sup>

Although Kames's argument met with mixed praise in England,<sup>286</sup> it found a more receptive audience in an America that saw no reason to duplicate the complexity (or expense) of the courts of Westminster.<sup>287</sup> In 1785, while offering advice on how to structure the constitution of the aborning state of Kentucky, James Madison expressly referred to Kames's argument in *Principles of Equity*:

With regard to a Court of Chancery as distinct from a Court of Law, the reasons of Lord Bacon on the affirmative side outweigh in my Judgment those of Lord Kaimes on the other side. Yet I should think it best to leave this important question to be decided by future lights without tying the hands of the Legislature one way or the other. I consider our county

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<http://vt.consource.org/index.asp?bid=582&documentid=5141>. As we shall explain, the Constitution indeed extended Scottish notions of unity and finality beyond their expression in the existent Scottish court system. That said, the failure of the Antifederalists to refer to the Court of Session and of the Federalists to mention it in response raises some concern about the soundness of our thesis that the Scottish system was well known in America. In some quarters, however, there existed a popular hostility to Scotland and the Scots, who often served as mercenaries during the Revolution and whom many viewed as opposed to American independence. This hostility may explain the paucity of references to Scottish law during ratification and the readiness of Antifederalists to cast Article III as unprecedented. On the paucity of references to Scottish law generally, see Rogers, *supra* note 55. On the paucity of references to Scotland in the *Federalist Papers*, see THE *FEDERALIST* CONCORDANCE 484 (Thomas S. Engeman et al. eds., 1980), which identifies five references to Scotland in the *Federalist Papers*. On the characterization of Article III as unprecedented, see *Essay of Brutus No. XV*, *supra* note 188, at 438, which states that the power of the Supreme Court under Article III "transcends any power before given to a judicial by any free government under heaven." In any event, in our view the solid evidence demonstrating that the Framers and others with legal knowledge, such as Jefferson and Adams, were familiar with the Scottish model stands up quite nicely to the unanswerable question of the motivations behind statements made during the heavily politicized ratification debate.

<sup>284</sup> See KAMES, *supra* note 9, at i–xviii.

<sup>285</sup> See *id.* at viii.

<sup>286</sup> See WALKER, *supra* note 7, at 232. Blackstone acknowledged Kames's learning but disputed his conclusions. See *id.*; 3 BLACKSTONE, *supra* note 7, at \*49, \*429–30, \*433, \*441.

<sup>287</sup> See Johnson, *supra* note 73, at 121.

courts as on a bad footing and would never myself consent to copy them into another constitution.<sup>288</sup>

Although Madison himself came down on the side of separate courts, he recognized that others might disagree and proposed to leave the choice between Bacon and Kames to the legislature.

In his *Lectures on Law*, James Wilson also joined the debate between Bacon and Kames:

Should the jurisdiction according to equity, and the jurisdiction according to law, be committed to the same court? or should they be divided between different courts?

My Lord Bacon thinks that they should be divided: my Lord Kaims thinks that they should be united. All this is very natural. My Lord Bacon presided in a divided, my Lord Kaims was a judge in a united jurisdiction. Let us attend to their arguments: the arguments of such consummate masters will suggest abundant matter of instruction, even if we cannot subscribe to them implicitly.<sup>289</sup>

In the end, Wilson sided with Kames. After paraphrasing the two positions, and analyzing their respective merits, Wilson concluded that, because the distinction between law and equity arose out of obscure historical circumstances unsuited to convenience, and because equity drives the law toward a state of refinement, “every court of law ought also to be a court of equity.”<sup>290</sup>

The evidence thus suggests that well-informed participants in the Framing of Article III were quite familiar with the debate between Bacon and Kames and may have interpreted Dr. Johnson’s motion as adopting the Scottish model — just as Wilson discussed the debate in explaining and defending the decision subsequently.<sup>291</sup> (Read’s objec-

<sup>288</sup> Letter from James Madison to Caleb Wallace, *supra* note 150, at 29.

<sup>289</sup> James Wilson, *Lectures on Law* Part 2 No. III, *supra* note 30, at 484–85.

<sup>290</sup> *Id.* at 486. Wilson then argued that a separate court of chancery should be established to handle mercantile cases in the first instance in order to govern commerce. *Id.* at 491–92.

<sup>291</sup> Another, less serious proposal at the Convention to follow the model of the Scottish judiciary came from Ben Franklin. During the debate on the selection of federal judges, Franklin suggested the method

he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice <among themselves>. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible.

James Madison, Notes on the Constitutional Convention (June 5, 1787), in 1 FARRAND’S RECORDS, *supra* note 260, at 120 (triangular brackets in original). A rhetorical remnant of Scottish legal traditions also made a curious appearance in the treason trial of Aaron Burr in 1807, when the jury returned a verdict of “not proved to be guilty.” See Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1299 (2005). Although “not proven” was not a recognized verdict in England, it was the jury’s third choice in criminal trials in Scotland. Almost two hundred years later, Senator Arlen Specter resurrected that third choice

tion to vesting the powers of law and equity in the same court certainly calls to mind the Bacon position.) Johnson's motion carried by a vote of six states to two, which included the state delegations of Virginia and Pennsylvania in the affirmative,<sup>292</sup> and it accomplished two things. First, it extended the judicial power of the Supreme Court to cases in law and equity, thereby assuring that Court of a supervisory role with respect to any lower federal court. Second, it engendered the possibility (doubtless agreeable to Madison) that Congress could create separate lower courts of law and equity if it chose to do so. As proposed by Johnson, the judicial power in law and equity was to be vested in the Supreme Court and in "such" inferior courts as Congress might establish, thereby conferring a measure of discretion on the legislative branch to give the lower federal courts a more specialized jurisdiction.<sup>293</sup>

The entire episode nicely illustrates the idea that (somewhat in contrast to Justice Frankfurter's implication) the Framers were not simply copying the judicial system of England and the colonial state courts. Although the Virginia courts dated from colonial times, and, as Engdahl notes,<sup>294</sup> tracked the Westminster system in many respects, Madison made quite clear that he did not regard his own state's system as

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when he attempted to offer a verdict of not proven in the impeachment trial of President Clinton. *See id.*

<sup>292</sup> *See* James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FARRAND'S RECORDS, *supra* note 260, at 428. Both of the states in opposition to the joinder of law and equity (Delaware and Maryland) had separated the two jurisdictions along English lines. *See* DEL. CONST. arts. 13, 17 (1776) (recognizing the power of the justices of the county courts of common pleas to hold a separate inferior court of equity and the power of a court of appeals to hear issues of law and equity); MD. CONST. arts. 40, 56 (1776) (recognizing the existence of a separate Court of Chancery, staffed by a life-tenured chancellor, in addition to a General Court and Court of Admiralty); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery — 1792–1992*, 18 DEL. J. CORP. L. 819, 822–34 (1993) (describing the court of equity held by common pleas after 1776 and the creation of a separate Court of Chancery by the Delaware constitution of 1792).

<sup>293</sup> Apparently for stylistic purposes, the Framers later shifted the reference to law and equity from section 1 (where Johnson had placed it) to section 2, thereby clarifying that the judicial power was to extend to federal question cases of law and equity, as well as to admiralty cases. *Compare* Report of Committee of Style, in 2 FARRAND'S RECORDS, *supra* note 260, at 600 (referring to law and equity in both sections 1 and 2 of proposed Article III), *with* The Constitution of the United States (Engrossed Copy), in 2 FARRAND'S RECORDS, *supra* note 260, at 660–61 (containing but a single reference to law and equity in Article III, section 2). Many scholars have described the district courts under the Judiciary Act of 1789 as primarily courts of admiralty, although they also exercised jurisdiction over less serious criminal proceedings. On the jurisdiction of the district courts under the Judiciary Act of 1789, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 25–26 (6th ed. 2009). Congress has, from time to time, created specialty courts, such as the Temporary Emergency Court of Appeals and the Foreign Intelligence Surveillance Court, innovations that pose little threat to the Court's supremacy. *See id.* at 34–36 & n.97 (describing new courts created by Congress).

<sup>294</sup> *See* Engdahl, *supra* note 35, at 468–70.

worthy of emulation. Wilson considered both the English and the Scottish systems as potential guides but refused to “subscribe to them implicitly.” Both men attempted, as they had done with the executive and legislative branches, to use all of the models and materials at hand to craft a judicial branch that improved upon the system they inherited from England.<sup>295</sup>

Indeed, in two important respects Article III departs from Scottish ideas by extending unity and finality to their logical conclusions. First, despite the Acts of Union’s insulation of Scottish courts from supervisory review at Westminster, Parliament interposed itself as an appellate body to overturn decisions of the Court of Session. Article III, by contrast, vests the entire judicial power in the federal courts, dispensing with any form of legislative appellate review.<sup>296</sup> In doing so, the Framers established a judicial power that was truly independent of the executive and legislative powers, and also created a court that was truly supreme because it was entirely immune from political supervision or correction. Second, although Scotland lacked overlapping superior courts, it did divide its judicial power into two separate hierarchies under the supreme Court of Session in civil causes and the supreme High Court of Justiciary in criminal ones. The Framers took the notion of unity one step further, vesting *all* of the judicial power in one Supreme Court in both civil and criminal cases. These two departures lend force to Wilson’s description of the work of the Framers in looking to exterior models for inspiration but making independent decisions in order to improve upon those models. At the very least, however, the Framers’ familiarity with Scotland’s supreme court and with what Wilson called its “united jurisdiction”<sup>297</sup> suggests that the shift from multiple supreme courts to one was far from meaningless. Instead, it was a choice between division and coordination as

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<sup>295</sup> Further support for this contention can be found in the Convention debates. Immediately after Dr. Johnson’s successful motion to extend the judicial power to equity as well as law, John Dickinson moved to provide for removal of judges “by the Executive on the application [of Congress].” James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FAR-RAND’S RECORDS, *supra* note 260, at 428. In favoring the motion, Roger Sherman “observed that a like provision was contained in the British Statutes,” *id.*, but John Rutledge argued that “[i]f the supreme Court is to judge between the U. S. and particular States, this alone is an insuperable objection to the motion,” *id.*, and Wilson further contended that the differences of American government made reliance upon the British model more “dangerous” in this country, *id.* at 429. The motion was ultimately defeated. *Id.*

<sup>296</sup> During the Jeffersonians’ impeachment of Federalist judge Samuel Chase, Chief Justice Marshall (himself a potential target) suggested a constitutional amendment that would allow Congress to review unpopular Supreme Court decisions as an alternative mode of political control. For an account, see PRESSER, *supra* note 78, at 162–64. One might view the proposal as aimed at introducing review on the House of Lords model.

<sup>297</sup> James Wilson, Lectures on Law Part 2 No. III, *supra* note 30, at 485.

represented by the English model on the one hand and unity and hierarchy as represented by the Scottish model on the other.

*C. Supremacy, Inferiority, and the Exceptions  
and Regulations Clause*

Most importantly, the Scottish model and the writings of Lord Kames call into question the validity of the orthodox view of the Exceptions and Regulations Clause of Article III. Under the well-known terms of the orthodox view, Congress has broad power over the Court's appellate jurisdiction and can fashion exceptions and regulations that would eliminate the Court's power to hear certain categories of cases.<sup>298</sup> Orthodoxy further holds that Congress can effectively zone unpopular constitutional rights out of the federal courts altogether by combining its power to restrict the jurisdiction of the lower federal courts under the Madisonian compromise with its power to fashion exceptions to the Court's appellate jurisdiction.<sup>299</sup> Although a number of scholars have questioned orthodox claims of plenary congressional power, the challenge for critics of orthodoxy has been to identify a textual limit on what appear to be the unqualified terms of Article III's Exceptions and Regulations Clause. For example, the so-called essential function test put forward by Professors Henry Hart and Leonard Ratner — which argues that Congress must not exercise its power to make exceptions in a way that removes the Court's essential role in the federal system<sup>300</sup> — has been faulted for its indeterminacy and its lack of textual foundation.<sup>301</sup>

A growing body of literature, however, suggests that Article III's requirements of unity, supremacy, and inferiority provide an important textual limit on congressional jurisdiction-stripping power.<sup>302</sup> One of us has argued that the Exceptions and Regulations Clause must be read in connection with the constitutional requirements that other tribunals remain inferior to the one Supreme Court.<sup>303</sup> To the extent that the Court's supremacy entails a supervisory role, it ensures ongoing forms of supervisory intervention on a basis independent of any par-

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<sup>298</sup> See, e.g., Van Alstyne, *supra* note 35, at 260–62; Wechsler, *supra* note 44, at 1004–07.

<sup>299</sup> For a more comprehensive account, see PFANDER, *supra* note 7, at 145–56.

<sup>300</sup> See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953); Ratner, *supra* note 45, at 171–72.

<sup>301</sup> See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901–03 (1984).

<sup>302</sup> See generally PFANDER, *supra* note 7; Calabresi & Lawson, *supra* note 46; Claus, *supra* note 46.

<sup>303</sup> See Pfander, *Article I Tribunals*, *supra* note 40, at 648–51; Pfander, *State Court Inferiority*, *supra* note 46, at 237–38; Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1500–08.

ticular grant of appellate jurisdiction.<sup>304</sup> Moreover, because the Constitution impresses the status of inferiority on any tribunal constituted to hear federal cases, it ensures that both state and lower federal court decisions will remain subject to review in the wake of restrictions on the Court's appellate jurisdiction.<sup>305</sup> On this view, Congress has broad power to fashion exceptions to the Court's as of right appellate jurisdiction, but it lacks the power to assign matters to the state courts and free them from supreme judicial oversight and from the obligation to apply the Court's own precedents regarding the meaning of federal law.

Yet the inferior-as-subordinate position, which lies at the center of a hierarchical conception of the federal judiciary, has been challenged by a number of scholars who question hierarchy on both definitional and structural grounds. First, as a matter of definition, these scholars argue that inferior courts were understood at the time of the Framing as courts of limited geographic jurisdiction.<sup>306</sup> Supreme courts, by contrast, had the power to exercise jurisdiction over disputes throughout the realm. On this view, one cannot draw any firm limits from the terms "supreme" and "inferior" because supreme courts had no special role to play with respect to lower or inferior courts, but simply provided a geographically expansive court of original jurisdiction for the trial of substantial civil and criminal matters. Others, such as Professor Amy Coney Barrett, have excavated contemporary usages, concluding that, in general, "supreme" and "inferior" often denoted rank or prestige rather than any sort of hierarchical relationship.<sup>307</sup>

Second, drawing a different lesson from the English model, Professor Edward Hartnett has argued that the common law writs on which the Court of King's Bench relied in exercising supervisory oversight of lower courts outside the ordinary course of appellate jurisdiction were distinctive features of a monarchical legal system.<sup>308</sup> For Hartnett, instead of being linked to supremacy and inferiority, the supervisory powers of the English superior courts derived from their relationship to the royal prerogative and the King's power to administer justice throughout the realm. Hartnett further contends that the republicans who framed Article III rejected the model of prerogative power in favor of a model that emphasized the importance of written law.<sup>309</sup> For Hartnett, then, the English courts provide an example of what the

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<sup>304</sup> Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1451–59.

<sup>305</sup> Pfander, *State Court Inferiority*, *supra* note 46, at 230–32.

<sup>306</sup> See *supra* pp. 1663–64.

<sup>307</sup> See Barrett, *supra* note 46, at 349–51. *But see* Caminker, *supra* note 262, at 828–34 (arguing that the language "inferior to" mandates a subordinate relationship).

<sup>308</sup> See Hartnett, *supra* note 186, at 307–14.

<sup>309</sup> *Id.* at 310–16.

Framers rejected when they required federal courts to act within boundaries set both by Article III and by acts of Congress conferring and limiting jurisdiction.<sup>310</sup>

Third, proponents of limits on the Exceptions and Regulations Clause have run up against the clause's relatively obscure origins. Convention holds that, aside from the text itself, interpretive guidance can be drawn only from a remarkably barren drafting history.<sup>311</sup> The clause first appeared rather late in the proceedings of the Committee of Detail in a draft written by James Wilson. A prior draft, penned by committee member Edmund Randolph, provided that "the legislature shall organize" the Supreme Court's original and appellate jurisdiction.<sup>312</sup> Wilson rewrote Randolph's provision in a form familiar to us from Article III: "In all the other Cases beforementioned, [the Court's jurisdiction] shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make."<sup>313</sup> Until now, no other information about how the clause originated has been discovered.

More fundamentally, as explained above, scholars have argued that there was simply no model for a hierarchical, appellate-style supreme court at the time of the Framing. Ritz, for example, points to the colonial and English models in contending that hierarchical judicial systems were unknown in 1787–1788.<sup>314</sup> A similar critique, albeit one addressed to the Hart-Ratner essential function thesis, is that advocates for limits on Congress's jurisdiction-stripping power confuse the familiar with the constitutionally required.<sup>315</sup> In leveling this critique at the essential function thesis, Professor Gerald Gunther doubtless had two ideas in mind. First, Article III leaves a fair amount of control over the structure of the federal judiciary in the hands of Congress. On this view, the federal judiciary could have been structured in a variety of different ways. Second, we have only come to rely on the Supreme Court as the final arbiter of the meaning of federal law in comparatively recent times. The Court's discretionary jurisdiction (via the writ of certiorari) was conferred in the Judges' Bill of 1925.<sup>316</sup> What Hart and Ratner view as the Court's essential function of settling the meaning of federal law through discretionary review ar-

<sup>310</sup> See *id.* at 312–13.

<sup>311</sup> See, e.g., Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1004 (2008); Ratner, *supra* note 45, at 172 & n.69.

<sup>312</sup> Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1409 (2010) (quoting Committee of Detail, IV, in 2 FARRAND'S RECORDS, *supra* note 260, at 147).

<sup>313</sup> *Id.* at 1411 (quoting Committee of Detail, IX, in 2 FARRAND'S RECORDS, *supra* note 260, at 173). For a more detailed description of the clause's origins, see *id.* at 1406–12.

<sup>314</sup> See RITZ, *supra* note 3, at 32–44.

<sup>315</sup> See Gunther, *supra* note 301, at 905–09.

<sup>316</sup> See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644–48 (2000).

rived rather late in its institutional history. To insist that such discretionary oversight must be respected by Congress would transform what has happened more or less by happenstance into a constitutional requirement.<sup>317</sup>

As the following sections explain, however, our findings demonstrate that the Scottish court system, as explained by Kames and as immunized from parliamentary tinkering in Article XIX of the Acts of Union, provides important support for the hierarchical/subordinate position in this debate over definitions and precedents.

1. *Supremacy and Inferiority in the Scottish Courts.* — First, in addition to introducing the Framers to a pyramidal and largely unified court system, Kames's *Historical Law-Tracts* provided the most complete exposition of the correlative relationship of supreme and inferior courts available at the time of the Framing.<sup>318</sup> According to Kames, a "supreme" court possessed several attributes. The Court of Session, for example, enjoyed wide geographic and subject matter jurisdiction,<sup>319</sup> which included the power to decide cases on equitable principles, a power not necessarily conferred upon inferior courts. More importantly, however, a supreme court was primarily defined by its ability to review the decrees of inferior courts:

The court of session is sovereign and supreme: sovereign, because it is the King's court, and it is the King who executes the acts and decrees of this court: supreme, with respect to inferior courts having the same or part of the same jurisdiction, but subjected to a review in this court.<sup>320</sup>

As Kames described it, the Session was supreme "with respect to" those courts whose judgments it could review.

Kames extended this idea of oversight and control to his definition of inferior courts; he characterized the decrees of inferior courts as subject to review by another court. For example, Kames explained that, at one time, an aggrieved party could appeal a decision of a baronial court to a sheriff court, making the baronial courts inferior to their supervising sheriff court.<sup>321</sup> But later, the appeal to the sheriff court

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<sup>317</sup> This critique from anachronism underlies Van Alstyne's suggestion that Congress could implement Article III with a multi-headed Hydra, no matter how inconsistent with current practice such an arrangement would appear. See Van Alstyne, *supra* note 35, at 269.

<sup>318</sup> Many of the Scottish institutional writers confirm that Kames's understanding of supremacy and inferiority was widely shared, although they differ about particular details. We note such confirmation throughout this section in the footnotes, but we refrain from a detailed discussion of the institutional works because they do not seem to have circulated as widely as *Historical Law-Tracts* and *Principles of Equity*.

<sup>319</sup> 1 KAMES, *supra* note 8, at 317 ("Courts superior and inferior which judge the same causes, admit not of any local distinction; because a court superior or supreme has a jurisdiction that extends over the several territories of many inferior courts."); *id.* at 329–30.

<sup>320</sup> *Id.* at 429.

<sup>321</sup> *Id.* at 384–85.

gave way to review by suspension and reduction in the Court of Session, at which point the sheriff courts lost their supremacy over the baronial courts:

[T]his process of reduction, first practiced in the daily council, and afterwards in the present court of session, put an end to the difference betwixt the sheriff and baron courts in point of superiority. When appeals went into disuse, the sheriff lost his power of reviewing the sentences of the baron court; and these courts came by degrees to be considered as of equal *rank*, when the proceedings of both were equally subjected to the review of the court of session.<sup>322</sup>

Kames's use of rank here also nicely resolves the textual ambiguity noted by Barrett and others by making clear that a court's rank *depended* upon that court's place in the chain of hierarchical review.

In the same discussion, Kames made clear that supremacy and inferiority were not absolute, but were instead matters of relation.<sup>323</sup> Thus, the High Court of Admiralty in Scotland was a supreme court in relation to the inferior admiralty courts, but was an inferior court in relation to the Court of Session (and to the High Court of Justiciary in criminal causes) because its decrees were subject to review, either by appeal or by suspension, reduction, or advocation:

The admiral court . . . is . . . supreme with respect to inferior admiral courts, whose sentences it can review. But with regard to the courts of session and justiciary, it is an inferior court; because its decrees are subjected to a review in these courts. The commissary [ecclesiastical] court of Edinburgh is properly the bishop's court, and not sovereign. With respect to its supremacy, it stands upon the same footing with the admiral court.<sup>324</sup>

<sup>322</sup> *Id.* at 394 (emphasis added); see also 1 ERSKINE, *supra* note 10, at 28 ("Inferior judges are those whose sentences are subject to the review of one or other of our supreme courts . . .").

<sup>323</sup> *Cf.* 2 BANKTON, *supra* note 10, at 475 (arguing that only the House of Lords could be considered supreme because its judgments were the last resort, and designating the Court of Session a "superior" court because although it reviewed the judgments of inferior courts, its own judgments were subject to parliamentary review); 1 ERSKINE, *supra* note 10, at 28 ("Mixed jurisdiction participates of the nature both of the supreme and inferior.").

<sup>324</sup> 1 KAMES, *supra* note 8, at 429–30; see also 1 ERSKINE, *supra* note 10, at 28 ("That jurisdiction is supreme from which there lies no appeal to a[] higher court."). Chief Justice Marshall expressed a similar understanding in *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), in the course of assessing the Supreme Court's power to review decisions of the federal district court for the territory of Orleans without explicit statutory authority. *Id.* at 312. The Court held that by giving the district court the same original and appellate jurisdiction as that exercised by the United States District Court for the District of Kentucky, whose decisions were subject to Supreme Court review pursuant to the Judiciary Act of 1789, Congress had meant for decisions of the Orleans court to be equally subject to review. *Id.* at 318. According to Chief Justice Marshall, to construe the statute as providing for no review by appeal, writ of error, or otherwise would have meant that "the court of Orleans would . . . be a *supreme* court," and "would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an *inferior* court." *Id.* (emphasis added). On *Durousseau*, see Pfander, *Jurisdiction-Stripping*, *supra* note 46, at 1502–03; and Ratner, *supra* note 45, at 176–77.

A number of features of *Historical Law-Tracts* shed light on the contemporary debate over the structural qualities of the federal courts. First, although the terms “supreme” and “inferior” generally did denote — as some modern scholars have contended — the breadth of a court’s geographic and subject matter jurisdiction, Scots jurists viewed these terms primarily as indicative of a hierarchical relationship. Second, in contrast with the views of scholars steeped in English precedents, Scottish authorities viewed the power to supervise inferior courts as derived not from a supreme court’s status as an arm of the king, but from the court’s supremacy. Several Scottish courts were sovereign, in the sense that they enjoyed broad territorial and subject matter jurisdiction, but sovereignty did not confer powers of review. Indeed, as Kames explained, the Court of Exchequer was a sovereign court, conducting the king’s business and hearing cases from across Scotland,<sup>325</sup> but it nevertheless was not a supreme court because it did not review the judgments of any other courts.<sup>326</sup> Third, a supreme court enjoyed wide powers to administer justice that transcended the formal strictures ordinarily regulating the exercise of judicial power at common law, namely, what Kames termed the *nobile officium*, or equitable powers, of the Court of Session.

Scholars have attempted to reconstruct the meaning of the Constitution’s references to “one supreme Court” and to “inferior” courts and tribunals from the Westminster model, but Kames’s account reveals that these scholars have been missing a key piece of the Framers’ understanding.<sup>327</sup> Kames, supported by other Scottish legal writers, took the position that a court was inferior only to those courts with the power to review its decrees and stop its proceedings. Although Kames also embraced the geographic account of inferiority, he did not regard geographical limits as the distinctive or defining feature of an inferior court. The Acts of Union confirm the understanding that, at least in Scotland, inferior courts were subordinate to the supreme court. Article XIX, as we have seen, ensures the supremacy of the Courts of Session and Justiciary by declaring that “all Inferior Courts” within Scotland must “remain Subordinate, as they are now[,] to the Supream Courts of Justice within the same[,] in all time coming.”<sup>328</sup> This requirement provides striking support for Kames’s equation of supremacy with hierarchy and inferiority with subordination. In addition, it

<sup>325</sup> 1 KAMES, *supra* note 8, at 383, 429.

<sup>326</sup> *Id.* at 429. *But see* 1 ERSKINE, *supra* note 10, at 28.

<sup>327</sup> In his commonplace book, for example, Thomas Jefferson transcribed or paraphrased many of the excerpts from *Historical Law-Tracts* quoted above and below, including Kames’s discussion of review for excess of jurisdiction even where a judgment of a lower court was considered final. *See* THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 80, § 562, at 122–27.

<sup>328</sup> Acts of Union (1707), *supra* note 15, art. XIX (emphasis added).

placed an important and avowedly permanent limitation upon the ability of Parliament to remove inferior jurisdictions from the supervision and oversight of the Court of Session, the subject to which we now turn.

2. *Supervision in the Wake of Jurisdictional Exceptions and Regulations.* — Second, the practice of the Court of Session under Article XIX of the Acts of Union establishes a notable precedent for the supervisory account of Article III, allays the concerns with anachronism that now inform the jurisdiction-stripping debate, and helps to explain the origins of the Exceptions and Regulations Clause. Recall that the Acts of Union provided that the Court of Session would retain its current position and privileges within the Scottish judicial system, “subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great-Britain.”<sup>329</sup> This clause has not been previously considered in the literature on the Constitution’s Exceptions and Regulations Clause. But it bears an obvious resemblance to the declaration in Article III that the Supreme Court shall have appellate jurisdiction subject only to “such Exceptions, and under such Regulations as the Congress shall make.”<sup>330</sup> Given the similarity of the clauses’ operative language and Wilson’s Scottish roots, one can reasonably infer that he drew the Clause not out of thin air, but on the model of the judicial article of the Acts of Union.

Indeed, at the same time as he was drafting the Exceptions and Regulations Clause, Wilson inserted into what was to become Article I the provision granting Congress the power to “constitute Tribunals *inferior to* the supreme Court,”<sup>331</sup> a phrasing conspicuously similar to the requirement in the Acts of Union that all inferior courts in Scotland remain “[s]ubordinate . . . to the Supreme Courts of Justice.”<sup>332</sup> The coincidence of the two provisions in Wilson’s draft suggests a conscious attempt to institute a pyramidal judicial framework, one that perhaps is based on the Scottish design. While the similarity suggests conscious borrowing, we do not think that an argument for the significance of the Scottish model depends on proof that Wilson deliberately copied from the Acts of Union. Plainly, the Scottish model provided the Framers with a vocabulary and set of concepts with which to implement the constitutional protections they sought to confer on the federal judiciary. In addition, the Court of Session’s eighty

<sup>329</sup> *Id.* (emphasis omitted).

<sup>330</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>331</sup> U.S. CONST. art. I, § 8, cl. 9 (emphasis added). The draft produced by the Committee of Detail included language that gave the “Legislature of the United States” the power “to constitute Tribunals inferior to the Supreme (national) Court.” Committee of Detail, IX, *in* 2 FARRAND’S RECORDS, *supra* note 260, at 163, 167–68.

<sup>332</sup> Acts of Union (1707), *supra* note 15, art. XIX (emphasis added).

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years of experience with regulations enacted pursuant to Article XIX would have shaped the Framers' understanding of how the combined requirements of unity, supremacy, and inferiority in Article III would limit the exercise of the exceptions and regulations power.

As Professor David Walker has noted, the seemingly innocuous regulations power in the Acts of Union could allow Parliament to "fundamentally modify the powers and functioning of a court."<sup>333</sup> But Parliament's regulations power was subject to a crucial limitation: the provision that inferior Scottish courts remain subordinate to the Court of Session for all time coming. In *Historical Law-Tracts*, Kames explained how the Court of Session reconciled its supremacy with jurisdictional "regulations" imposed by Parliament. As with King's Bench in England, the Court of Session reviewed the judgments of inferior courts in a variety of ways, ranging from appeals to the issuance of the extraordinary processes, in order to rectify error: "[J]udges subjected to no review[] soon become arbitrary. Hence the necessity of superior courts, to review the proceedings of those that are inferior."<sup>334</sup> Uniquely to Scotland, though, the practice of appeal as of right had mostly given way by Kames's time to the regular issuance of reductions, suspensions, and advocations, whose flexibility was preferable to the complexities of appeals.<sup>335</sup> In this function, the Court of Session used its supervisory powers to act as "a compleat legal police,"<sup>336</sup> one constituted in order to ensure the orderly administration of justice.

Although the supervisory processes tended to issue upon sufficient showing as a matter of course,<sup>337</sup> direct review on the merits in the Court of Session did not lie in every case. The function of a supreme court, according to Kames, was not necessarily to scrutinize every decision of an inferior court in every case for any sign of legal or factual error, but rather to supervise those inferior courts in order to prevent them from exceeding their powers or administering justice arbitrarily. As such, parliamentary regulations often significantly curtailed the ability of litigants to secure review in the Court of Session in the ordinary course. For a variety of reasons, Parliament used the authority conferred upon it by the Acts of Union to provide for other tribunals to serve as the exclusive and final jurisdictions in certain matters. But despite these declarations of lower court finality, the Court of Session possessed the power by virtue of its supremacy to interpose extraordinary supervisory remedies where necessary to keep inferior courts within their proper bounds.

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<sup>333</sup> 5 WALKER, *supra* note 8, at 455.

<sup>334</sup> 1 KAMES, *supra* note 8, at 316.

<sup>335</sup> *See id.* at 385-95.

<sup>336</sup> *Id.* at 395.

<sup>337</sup> *See id.* at 392-95.

In some instances, the Court of Session exercised a confined appellate jurisdiction, leaving closer supervision to an intermediate court. For example, although the Session reviewed judgments in admiralty cases, Parliament conferred on the High Court of Admiralty “a peculiar or privative jurisdiction in the first instance”<sup>338</sup> in maritime cases. Thus, the Court of Session refrained from direct supervision of the inferior admiral courts, and acted only in an appellate function:

[W]ith relation to [the admiral court], the session at present cannot be considered in any other light, than as a court of appeal; precisely as the house of Lords is with relation to the session. Hence it seems to follow, that the court of session cannot regularly suspend the decree of an inferior admiral; which would be the same, as if a cause should be appealed from the sheriff to the house of Lords.<sup>339</sup>

Nevertheless, when the admiral court heard mercantile cases not occurring directly on the high seas (but related to merchant shipping<sup>340</sup>), its jurisdiction was an inferior one, supervised like any inferior court by the Court of Session: “The [admiral] court pretends not to an exclusive jurisdiction in mercantile affairs; and in these it is precisely like the sheriff court, considered as an inferior jurisdiction, subjected to the orders and review of the supreme court of session, by advocation, suspension, and reduction, in the ordinary course.”<sup>341</sup>

Note here that Kames distinguished between a court of appeal and a supreme court. Although the Session heard appeals from the admiral court in maritime cases because the admiral court possessed an exclusive jurisdiction, it was only in those mercantile cases in which the Session exercised direct supervisory power that the admiral court was considered “an inferior jurisdiction.” Indeed, Kames inserted the adjective “supreme” when transitioning from the Session’s appellate to its supervisory function.

Conversely, the Court of Session also issued supervisory decrees in many situations in which it lacked appellate jurisdiction. That practice emerged from the complicated and vexatious nature of interlocutory appeals in Scotland in the fifteenth century. These appeals had to run through numerous courts and could multiply proceedings indefinitely before eventually reaching the supreme court. According to Kames, the Daily Council — the predecessor of the Session as the supreme civil court<sup>342</sup> — began reviewing judgments of lower courts for error after aggrieved parties filed direct complaints for relief, though it did so without explicit statutory authority:

<sup>338</sup> 5 WALKER, *supra* note 8, at 469.

<sup>339</sup> 1 KAMES, *supra* note 8, at 327–28.

<sup>340</sup> See 5 WALKER, *supra* note 8, at 469.

<sup>341</sup> 1 KAMES, *supra* note 8, at 328.

<sup>342</sup> See *id.* at 386–89.

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[C]omplaints were received against the proceedings and decrees of inferior judges, and, upon iniquity found, . . . the proceedings were rectified or annulled. The *very nature and constitution of this court*, behoved to give birth to some such remedy . . . This court could not receive an appeal, because no such privilege was bestowed upon it; and the whole forms of a process of appeal, were accurately adjusted by parliament immediately after the institution of this court. Now, no man who had once experienced an earlier remedy, would ever patiently submit to the hardship and expence, of multiplying appeals through different courts, before he could get his cause determined in the last resort. We may therefore readily believe, that a direct application to the daily council for redress, would be the choice of every man who conceived injustice to be done him by an inferior judge. He could not bring his cause before this court by appeal; which justified his bringing it by summons or complaint. And in this form he had not any difficulty to struggle with, more than in an appeal; for the former requires no antecedent authority from the court, more than the latter. This assumed power of reviewing the decrees of inferior judges, was soon improved into a more regular form. Decrees of registration were from the beginning suspended and reduced in this court; and *by its very institution* it was the proper court for such matters. The same method came to be followed, in redressing iniquity committed by inferior judges. In place of a complaint, a regular process of reduction was brought; and because this process did not stay execution, the defect was supplied by a suspension.<sup>343</sup>

Thus, as the supreme court, the Daily Council — and its later successor, the Court of Session — was “by its very nature and constitution” empowered to exercise supervisory authority in order to prevent inferior courts from exceeding their authority, even in the absence of statutorily vested as of right appellate jurisdiction.

More intriguingly, although the Session lacked a specific criminal jurisdiction, during the development of the Scottish judicial system the Session for a time interposed itself where necessary to issue advocations to inferior criminal courts, a power to which the Justiciary had not yet succeeded:

The privilege of advocacy, according to the established notion, was confined to the court of session. The justiciary court did not pretend to this privilege, and the court of session could not properly interpose in matters which belonged to another supreme court. . . . The court of session received complaints of wrong done by inferior criminal judges, and upon finding a complaint well founded, took upon them to remove the cause by advocacy to the justiciary. They also ventured to remove criminal causes from one court, to another that was more competent and unsuspected.<sup>344</sup>

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<sup>343</sup> *Id.* at 391–93 (emphasis added) (footnote omitted).

<sup>344</sup> *Id.* at 401 (footnote omitted); *see also id.* at 402 (“And through the same influence [the Court of Session] interposed in ecclesiastical matters also. They advocated a cause for church censure,

In this example, the Session's actions were even more notable than in the previous one, for the court lacked eventual appellate jurisdiction over criminal cases. Thus, the court assumed power only through its role as a supervisory court, but this time, instead of removing the cause for its own determination, the Session transferred it for impartial adjudication in the Justiciary.<sup>345</sup>

The Court of Session also entertained applications for extraordinary remedies to supervise inferior courts even where another court possessed final power to determine a case. Ecclesiastical courts, for example, were given the authority to pass an "ultimate" sentence settling a minister in a parish, a decision with which the Session could not interfere regardless of the lack of a minister's legal entitlement to the position.<sup>346</sup> "One would imagine," Kames explained, "that this should entitle him to the benefice or stipend" of the office; nevertheless, "the court of session, without pretending to deprive a minister of his office, will bar him from the stipend, if the ecclesiastical court have proceeded illegally in the settlement."<sup>347</sup> According to Kames, "it would be a great defect in the constitution of a government, that ecclesiastical courts should have an arbitrary power in providing parishes with ministers."<sup>348</sup> Thus, the Session interposed a limited remedy to prevent such illegal proceedings without embroiling itself in the merits of every dispute over the settlement of ministers: "The check is extremely mild, and yet is fully effectual to prevent the abuse."<sup>349</sup>

Most strikingly, the Court of Session actually addressed the consequences of an act of Parliament restricting its appellate jurisdiction. In a decision with important but thus far unremarked implications for the jurisdiction-stripping debate under Article III, the Court of Session upheld its supervisory authority despite a statutory restraint on its appellate jurisdiction. The case began with Parliament's adoption in 1749 of a statute authorizing certain trustees of a shire to determine charges for tolls on a turnpike.<sup>350</sup> This turnpike act also declared that

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from the Dean of the chappel-royal, and remitted the same to the Bishop and clergy. And a minister who was pursued before a sheriff as an intruder into a church, having presented a bill of advocacy to the court of session, the cause was advocated to the privy council." (footnotes omitted).

<sup>345</sup> See *id.* at 401. In addition, despite not possessing appellate jurisdiction over criminal cases, the Court of Session used reduction as an equivalent of the writ of habeas corpus. See, e.g., 1 THE DECISIONS OF THE COURT OF SESSION, FROM ITS FIRST INSTITUTION TO THE PRESENT TIME 495–96 (Henry Home, Lord Kames ed., Edinburgh, Bell & Bradfute, William Creech & Watson, Elder & Co. 2d ed. 1791) (1741).

<sup>346</sup> 1 KAMES, *supra* note 8, at 337–38.

<sup>347</sup> *Id.* at 338.

<sup>348</sup> *Id.* at 339.

<sup>349</sup> *Id.*

<sup>350</sup> See Haddington County Roads Act, 1749, 23 Geo. 2, c. 17 (Gr. Brit.); 1 KAMES, *supra* note 8, at 427.

the justices of the peace would review the actions of the trustees and could “rectify” any abuses “ultimately and without appeal.”<sup>351</sup> At one point, a dispute arose because the trustees had exempted certain parties from paying the tolls the trustees otherwise charged. The justices of the peace issued an order requiring the trustees to levy the toll, and the trustees appealed that order to the Court of Session.<sup>352</sup>

Even where Parliament had provided, as in this case, for finality with respect to the Session’s appellate jurisdiction, that finality extended only to the merits of the case. The Court of Session could still interpose to determine whether the justices of the peace had incorrectly ascertained the extent of their statutory jurisdiction, perhaps by applying their power to a party or a situation outside the contemplation of the statute: “A judgment however of a court upon its own powers, ought never, in good policy, to be declared final; for this, in effect, would be to bestow upon the court, however limited in its constitution, a power to arrogate to itself an unbounded jurisdiction, which would be absurd.”<sup>353</sup> Thus, despite the statutory vesting of finality in the justices of the peace under the turnpike act, the Court of Session separated finality as to the merits from finality as to the jurisdiction and maintained its supervisory role.<sup>354</sup>

Another manifestation of the idea that supervision survives a parliamentary restriction on appellate jurisdiction appears in *Countess of Loudon v. Trustees*.<sup>355</sup> In this 1793 case involving a different turnpike statute, a similar question arose as to the meaning of a provision that deemed the decisions of the quarter-sessions “final and conclusive” when reviewing the local trustees’ exercise of their authority “to suppress any *by-roads* that do not appear to be *of importance* to the public.”<sup>356</sup> After the trustees decided to close a certain road, the Countess of Loudon petitioned the Court of Session for an advocacy.<sup>357</sup> In determining that it possessed jurisdiction to review the judgment of the lower court, the Court of Session distinguished between discretionary determinations committed to the trustees, which were final, and determinations about the scope of the trustees’ power, which were not.<sup>358</sup> And because the “Supreme Court” of Session had determined in a previous decision that the road in question was in fact of importance to

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<sup>351</sup> 1 KAMES, *supra* note 8, at 427.

<sup>352</sup> *Id.* at 427–28.

<sup>353</sup> *Id.* at 426–27.

<sup>354</sup> *Id.* at 428–29.

<sup>355</sup> *Countess of Loudon*, *supra* note 28, at 115.

<sup>356</sup> *Id.* (internal quotation marks omitted). Obviously, *Countess of Loudon* came too late to have influenced the Framing of Article III, although this case represented the continuation of an established trend in Scottish jurisprudence.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 117–18.

the public, the trustees had exceeded their statutory authority by ignoring the Court of Session's prior decision.<sup>359</sup> "In this way," the court explained, "the question of competency came to be blended with the question of merits."<sup>360</sup>

*Countess of Loudon* sheds important light on the flexible quality of supervisory power and on the importance of subordination as a defining feature of inferiority, both considerations at the center of modern debates over jurisdiction stripping under Article III. One centerpiece of the debate concerns the question whether Congress might free inferior state and federal courts from any duty to apply the precedents of the Supreme Court by exercising the Exceptions Clause to declare those precedents inapplicable and to immunize the lower courts from Supreme Court review.<sup>361</sup> In *Countess of Loudon*, the Court of Session indicated that the inferior court was bound to apply the decisions of its hierarchical superior and had no discretion to second-guess the Court's prior judgment about the importance of the road. Viewing itself as duty-bound to interpose to correct that error, the Court of Session treated the parliamentary limit on its appellate jurisdiction as inapplicable to its supervisory role. Even though the error did not implicate the lower court's jurisdiction, it threatened to upend the hierarchical relationship specified in the Acts of Union and thus required correction. Indeed, the Court of Session intimated that the vesting of final and conclusive jurisdiction on all points in an inferior court "might even be held to be in some measure unconstitutional."<sup>362</sup>

*Historical Law-Tracts* and *Countess of Loudon* suggest that the supervisory account of Article III, far from being an anachronism, actually gives voice to a model of supremacy and inferiority that was widely understood in the eighteenth century and employed in the Constitution. The Court of Session saw no threat to its supremacy in routine exceptions to its power of review or in the vesting of final jurisdiction over factual decisions in inferior courts. In addition, it was content to let intermediate courts — such as the High Court of Admiralty — handle the supervision of much judicial business in the first instance. Notwithstanding Parliament's regulations, however, the

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<sup>359</sup> *Id.* at 118.

<sup>360</sup> *Id.*; see also 1 ERSKINE, *supra* note 10, at 30 n.15 ("[I]f the statutory trustees do not follow the terms of the act, or exceed the powers thereby given, the party aggrieved is not limited to the statutory or local jurisdiction, but may at once apply for his redress in the Court of Session . . . ." (citing *Countess of Loudon*, *supra* note 28)). According to the editor of a later edition of Erskine's *Institute*, in the early nineteenth century the House of Lords agreed with this principle in a number of cases on appeal. See *id.* at 30 n.(c).

<sup>361</sup> For examples of proposed jurisdiction-stripping legislation, see Pfander, *State Court Inferiority*, *supra* note 46, at 192–94. For an argument that state courts hearing federal cases are inferior tribunals within the meaning of Article I, see generally *id.*

<sup>362</sup> *Countess of Loudon*, *supra* note 28, at 118.

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Court of Session ensured the uniformity of the law, the status of its precedents, and the orderly administration of justice through limited interventions on jurisdictional grounds, thereby preventing inferior courts from escaping their subordinate status and using legislative exceptions to accumulate an unbounded jurisdiction.

## V. CONCLUSION

Scholarship on the origins of Article III of the Constitution and the meaning of the judicial power of the United States has often drawn on what Justice Frankfurter called the “traditional” work of the courts of Westminster.<sup>363</sup> In an effort to understand English legal traditions, scholars have invariably turned to Blackstone’s *Commentaries* as the best digested summary of English law. But just as Thomas Jefferson feared Blackstone’s influence on the sons and daughters of the nation’s founders, so too should modern scholars be wary of the extent to which Blackstone has captivated the scholarly gaze of subsequent generations. England’s eighteenth-century jurists aspired to a hierarchy that their judicial system did not achieve; this system featured multiple superior courts with overlapping jurisdiction, without one supreme court to oversee the work of all subordinate inferior tribunals. Pointing to the English reality (rather than to the aspiration), scholars conventionally argue that the terms of Article III impose no limits on Congress’s power over the jurisdiction of the federal courts. For scholars steeped in Blackstone and English judicial structure, the crucial terms of Article III — unity, supremacy, and inferiority — invite argument about the degree to which Congress must create and respect a judicial hierarchy with ultimate oversight over law, equity, and admiralty vested in the Supreme Court. Supremacy conveys conflicting meanings, and the hierarchy that now characterizes the Article III judiciary has appeared to some to have emerged by accident, rather than by design.

We think that quite the contrary is true. In our view, the Framers deliberately chose a system of judicial hierarchy and supervision and rejected the vision of plenary congressional control on which orthodox accounts depend. The Scottish model of a unitary judicial system, familiar to the Framers and quite different from the English model of multiplicity, provides important support for our supervisory account, and answers both Engdahl’s critique that the Framers could not have understood supremacy to denote hierarchy and Hartnett’s critique that supervisory authority is a monarchical vestige that contradicts a republican government predicated upon written law. The evidence of

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<sup>363</sup> See *supra* p. 1627.

Scottish influence on those individuals who structured Article III plainly demonstrates that the Framers had available to them a fully formed model of a unitary judicial system, written down in the Acts of Union and implemented through a system of supervisory review that clearly defined one supreme civil court (the Court of Session) and imposed obligations of subordination on all inferior courts. Rather than one we moderns have imposed on them, the hierarchical conception of Article III was one the Framers could readily have borrowed from Scotland, extended, and projected into the future.

The Scottish model has important lessons to teach, not only about the many influences on the Founding generation but also about the way that knowledgeable lawyers would have understood the operation of Article III's Exceptions and Regulations Clause. Just as the Acts of Union protected the privileges and authority of the Court of Session from parliamentary remodeling, so too did Article III secure the judicial power and jurisdiction of the Supreme Court. Just as the Acts of Union contemplated that Parliament would make routine housekeeping regulations, so too did Article III authorize exceptions and regulations to the Court's appellate jurisdiction to provide for the more convenient administration of justice. Just as the Session's power to supervise inferior courts was understood to survive any parliamentary restrictions on its appellate jurisdiction, so too does the Supreme Court's spot-checking supervisory authority necessarily survive any congressional exceptions to its as of right appellate jurisdiction.

Scottish law, so familiar to revolutionary Americans, left very few traces upon the American common law norms that developed in the nineteenth century under the stewardship of Justice Story and James Kent. Blackstone's emergence and the *Commentaries*' influence on the education of young lawyers helped to fuel the widespread adoption of English law (even in Scotland). Yet the absence of Scottish influence on nineteenth-century American legal education and on the rules of contract, tort, and property law should not be read to mean that the Scots example was entirely lost on early Americans. Indeed, the Scottish judiciary had its most profound impact in providing a model for the structure of the federal judiciary, with its one Supreme Court sitting atop a judicial pyramid consisting of a multitude of inferior tribunals. If it contributed little to the common law of the early Republic, the Scottish judicial system as secured through the Acts of Union may have helped to shape the features of unity, hierarchy, finality, and independence that define the federal judiciary.

## APPENDIX

## ARTICLE XIX OF THE ACTS OF UNION

THAT the Court of Session, or Colledge of Justice, do after the *Union*, and notwithstanding thereof, remain in all time coming within *Scotland* as it is now Constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the *Union*, subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the *Parliament of Great-Britain*; And that the Court of *Justiciary* do also after the *Union*, and notwithstanding thereof, remain in all time coming within *Scotland*, as it is now Constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the *Union*, subject nevertheless to such Regulations as shall be made by the *Parliament of Great-Britain*, and without prejudice of other Rights of *Justiciary*; And that all *Admiralty Jurisdictions* be under the Lord High *Admiral* or *Commissioners* for the *Admiralty of Great-Britain* for the time being; And that the *Court of Admiralty* now Established in *Scotland* be continued, and that all Reviews, Reductions, or Suspensions, of the Sentences in Maritime Cases competent to the Jurisdiction of that *Court*, remain in the same manner after the *Union*, as now in *Scotland*, until the *Parliament of Great-Britain* shall make such Regulations and Alterations, as shall be judg'd Expedient for the whole united Kingdom, so as there be always continued in *Scotland* a *Court of Admiralty*, such as is in *England*, for Determination of all Maritime Cases relating to privat Rights in *Scotland*, competent to the Jurisdiction of the *Admiralty Court*, subject nevertheless to such Regulations and Alterations, as shall be thought proper to be made by the Parliament of *Great-Britain*; And that the Heretable Rights of Admiralty and Vice-Admiralties in *Scotland* be Reserved to the Respective Proprietors as Rights of Property, subject nevertheless, as to the manner of Exercising such Heretable Rights, to such Regulations and Alterations, as shall be thought proper to be made by the Parliament of *Great-Britain*; And that all other Courts now in Beeing within the Kingdom of *Scotland* do remain, but subject to Alterations by the Parliament of *Great-Britain*; And that all Inferior Courts within the said Limits do remain Subordinate, as they are now to the Supream Courts of Justice within the same in all time coming; And that no Causes in *Scotland* be Cognoscable by the Courts of *Chancery*, *Queens-Bench*, *Common-Pleas*, or any other Court in *Westminster-Hall*; And that the said Courts, or any other of the like Nature, after the *Union*, shall have no Power to Cognosce, Review, or Alter the Acts or Sentences of the Judicatures within *Scotland*, or Stop the Execution of the same; And that there be a Court of Exchequer in *Scotland* after the *Union*, for Deciding Questions concerning the Revenues

of Customs and Excises there, having the same Power and Authority in such Cases, as the Court of Exchequer has in *England*; And that the said Court of Exchequer in *Scotland* have Power of passing Signatures, Gifts, Tutories, and in other Things, as the Court of Exchequer at present in *Scotland* hath; And that the Court of Exchequer that now is in *Scotland* do remain, until a New Court of Exchequer be settled by the *Parliament of Great-Britain* in *Scotland* after the Union; And that, after the Union, the Queens Majesty, and Her Royal Successors, may continue a Privy Council in *Scotland*, for preserving of publick Peace and Order, until the *Parliament of Great-Britain* shall think fit to alter it, or establish any other effectual Method for that End.