The District of Columbia and Article III

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Today, it is black-letter law that Congress may create non-Article III courts in the District of Columbia and staff them with judges who lack salary protection and life tenure. Forty-five years ago, the Supreme Court upheld the District's non-Article III court system. And since that decision, judges and scholars alike have accepted that the District is an exception to Article III.

This Article challenges that consensus. It shows that, as a historical matter, Article III's judicial protections were long believed to apply to the District. And it demonstrates that the various functional justifications for non-Article III adjudication do not apply to courts in the capital. In short, this Article demonstrates that the current D.C. court system likely violates Article III.

This conclusion should be significant in its own right, since the right to an Article III judge has long been viewed as an essential constitutional safeguard. Indeed, the modern history of the D.C. court system reveals the troubling influence of crime and race on Congress's decision to create a non-Article III court system in the capital. But the historical research presented in this Article also has broader implications outside the seat of government. Most directly, it suggests a new limit on Congress's power to create non-Article III tribunals on public lands.

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INTRODUCTION

Today, it is black-letter law that Congress may create non-Article III courts in the District of Columbia and staff them with judges who lack salary protection and life tenure. This assumption has gone uncontested for almost fifty years. In 1970, Congress created a non-Article III court system in the capital to adjudicate cases arising under the D.C. Code. And just three years later, eight Justices of the Supreme Court voted in *Palmore v. United States* to uphold the constitutionality of the new local court system.[1] Since *Palmore*, judges and scholars alike have accepted that the District is an exception to Article III. Indeed, in a recent decision, all nine Justices concluded (based on existing precedent) that the Constitution and historical practice supported the use of non-Article III tribunals in the nation's capital.[2]

This Article challenges that consensus. The original meaning of the Constitution, longstanding historical practice and precedent, and functional concerns all show that Article III's judicial protections should apply to courts in the capital. It follows that, for the past fifty years, residents of the District have been improperly tried before judges who lack the independence guaranteed by Article III. And as Justice Gorsuch recently put it, "[T]he loss of the right to an independent judge is never a small thing."[3]

As in debates about the separation of powers more generally, there are both formal and functional justifications for non-Article III courts in the District.[4] The formal account—accepted by most judges and scholars—assumes that the District is similar to the federal territories. On this view, Congress's power "[t]o exercise exclusive Legislation" in the District under the Seat of Government Clause is analogous to its power "to dispose of and make all needful Rules and Regulations" for the territories under the Property Clause.[5] And the Property Clause has long been read as authorizing Congress to create non-Article III tribunals. As early as 1804, Congress established a non-Article III court system in the territories.[6] And in 1828, the Supreme Court affirmed Congress's power to do so in *American Insurance Co. v. Canter*.[7] Whether or not *Canter* was correctly

1. 411 U.S. 389, 410 (1973).

2. *See* Ortiz v. United States, 138 S. Ct. 2165, 2177 (2018) (invoking "the Constitution's 'plenary grant [ ] of power to Congress to legislate with respect to' the national capital" and "the 'historical consensus' supporting congressional latitude over the District's judiciary" (alteration in original) (first quoting *Palmore*, 411 U.S. at 408; then quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion))); *id.* at 2196 (Alito, J., dissenting) (observing that "the founding generation understood—and for more than two centuries, we have recognized—that Congress's power to govern . . . the District" is not bound by Article III).

3. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting).

4. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–71 (2011) (describing the Supreme Court's alternating formal and functional approaches to the separation of powers).

5. *Compare* U.S. CONST. art. I, § 8, cl. 17, *with id.* art. IV, § 3, cl. 2.

6. *See infra* Section III.A.2.

7. 26 U.S. (1 Pet.) 511, 546 (1828).

decided—indeed many have questioned the decision—even originalists on the Supreme Court have acquiesced to the territorial court exception based on this "firmly established historical practice."[8] As Curtis Bradley and Neil Siegel have recently suggested, historical practice (often called "historical gloss") "likely play[s] a substantial role in explaining the permissible use of non-Article III federal tribunals."[9]

Yet there are three basic problems with this formal account. The first problem concerns the original meaning of the Constitution. The Seat of Government Clause in Article I and the Property Clause in Article IV do not clearly grant Congress equivalent powers. Both the text of the respective Clauses and Founding-era evidence indicate that the District of Columbia occupies a unique constitutional space, the status of which can only be understood by examining its particular history.[10] In fact, the Founding generation likely would have been surprised to learn that the Constitution is now read to permit non-Article III adjudication in the capital. During the ratification debates, many Anti-Federalists expressed concerns about the federal government undermining Article III protections in the seat of government. And in response, the Federalists argued quite adamantly that Congress would lack such a power over the capital.

The second problem concerns historical practice (or the lack thereof). Unlike non-Article III courts in the territories, there is no "firmly established historical practice" of non-Article III courts in the District. Although courts and scholars often treat the District as a historical exception to Article III, no one has seriously engaged with the relevant history.[11] This oversight is all the more surprising given the rich history of congressional debates regarding the constitutional status of the D.C. courts. This Article draws upon these debates and other historical evidence to show that, during the early nineteenth century, Congress understood Article III's judicial protections to apply to federal courts in the District. In later years, a minority in Congress began to question this view. But others continued to defend it. And Congress as a whole never departed from this historical understanding until late into the twentieth century.

The final problem concerns judicial precedent. Forty years before *Palmore*, the Supreme Court held in *O'Donoghue v. United States* that Article III's judicial

8. Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring).

9. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 319 (2017).

10. *See* Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1211 (2011) ("The District is a unique space and entity, and thus any effort to consider its constitutional significance requires engaging with its Districtness."); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1214 (1996) ("The anomalous character of the District of Columbia was recognized from the beginning."); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 438 (2005) (describing "[t]he constitutionally awkward status of the District").

11. *See* Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 105 GEO. L.J. ONLINE 1, 2 (2017) (describing research into historical gloss as a "new avenue of inquiry for federal courts scholarship"); Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835, 1836 (2015) ("There is . . . far less focus on political branch practice in Article III scholarship.").

protections applied to courts in the District of Columbia.[12] *O'Donoghue* specifically distinguished courts in the District from courts in the territories for the purposes of Article III.[13] To be sure, *Palmore* attempted to cabin this earlier holding. But the latter decision's reasoning does not stand up to closer scrutiny.

At least in theory, there are also functional justifications for non-Article III courts in the District. But in reality, functional concerns likewise weigh against non-Article III adjudication in the capital. Past functional arguments—such as the logistical challenges of creating Article III courts in faraway places or concerns about creating a vast life-tenured judiciary for a temporary court system—do not apply to the conveniently located and permanent court system in the District.[14] And the motivating purpose for Article III's judicial protections—to insulate the judiciary from political influence—applies with equal (if not greater) force to the judges who sit in close proximity to the political branches.

Moreover, the non-Article III court system established by Congress in 1970 raises a host of functional concerns. In contrast to past non-Article III tribunals, the District's local courts decide cases with near-complete independence from Article III supervision. Article III courts lack managerial control over the District's judiciary and lack the robust appellate review that has been found necessary in other contexts. And perhaps most troublingly, criminal defendants in the District have almost no recourse to collateral review before an Article III tribunal. Instead, Congress has assigned the vast majority of collateral review to the same non-Article III courts that heard the cases in the first place.

Finally, Congress's purpose in creating non-Article III judges in the District should raise concerns about the court system's constitutionality. The legislative history of the District of Columbia Court Reform and Criminal Procedure Act of 1970[15] shows that the Nixon Administration's "War on Crime in the District" was a central influence behind the law. Specifically, Congress enacted the D.C. Court Reform Act (at least in part) to keep criminal cases away from certain liberal judges on the D.C. Circuit, who were perceived as overly protective of criminal defendants' rights.[16] Thus, the D.C. Court Reform Act seems to be the very kind of law that the Supreme Court recently warned could violate Article III: "an effort [by Congress] to aggrandize itself or humble the Judiciary."[17]

To be sure, the argument that judges in the District of Columbia must have life tenure and salary protection might seem like a purely academic question.[18] No one has suggested that the local judges in the District are currently subject to

12. 289 U.S. 516, 551 (1933).

13. *Id*. at 546.

14. *See infra* Section IV.A.

15. Pub. L. No. 91-358, 84 Stat. 473 (codified as amended in scattered sections of the D.C. Code).

16. *See infra* notes 397–407 and accompanying text.

17. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1945 (2015).

18. Indeed, both parties in *Palmore* characterized the issue as "academic." Transcript of Oral Argument at 8, Palmore v. United States, 411 U.S. 389 (1973) (No. 72-11) ("Article III discussions tend frequently to become academic . . . ."); *id*. at 42 ("This particular area of the interplay of Article III and Article I has a sort of academic flavor to it . . . .").

undue political influence. But then again, the Supreme Court has never required a party to show undue influence in a particular case to establish a violation of Article III.[19] And for good reason. "The impact of [any one violation of Article III]," as Chief Justice Roberts recently explained, "may seem limited, but the . . . next time Congress takes judicial power from Article III courts, the encroachment may not be so modest."[20]

More broadly, the history and analysis in this Article implicates more than just the District of Columbia or the few remaining federal territories. Today, the federal government owns over a quarter of the entire country and up to eighty percent of the land in certain states.[21] And under current doctrine, Congress appears to have the authority to create non-Article III courts to hear cases on much of this federally owned property. This sweeping power has been little discussed—probably because Congress has never chosen to exercise it fully. But it follows from the claim that Congress can create non-Article III tribunals for the District of Columbia, federal enclaves, and the federal territories. In short, the potential scope of non-Article III adjudication is likely much broader than people currently realize.

Yet the history of the District of Columbia can help us identify an important limitation on Congress's power to create non-Article III courts. This Article will show that during the nineteenth and early twentieth centuries both courts and scholars distinguished the District from other federal territories on the ground that the capital was at one point a part of Maryland and Virginia. The theory was that once the Constitution had attached to an area of land neither federal nor state legislation could take it from outside of the protections of Article III (or the Constitution more broadly). The same logic applied not only to the seat of government but also to other federal lands acquired directly from states. And this historical principle—call it "constitutional attachment"—suggests an important limitation on non-Article III adjudication.

Moreover, this principle may resolve a long-unexplained puzzle about the early territorial courts: namely, why did Congress initially create territorial courts that complied with Article III but subsequently create territorial courts that did not? The straightforward explanation is that the early territories were formed out of existing states, whereas the latter territories were acquired from outside of the country. Article III had therefore attached to the former but not the latter. In this regard, the history of the District of Columbia may not only tell us something

19. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 533 (1962) (plurality opinion) (addressing potential violation of Article III even though "[n]o contention [was] made that either [judge] displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive").

20. *Sharif*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting).

21. *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1, 6–9 (2017), https://fas.org/sgp/crs/misc/R42346.pdf.

about the D.C. court system but may also help us rethink the history of Article III more broadly.[22]

Of course, even if we recognize that the D.C. court system violates Article III, there is still the question of how we should fix the violation. It is admittedly hard to imagine the Supreme Court retroactively holding the D.C. court system unconstitutional, thereby invalidating thousands of pending cases. And the Court has become reluctant to issue purely prospective decisions—let alone those overturning well-settled precedent. Yet the Court is not the only body that can remedy constitutional violations. Congress also has a duty to assess the constitutionality of its laws. Indeed, throughout the nineteenth century, Congress did exactly that. Each new major court bill inspired lengthy debates about the constitutional status of the District of Columbia. And unlike the Supreme Court, Congress could fix the District's Article III problem purely prospectively. Thus, regardless of whether the Justices ever address the issue, Congress can (and should) do so.

This Article proceeds as follows. Part I briefly describes the District of Columbia's modern court system and the judicial and scholarly justifications for non-Article III courts in the nation's capital. The next three Parts consider the justifications for the District's non-Article III court system. Part II addresses the constitutional case. Specifically, it considers the original meaning of the Seat of Government Clause and related principles of constitutional rights and structure. Part III addresses the historical case. In particular, it considers nineteenth- and early twentieth-century historical practice and judicial precedents concerning the D.C. court system. Part IV addresses the functional concerns behind Article III (and the exceptions to Article III). Specifically, it considers how these functional values apply to the District. Together, these three Parts show that Article III's judicial protections should apply to the District. Finally, Part V considers what this history means and why it matters. First, it draws upon the Justices' papers and other historical evidence in attempting to explain and contextualize the Supreme Court's decision in *Palmore*. Second, it considers how the different branches might remedy the District's Article III problem. Lastly, the Article concludes by considering the implications of the District's history for Article III more broadly.

I. THE DISTRICT OF COLUMBIA AND ARTICLE III

This Part discusses the current relationship between the District of Columbia and Article III. It begins by briefly describing the District's modern dual-court structure. It then considers the various judicial and scholarly justifications for non-Article III courts in the capital.

22. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 624 (2002) ("The District has been a repeat player doctrinally, as a regular source of case law prompting the life-tenured judiciary to think about the meaning of Article III.").

A. THE COURT SYSTEM

For its first 170 years, the District of Columbia had a single, primary court system that exercised jurisdiction over both national and local cases.[23] In 1970, however, Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, which entirely restructured the judicial system in the nation's capital.[24] Under the new structure, the "judicial power in the District of Columbia" was vested in five separate courts.[25] Three of these courts were national courts already established under Article III: the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia.[26] But the D.C. Court Reform Act transferred jurisdiction over local cases to two new, non-Article III courts: the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.[27] The local court system acquired jurisdiction over all civil cases in which Congress had not vested exclusive jurisdiction in the D.C. Circuit or federal district court[28] and over all criminal cases in which the statute applied only locally.[29] Importantly, unlike their Article III colleagues, judges on the court of appeals and the superior court do not have life tenure or salary protections. Rather, they serve for limited terms of fifteen years, have a mandatory retirement age of seventy-four, can be removed outside of the impeachment process, and have unprotected salaries.[30]

In creating this dual-court structure, Congress in many ways created the equivalent of a state court system for the District.[31] For example, like decisions from state courts, decisions from the District's local courts can only be reviewed by the Supreme Court by writ of certiorari.[32] Indeed, the certiorari statute expressly analogizes the D.C. local courts to state courts by defining the District of Columbia

23. I say "primary" because the District also had a second, minor court system to adjudicate "petty" cases. *See infra* Section III.A.1. For histories of the District of Columbia court system, see generally JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT (2001); Theodore R. Newman, Jr., *The State of the District of Columbia Court of Appeals*, 27 CATH. U. L. REV. 453 (1978); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375 (2006); and Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 CATH. U. L. REV. 917 (1980).

24. Pub. L. No. 91-358, 84 Stat. 473 (codified as amended in scattered sections of the D.C. Code).

25. *Id.* § 111, 84 Stat. at 475 (codified at D.C. Code § 11-101 (2018)).

26. *Id.* (codified at D.C. Code § 11-101(1)).

27. *Id.* (codified at D.C. CODE § 11-101(2)).

28. D.C. CODE §§ 11-921.

29. *Id.* § 11-923.

30. *Id.* §§ 11-1502, 11-1526. This Article brackets the separate concerns raised by the system of appointing these judges. *See* Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914 (2007) [hereinafter *Congressional Restrictions*] (describing how congressional restrictions on the President's power to appoint judges to the local D.C. courts may violate the Appointments Clause).

31. *See* Stephen I. Vladeck, *Article I Federal Courts*, *in* THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 745, 751 (Peter M. Koelling ed., 8th ed. 2016) (describing Article I courts in the District as following the "State Court Model").

32. *See* 28 U.S.C. § 1257(a) (2012); D.C. CODE § 11-102.

Court of Appeals as equivalent to the "highest court of a State."[33] Likewise, the national D.C. courts defer to the local D.C. courts on questions involving the D.C. Code just as federal courts defer to state courts on questions of state law.[34] In other words, federal courts have developed an analogue to *Erie Railroad Co. v. Tompkins*[35] in the District and will even attempt to "predict" how the Court of Appeals for the District of Columbia would interpret local law.[36] Over the years, federal courts have applied other judicial federalism doctrines to the District as well.[37]

Today, the Court of Appeals and Superior Court adjudicate a wide array of cases. The Court of Appeals—staffed by nine active judges—receives over one thousand civil and criminal appeals each year.[38] And the Superior Court—staffed by over sixty active judges—hears tens of thousands of civil and criminal cases each year.[39] In short, the District's non-Article III courts play a prominent role in the federal judicial system. Their constitutionality therefore has important implications for the residents of the District and the federal judiciary more broadly.

B. JUDICIAL JUSTIFICATIONS

Soon after Congress created non-Article III courts in the District, the local court system was challenged for violating Article III. This section considers the outcome of that challenge and the various judicial justifications—both formal and functional—that have been given for Congress's power to create non-Article III courts in the District.

In 1973, eight Justices of the Supreme Court voted in *Palmore v. United States* to uphold the District's non-Article III court system.[40] At the time, the precise grounds for this ruling were less than clear. In later years, however, judges have

33. 28 U.S.C. § 1257(b).

34. *See, e.g.*, Whalen v. United States, 445 U.S. 684, 687–88 (1980); Pernell v. Southall Realty, 416 U.S. 363, 366–69 (1974). This rule of deference long predates the non-Article III court system since the Supreme Court deferred to the D.C. Circuit on questions of local law prior to the 1970s. *See, e.g.*, Fisher v. United States, 328 U.S. 463, 476–77 (1946); Busby v. Elec. Utils. Emps. Union, 323 U.S. 72, 74–75 (1944) (per curiam); District of Columbia v. Pace, 320 U.S. 698, 702 (1944); Del Vecchio v. Bowers, 296 U.S. 280, 285 (1935).

35. 304 U.S. 64 (1938).

36. *See, e.g.*, Earle v. District of Columbia, 707 F.3d 299, 310 (D.C. Cir. 2012); Novak v. Capital Mgmt. & Dev. Corp., 452 F.3d 902, 907 (D.C. Cir. 2006); Sherman L. Cohn, *Relationships Between Federal and Local Courts After Court Reorganization*, 39 D.C. B.J. 49, 54–56, 59–62 (1972); Peter W. Benner & Marilyn J. Holmes, Note, *An Erie Doctrine for the District of Columbia*, 62 GEO. L.J. 963, 996–99 (1974).

37. *See, e.g.*, JMM Corp. v. District of Columbia, 378 F.3d 1117, 1120, 1125 (D.C. Cir. 2004) (applying *Younger* abstention to the District).

38. D.C. COURTS, DISTRICT OF COLUMBIA COURTS: STATISTICAL SUMMARY 2 (2017), https://www.dccourts.gov/sites/default/files/DC%20Courts%20Statistical%20Summary%20CY%202017%20-%20Final.pdf; *Court of Appeals*, D.C. COURTS, https://www.dccourts.gov/court-of-appeals [https://perma.cc/3MBK-ZMHC] (last updated July 16, 2018) (listing number of active judges).

39. D.C. COURTS, *supra* note 38, at 4; *Superior Court*, D.C. COURTS, https://www.dccourts.gov/superior-court [https://perma.cc/V8ZT-T7X2] (last visited Apr. 23, 2018) (listing number of active judges).

40. 411 U.S. 389 (1973).

coalesced around two basic rationales for the decision: they either treat non-Article III courts in the District as a historical exception to Article III (analogous to territorial courts) or view the District's local courts as functionally permissible under Article III.

In *Palmore*, Justice White began his opinion for the Court by noting that under the Seat of Government Clause, Congress has the "power '[t]o exercise exclusive Legislation in all Cases whatsoever, over' the District of Columbia."[41] This power, he explained, "permits [Congress] to legislate for the District in a manner with respect to subjects that would exceed its powers . . . in the context of national legislation enacted under other powers delegated to it."[42] He thus concluded that Congress "may vest and distribute the judicial authority . . . and regulate judicial proceedings [in the capital] . . . so long as it does not contravene any provision of the Constitution."[43]

Justice White then surveyed some historical examples of non-Article III adjudication to demonstrate why the District's non-Article III court system was constitutionally permissible. He noted, for instance, that Congress did not create general federal question jurisdiction until the late nineteenth century, leaving many federal claims (including the enforcement of some federal criminal statutes) to the state court system.[44] In addition, Justice White cited two well-recognized historical exceptions to Article III to undermine any notion that Article III applied to all federal courts.[45] Specifically, he noted that both the Property Clause[46] and the Military Regulations Clause[47] had long been read as authorizing Congress to create non-Article III tribunals to hear cases in the federal territories and for military proceedings respectively.[48]

Justice White used these latter two exceptions to demonstrate that a "confluence of practical considerations" might justify an exception to Article III.[49] And he observed that Congress had acted to address similar practical concerns in creating the local court system in the District. Specifically, he described the pre-reform "crisis in the judicial system of the District of Columbia" where "case loads had become unmanageable" and where matters of both national and local

41. *Id.* at 397 (quoting U.S. CONST. art. I, § 8, cl. 17).

42. *Id.* at 398.

43. *Id.* at 397 (quoting Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899)).

44. *Id.* at 401–02.

45. *Id.* at 388–89, 404.

46. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *see also* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 887–94 (1990) (describing origins and rise of territorial court exception).

47. U.S. CONST. art. I, § 8, cl. 14 (providing that Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *see also* Peter Margulies, *Justice as War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 349–79 (2015) (justifying the military court exception under a functional theory); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 969–1000 (2015) (describing the military court exception and defending it as a matter of international law).

48. *See Palmore*, 411 U.S. at 402–04.

49. *Id.* at 404 (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962)).

concern were not "being promptly tried and disposed of by the existing court system."[50] Against this backdrop, Congress had decided to create a local court with non-tenured judges—the model followed in almost every state.[51] And the Supreme Court, according to Justice White, would not second-guess this policy decision.[52]

Finally, Justice White distinguished an earlier precedent, *O'Donoghue v. United States*, in which the Supreme Court held that courts in the District (which at the time consisted of a single court system) had to receive the judicial protections prescribed in Article III.[53] Justice White curtly dismissed the decision by noting that the court system challenged in *O'Donoghue* heard both national and local cases and thus "were the only courts within the District in which District inhabitants could exercise their 'right to have their cases arising under the Constitution heard and determined by federal courts.'"[54] By contrast, the court system challenged in *Palmore* was "a far cry from [that challenged in] *O'Donoghue*" because it primarily addressed questions of local concern and a separate Article III court system remained in the District to hear cases arising under the Constitution.[55]

Because the majority opinion in *Palmore* relied upon a variety of formal and functional considerations, it left unclear what, if any, factor dictated the Court's ruling. This tension emerged a decade later when the Court split in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* over *Palmore*'s core rationale.[56]

The plurality opinion in *Northern Pipeline*, written by Justice Brennan, presented what now appears to be the predominant view of *Palmore*. According to Justice Brennan, Congress's power to create non-Article III courts in the District rests upon its "plenary authority" to legislate in the District and is analogous to its power over the territories.[57] On this view, the District's local courts fit within one of three narrow, historical exceptions to Article III as territorial courts (the other two historical exceptions being for military courts and cases involving public rights).[58] Since *Northern Pipeline*, many judges have endorsed this framework.[59]

By contrast, Justice White dissented in *Northern Pipeline*, offering a functional account of *Palmore*. Under the functional view, the Court should evaluate the

50. *Id.* at 408.
51. *See id.* at 409.
52. *Id.* at 409–10.
53. 289 U.S. 516, 551 (1933), *distinguished by Palmore*, 411 U.S. at 406.
54. *Palmore*, 411 U.S. at 406 (quoting *O'Donoghue*, 289 U.S. at 540).
55. *Id.* at 406–07. Justice Douglas dissented, emphasizing the importance of Article III tenure and salary protections and the binding precedential effect of the Court's earlier decision in *O'Donoghue*. *See id.* at 411–12, 416 (Douglas, J., dissenting).
56. 458 U.S. 50 (1982).
57. *Id.* at 76.
58. *See id.* at 64–67.
59. *See, e.g.*, Ortiz v. United States, 138 S. Ct. 2165, 2178 & n.7 (2018); Kuretski v. Comm'r, 755 F.3d 929, 942 (D.C. Cir. 2014); *In re* Clay, 35 F.3d 190, 192 (5th Cir. 1994); *In re* Grabill Corp., 967 F.2d 1152, 1157 (7th Cir. 1992).

constitutionality of non-Article III courts by "focus[ing] equally on . . . Art. III values [and legislative interests] and ask whether and to what extent the legislative scheme accommodates [Article III values] or, conversely, substantially undermines them."[60] Although Justice White's functional defense has not been adopted by other judges in the context of the D.C. court system, the Supreme Court has endorsed a functional theory of Article III in other contexts.[61]

Finally, Justices Rehnquist and O'Connor concurred in *Northern Pipeline*, offering what is probably the most descriptively accurate account of *Palmore*:

> The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between [*Canter*] and [*Palmore*] the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be.[62]

The Court's decision in *Palmore* has received little elaboration by the Supreme Court. And as the next Section will show, the decision has received little critical attention by scholars.

C. SCHOLARLY JUSTIFICATIONS

Legal scholars often cite *Palmore* in broader discussions about Congress's power to create non-Article III legislative courts. Like judges, the vast majority of scholars treat the District's non-Article III courts as fitting within the territorial court exception to Article III.[63] Indeed, even scholars who have criticized aspects of *Palmore* or the Court's territorial court exception more broadly have accepted the basic analogy between courts in the District of Columbia and courts in the territories. Michael Collins and Jonathan Remy Nash, for instance, have persuasively argued that Justice White was mistaken in *Palmore* when he claimed that Congress had historically assigned federal criminal cases to state courts, but they

60. *N. Pipeline Constr. Co.*, 458 U.S. at 115 (White, J., dissenting).

61. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857–58 (1986) (upholding non-Article III adjudication by an agency under the functional theory); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985) (same).

62. *N. Pipeline Constr. Co.*, 458 U.S. at 91 (Rehnquist, J., concurring).

63. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 4.2, at 240–42 (7th ed. 2016); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 362 (7th ed. 2015); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 921–22, 972 & n.16 (1988); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 575 & n.64 (2007); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 847 (1986).

still defend the Court's decision by pointing to Congress's plenary power over the District.[64] Likewise, Gary Lawson and Judith Resnik have been critical of Justice Marshall's decision in *Canter*, but both still accept the basic analogy between courts in the District and courts in the territories.[65]

Most scholars who discuss this formalist view of Article III have devoted little attention to the District of Columbia. The primary exception is James Pfander, who has argued that the original D.C. circuit court was a non-Article III tribunal.[66] Pfander points to several features of the District's first circuit court to suggest that Congress created the court under Article I, not Article III. Part III will consider these arguments and will show that they do not establish a historical exception to Article III. In fact, this early historical evidence better supports the opposite conclusion: that Article III's judicial protections applied fully to courts in the capital.

By contrast, only a few scholars have embraced Justice White's functional theory of Article III—as announced in *Palmore* and elaborated in *Northern Pipeline*.[67] But these scholars have not elaborated on the theory beyond these opinions. Thus, Part IV will consider the potential functional justifications for non-Article III tribunals in the District and will show that functional concerns likewise counsel against non-Article III adjudication in the capital.

Finally, a few scholars have raised questions about whether *Palmore* was rightly decided and, specifically, whether courts in the District of Columbia should be analogized to courts in the territories. Stephen Vladeck has been the most recent and frequent proponent of this critique.[68] But even these critics have devoted little attention to the question. And more importantly, they have not considered the history of the Seat of Government Clause or the early court systems in

64. Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 295 (2011); *see also* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 73–74 (1996) (arguing that state courts cannot hear federal criminal cases and that *Palmore* does not justify a different conclusion).

65. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 149–50 (2004); Lawson, *supra* note 46, at 892–93; Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 591 (1985).

66. *See* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 56–57, 129–30, 201–04 nn.82–88 (2009); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 685–89, 749–52 (2004).

67. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 254–55 (1990); Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1559–61 (2017); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 220–24.

68. *See* Vladeck, *supra* note 47, at 982–83 & n.307; Stephen I. Vladeck, *Petty Offenses and Article III*, 19 GREEN BAG 2D 67, 78 & n.48 (2015) [hereinafter Vladeck, *Petty Offenses*]; Steve Vladeck, *Federal Crimes, State Courts, and Palmore*, JOTWELL (Oct. 26, 2012), https://courtslaw.jotwell.com/federal-crimes-state-courts-and-palmore/ [https://perma.cc/YNM7-ZBYH] [hereinafter Vladeck, *Federal Crimes*]; *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 47–48 (1980) (questioning whether any of the justifications in *Palmore* support the result).

the District. Instead, critics have assumed that before the 1970s virtually all cases in the District were heard by Article III courts and have used this assumption to undermine the historical analogy between courts in the territories and courts in the District. This assumption—as Part III shows—turns out to be correct. But Pfander's arguments about the original D.C. circuit court demonstrate that this historical claim is not self-evident.

Thus, the next three Parts consider the constitutional, historical, and functional relationship between the District of Columbia and Article III. Unlike past critiques of *Palmore*, this Article finds that the Article III status of the early courts in the capital is more complicated than previously understood. But unlike defenses of *Palmore*, it finds that the weight of constitutional, historical, and functional evidence supports the conclusion that the D.C. courts are protected by Article III.

II. THE CONSTITUTION

Both the Supreme Court and scholars have generally assumed that the Seat of Government Clause and the Property Clause vest Congress with essentially identical powers.[69] But there are reasons to doubt this analogy. On its face, the Constitution appears to vest Congress with distinct powers over the District of Columbia and the federal territories. For the District, Article I empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[70] For the territories, by contrast, Article IV empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[71]

This Part will analyze the meaning of the Seat of Government Clause—and its differences from the Property Clause—by drawing upon a number of interpretive resources. The core of the argument is historical: it relies upon the original meaning of the Clause to show that the Founding generation would have likely understood Article III's judicial protections to apply to the District.[72] But this Part also draws upon broader principles of constitutional rights and structure to explain why the District should not be treated as an exception to Article III.

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69. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73–76, 74 n.27 (1982); AMAR, *supra* note 10, at 439; Lawson, *supra* note 46, at 861 n.33.

70. U.S. CONST. art. I, § 8, cl. 17.

71. *Id.* art. IV, § 3, cl. 2.

72. This Article thus grounds its argument in the text, structure, and history of the Constitution. "For those who agree, as a first-order matter, that this is the correct way to read the Constitution, no more methodological justification needs to be produced." William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1813 (2008). For those who think that originalism is relevant but not dispositive in determining the meaning of the Constitution, this Article also defends its argument using non-originalist sources.

A. ORIGINS

Congress's authority to exercise "exclusive Legislation" over the District appears to be "peculiar to the United States."[73] Indeed, both the Founders and later historians trace this "exclusive" authority back to 1783. That summer, threatened by a mutiny of unpaid soldiers, the Continental Congress fled from Philadelphia to New Jersey after Pennsylvania failed to protect Congress from the mutineers.[74] In the aftermath of the flight, the Continental Congress concluded that it needed to have exclusive control over the capital in order to protect itself.[75]

That fall, a committee "appointed to consider what jurisdiction may be proper for Congress in the place of their permanent residence" reported to the Continental Congress its views regarding the "powers to be exercised by Congress within that District."[76] Notably, this committee included two of the most influential drafters of the Constitution—James Madison and James Wilson.[77] The Committee concluded that Congress "ought to enjoy an exclusive jurisdiction over the District which may be ceded and accepted for their permanent residence."[78]

Two subsequent motions included in the same debates shed additional light on Congress's understanding of this "exclusive" power. The first motion, which appears to have been written by Madison, noted "[t]hat the district . . . ought to be entirely exempted from the authority of the State ceding the same; and the organization and administration of the powers of government within the said district concerted between Congress and the inhabitants thereof."[79] The second motion

73. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 112 (Philadelphia, Philip H. Nicklin 2d ed. 1829). What was "peculiar" seems to be the idea of "exclusive legislation" as England had limited forms of exclusive judicial jurisdiction. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *83 (reporting that the University of Oxford and the University of Cambridge have "sole jurisdiction" over civil cases committed within their grounds); 4 WILLIAM BLACKSTONE, COMMENTARIES *277 (reporting the same for criminal cases); RAWLE, *supra*, at 112 n.* ("[T]he Royal Palace, with an extent of twelve miles round it, has a peculiar jurisdiction in regard to some legal controversies . . . .").

74. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 13 (1909).

75. *See id*. at 6–7. The Continental Congress appears to have recognized the need for some exclusive federal jurisdiction in the capital even before the mutiny. At the end of May of 1783, just a few weeks before the mutiny, a Committee recommended that Congress reject an initial offer from New York for a capital in part because the "jurisdiction offered to Congress" was "too limited." 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 376 (Gaillard Hunt ed., 1922). Instead, the Committee recommended that Congress ask for "an exclusive jurisdiction, in all criminal matters arising within that district." *Id*.

76. 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 75, at 603.

77. *Id*.

78. *Id*. In adopting this language of "exclusive" jurisdiction, Madison appears to have taken the suggestion of Edmund Pendleton that Congress have "the whole intire [sic] Sovereignty in the limited district, with all the legislative, Executive & Judiciary Powers." Letter from Edmund Pendleton to James Madison (Sept. 1, 1783), *in* 17 THE PAPERS OF JAMES MADISON 503–04 (David B. Mattern et al. eds., 1991). Pendleton had also suggested (as an alternative) that the state retain "Legislative powers" and only give Congress "the appointment & control of the Executive & Judiciary Officers." *Id*.

79. 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 75, at 603–04.

further clarified "[t]hat the appointment of Judges and the executive power within the said territory, should vest in Congress" and "[t]hat the People inhabiting within the said territory, should enjoy the privilege of trial by Jury."[80] In other words, it does not appear that the Continental Congress viewed the grant of "exclusive jurisdiction" as an exceptional power that exempted Congress from all other legal limits. Instead, Congress's "exclusive" power over the District appears to have been meant to exclude the states from exercising concurrent authority in the capital.

At the end of October, Congress passed a motion that would locate the new "federal town" "at or near the lower falls of Potomac or Georgetown; provided" that "the right of soil, and an exclusive jurisdiction or such other as Congress may direct, shall be vested in the United States."[81]

B. TEXT

The Framers eventually incorporated this "exclusive" power into the Seat of Government Clause.[82] Neither the text nor the drafting history of the Clause, however, addresses the specific relationship between the District of Columbia and Article III.[83] To be sure, the Property Clause is similarly ambiguous about the territories and has long been read as authorizing Congress to create non-Article III courts.[84] But the distinct textual powers enumerated in the two Clauses—"[t]o exercise exclusive Legislation in all Cases whatsoever"[85] and "to dispose of and make all needful Rules and Regulations"[86]—their distinct drafting histories, and their distinct placements in the Constitution (Article I for the former, Article IV for the latter) suggest that the Seat of Government Clause may vest Congress with different (and arguably narrower) powers over the District than the Property Clause does over the territories. In other words, even if we assume that the Supreme Court has read the Property Clause correctly (a claim which many have contested[87]), there are good reasons to read the Seat of Government Clause differently.

The most straightforward reading of Congress's power "to exercise exclusive Legislation" is that it simultaneously authorizes Congress to legislate in the District and bars states from doing so. Indeed, in first proposing the Clause, George Mason explained its purpose as preventing "disputes concerning jurisdiction" between the federal government and the states.[88] Dictionaries from the

80. *Id.* at 604. Prior to the Constitution, the Continental Congress often exercised the power to appoint judges. *See* An Ordinance for the Government of the Territory of the United States north-west of the river Ohio (1787) (detailing this power under the Northwest Ordinances), *reprinted in* Act of Aug. 7, 1789, 1 Stat. 50, 51 n.(a).

81. 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 75, at 712.

82. U.S. CONST. art. I, § 8, cl. 17.

83. *Id.* art. III, § 1.

84. *See* LAWSON & SEIDMAN, *supra* note 65, at 139.

85. U.S. CONST. art. I, § 8, cl. 17.

86. *Id.* art. IV, § 3, cl. 2.

87. *See supra* note 65 and accompanying text.

88. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 127 (Max Farrand ed., 1911).

period confirm this straightforward reading, defining "exclusive" as "[h]aving the power of excluding or denying admission" or "debarring from participation."[89] And both in the ratification conventions and the First Congress, prominent Founders described the Clause as excluding state legislation over the capital.[90]

Yet, like with other provisions of the Constitution, the Necessary and Proper Clause gave Congress broader authority over the District than the bare text of the Seat of Government Clause might have suggested. The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" Congress's other powers.[91] And many Founders appeared to view the power to regulate the police and local government as "necessary and proper" for exercising Congress's exclusive jurisdiction over the District.[92] For example, the President of the Virginia Ratification Convention, Edmund Pendleton, described the Clause as "giv[ing] [Congress] power over the local police of the place, so as to be secured from any interruption in their proceedings."[93] Even the Anti-Federalists acknowledged that Congress would need some local police powers in the capital.[94] But even so, neither the Founders nor

89. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, James Duncan & Son et al. 10th ed. 1792); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828). This straightforward reading of "exclusive" is also supported by an "intratextual" reading of the Constitution. Specifically, the Patent Clause—introduced to the Convention on the same day as the Seat of Government Clause—gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries," and thus appears to use the term "exclusive" in this ordinary sense. U.S. CONST. art. I, § 8, cl. 8 (emphasis added); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 505–06, 508–10 (noting that the two clauses were introduced to and voted on by the Convention on the same day); *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791 (1999) (arguing that judges and scholars often use the Constitution as its own dictionary, interpreting a term in one provision of the document in light of the term's use in other provisions).

90. *See* 1 ANNALS OF CONG. 877 (1789) (Joseph Gales ed., 1834) (statement of Rep. Joseph Lawrence); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 439 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) (statement of James Madison) [hereinafter THE DEBATES IN THE STATE CONVENTIONS]; *id*. at 439–40 (statement of Edmund Pendleton).

91. U.S. CONST. art. I, § 8, cl. 18.

92. The Framers appear to have disagreed about how broadly this power should extend. *See* 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. at 276 (Philadelphia, William Young Birch & Abraham Small 1803) (noting that "[t]he exclusive right of legislation granted to congress . . . is a power, probably, more extensive than it was in the contemplation of the framers of the constitution to grant" and noting failed proposals to amend the Constitution to only give Congress the power to enact "such regulations as respect the police, and good government thereof"); William C. diGiacomantonio, *"To Make Hay While the Sun Shines": D.C. Governance as an Episode in the Revolution of 1800*, *in* ESTABLISHING CONGRESS: THE REMOVAL TO WASHINGTON, D.C., AND THE ELECTION OF 1800, at 39, 42 (Kenneth R. Bowling & Donald R. Kennon eds., 2005) ("Congress's exclusive jurisdiction over the federal district had a complex pedigree, and that by no means was there consensus over what it meant . . . .").

93. 3 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 439 (statement of Edmund Pendleton).

94. *See id*. at 432 (statement of George Mason); *id*. at 434 (statement of William Grayson).

early commentators described this broad power as trumping other provisions of the Constitution—a point made clear in the subsequent ratification debates.[95]

Although the text of the Seat of Government Clause appears to vest Congress with broad legislative powers, the Clause appears more limited when contrasted with the Property Clause. The latter Clause gives Congress the power "to dispose of and make all needful Rules and Regulations" for federal territories or property.[96] The Property Clause was "a late and apparently uncontroversial addition" to the Constitution whose meaning was little discussed during the Convention or the ratification debates.[97] But the text of the Property Clause appears to describe a different—and seemingly broader—power than the Seat of Government Clause. For example, dictionaries from the period defined the power "to dispose of" in broad terms as the power "to employ to any end" or "to place in any condition."[98] In addition, the Clause empowers Congress to make "*all needful* Rules and Regulations."[99] "Needful" was synonymous with "necessary."[100] But unlike the Necessary and Proper Clause in Article I, Congress's authority under the Property Clause is not textually constrained by the requirement that the power be both "necessary" and "proper." In other words, when Congress enacts laws under the Seat of Government Clause (as supplemented by the Necessary and Proper Clause), the laws arguably must be both "necessary" and "proper."[101] But when Congress enacts laws under the freestanding grant of authority in the Property Clause, the laws need only be "needful."

Indeed, the primary drafter of the Property Clause, Gouverneur Morris, understood the Clause as vesting Congress with the broadest possible powers. In 1803, Morris wrote: "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording [the Property Clause], I went as far as circumstances would permit to establish the exclusion."[102] In other words, there are good reasons to think that the Constitution vests Congress with greater legislative discretion over the territories than over the District.

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95. *See infra* Section II.C.1.

96. U.S. CONST. art. IV, § 3, cl. 2.

97. Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 644 (2018); *see also* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 26 (2001) ("[T]he question of how to draft the language that would become the Property Clause did not generate much debate, and the Clause itself would not prove controversial during ratification.").

98. JOHNSON, *supra* note 89; 1 WEBSTER, *supra* note 89.

99. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

100. *See* JOHNSON, *supra* note 89; 2 WEBSTER, *supra* note 89.

101. *Compare* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 720–26 (2016) (describing this as the reading as the prevailing view), *with id.* at 726–57 (offering reasons to question this reading).

102. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 192, 192 (Jared Sparks ed., Boston, Gray & Bowen 1832).

In addition to these textual differences, consider also that the Clauses are placed in different parts of the Constitution. The Seat of Government Clause is located within a list of over a dozen other ordinary legislative powers in Section 8 of Article I. The Property Clause, by contrast, is located next to the provision for admitting new states in Section 3 of Article IV.[103] At minimum, this structural difference suggests that we should question arguments that automatically equate the Seat of Government Clause with the Property Clause.

Finally, distinguishing the Seat of Government Clause from the Property Clause might give us a more coherent reading of the Constitution's exceptions to Article III. Note that Congress's power "to make all needful Rules and Regulations"[104] for the territories parallels another of Congress's powers: "[t]o make Rules for the Government and Regulation of the land and naval Forces."[105] Just as the Property Clause has long been read to authorize non-Article III courts in the territories, the Military Regulations Clause has likewise been read as authorizing Congress to create non-Article III courts for the military.[106] The point here is not to make a sweeping claim about the original meaning of "Rules" or "Regulations" in the Constitution. Intervening history and precedent have surely made it more difficult to construct a universal and coherent theory of non-Article III courts.[107] Rather, the point is more modest: given the existing and well-established exceptions to Article III, we might develop a more coherent account for some of these exceptions if we distinguish the District from the territories.

C. HISTORY

The early history of the Seat of Government Clause provides additional (and clearer) evidence that the Clause does not authorize Congress to violate other provisions of the Constitution—and in particular the protections prescribed in Article III. Specifically, this section examines the ratification debates and the subsequent process by which Maryland and Virginia ceded land for the District to the federal government.

1. Ratification

The ratification debates suggest that the Seat of Government Clause did not empower Congress to create non-Article III courts in the District.[108] The Founders described the Clause as serving three core purposes: making the capital independent from the control of any state, protecting the capital from the type of "insult" that had occurred when the Continental Congress fled Philadelphia in

103. *Cf.* Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 625–29 (2018) (discussing the relevance of the location of the Guarantee Clause in Article IV).

104. U.S. CONST. art. IV, § 3, cl. 2.

105. *Id.* art. I, § 8, cl. 14.

106. *See* Vladeck, *supra* note 47, at 951–61.

107. *See* William Baude, Adjudication Outside Article III 5–6 (June 12, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945 [https://perma.cc/23ZF-5CVC] (describing this "puzzle").

108. By contrast, the debates tell us little about Congress's power over the territories under the Property Clause. *See supra* note 97 and accompanying text.

1783, and giving the capital "dignity."[109] Yet none of these purposes implies a power to create non-Article III courts. To the contrary, the Founders likely would have viewed such a power as degrading the constitutional "dignity" of the new capital.[110]

Specific debates about courts and trial rights in the seat of government further reflected this understanding. During the debates, numerous Anti-Federalists worried that Congress might undermine the District's judicial system, such as by eliminating trial by jury,[111] abolishing the benefit of the clergy,[112] or even making the District a safe-haven for felons from other states.[113] Others suggested that Congress might extend the judicial power of "federal courts" in the District to "all questions" of law, thus aggrandizing the power of the D.C. courts.[114] Yet none of these critics suggested that Congress would have the power to create courts staffed by judges without the constitutional protections prescribed in Article III. Indeed, even the leading Anti-Federalist George Mason, who suggested that "judges and juries [in the District] may be under [Congress's] influence, and bound to support their operations," assumed that "federal courts are to sit" in the seat of government.[115] In other words, Mason worried that Article III's judicial protections would prove inadequate in their own right given the proximity of the D.C. courts to the political branches.

Likewise, Federalist responses to these criticisms provide strong evidence for thinking that Article III applied to the District. The first response was practical. Why would members of the government—many of whom would end up living at the capital—want to "degrade their own dignity" by removing various trial protections and making the capital a refuge for felons?[116] This self-interest rationale would seem to apply equally to the judicial protections prescribed by Article III. Why would the Founders—many of whom would join the early federal government—want to face trials by judges without life tenure and salary protection? Recall that these were the same men who had started a revolution because (among other indignities) their King had made judges "dependent on his Will alone, for the tenure of their offices,

109. *See* THE FEDERALIST NO. 43, at 272–73 (James Madison) (Clinton Rossiter ed., 1961); *see also* 2 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 99 (statement of Caleb Strong); 3 *id*. at 89 (statement of James Madison); *id*. at 433 (statement of James Madison); 4 *id*. at 219–20 (statement of James Iredell).

110. *See infra* note 116 and accompanying text.

111. *See* 3 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 442 (statement of George Mason).

112. *See id*. at 436 (statement of Patrick Henry).

113. *See id*. at 431–32 (statement of George Mason); *id*. at 435 (statement of William Grayson); A COLUMBIAN PATRIOT, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 270, 282 (Herbert J. Storing ed., 1981).

114. LETTER FROM FEDERAL FARMER XVIII (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 113, at 339, 346.

115. 3 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 431 (statement of George Mason).

116. *Id*. at 439–40 (statement of Edmund Pendleton); *see also id*. at 435–36 (statement of Henry Lee).

and the amount and payment of their salaries."[117] They thus viewed "[t]he complete independence of the courts of justice [as] peculiarly essential in a limited Constitution."[118]

The second response reflected the inherent limits imposed by the Constitution. The Federalists noted that Congress's powers under the Seat of Government Clause were limited in the same ways as other powers granted by the Constitution.[119] Addressing trial-related concerns directly, Federalist Richard Spaight responded to the charge that Congress might direct people to be tried for treason in the District without a jury by exclaiming, "What an astonishing misrepresentation! Why did not the gentleman look at the Constitution, and see their powers?"[120] Spaight continued that Article III prescribed a specific definition of treason and a specific procedure for convicting people of the offense, and elaborated that "[p]ersons accused [also] cannot be tried without a jury; for the same article provides that 'the trial of all crimes shall be by jury.'"[121] Put simply, Article III limited Congress in the seat of government in the same way as in the states.

The final response focused on the process by which states would cede land for the capital. The Federalists argued that the states would protect their residents' rights and often expressed this idea in terms of a "compact" between the federal government, the states, and the local residents.[122] As Madison explained, the District was "to be appropriated . . . with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it."[123] This notion that the states could protect their residents by conditioning the cession to the District on the express preservation of certain rights reappeared throughout the ratification debates and was even

117. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

118. THE FEDERALIST NO. 78, *supra* note 109, at 466 (Alexander Hamilton). Consider also how this power would have imperiled judicial independence more broadly. The First Judiciary Act required the Supreme Court to sit "at the seat of government." Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 73. And the Justices have done so since the District of Columbia became the seat of government in December of 1801. *See* TINDALL, *supra* note 74, at 12–13. But if Congress could create non-Article III courts in the District, then one might also reasonably worry that Congress could put pressure on the Justices by subjecting them to non-Article III courts under direct congressional control.

119. *See* 3 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 439 (statement of Edmund Pendleton); 4 *id*. at 220 (statement of James Iredell). Perhaps not surprisingly, Alexander Hamilton later adopted a much broader construction of the power when attempting to defend the constitutionality of the First Bank of the United States. *See* Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 112–13 (Harold C. Syrett ed., 1965) ("Here then is express power to exercise *exclusive legislation in all cases whatsoever over certain places*; that is to do in respect to those places, all that any government whatever may do: For language does not afford a more complete designation of sovereign power, than in those comprehensive terms. It is in other words a power to pass all laws whatsoever . . . .").

120. 4 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 209 (statement of Richard Spaight).

121. *Id*.

122. THE FEDERALIST NO. 43, *supra* note 109, at 272 (James Madison).

123. *Id*.

acknowledged by opponents of the Clause.[124] Indeed, congressional debates more than a decade after the ratification of the Constitution continued to describe the creation of the District as a "compact" or "contract."[125] In this way, the Federalists defended the Seat of Government Clause in the well-recognized language of social contract theory, which lay at the heart of the broader Constitution.[126] In short, the Founders assumed that the states would protect the constitutional rights of their inhabitants—including (presumably) the rights embodied in Article III.

2. Cession

A second source of evidence about the meaning of the Seat of Government Clause comes from the actual creation of the District of Columbia through acts of cession by Maryland and Virginia. This history illustrates a key difference between the District and other federal territories: The Constitution had at one point applied to the former, but not the latter.

The District of Columbia and the federal territories created in the eighteenth century were established through a different process than territories later acquired by the federal government during the nineteenth century. In *Canter*, for instance, Justice Marshall described two methods by which Congress could acquire territory not already part of the states: "by conquest or by treaty."[127] By contrast, the Constitution prescribes a specific procedure for creating the seat of government: particular states would have to cede land and Congress would have to accept the cession.[128] The Northwest Territory and other eighteenth-century territories were acquired through a similar process of state cession.[129]

As a result, there are two important differences between the creation of the District and the acquisition of later territories. First, the District had previously been part of Maryland and Virginia, and thus subject to all of the protections of the Constitution. Throughout the nineteenth century, scholars recognized the significance of this fact. For example, in his well-known 1829 legal treatise, William

124. *See, e.g.*, 3 THE DEBATES IN THE STATE CONVENTIONS, *supra* note 90, at 433 (statement of James Madison); 4 *id.* at 219 (statement of James Iredell); LETTER FROM FEDERAL FARMER XVIII, *supra* note 114, at 345; James Wilson, Speech (Oct. 6, 1787), PA. PACKET, Oct. 10, 1987, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 183, 184 (Ralph Ketcham ed., 1986).

125. 12 ANNALS OF CONG. 488 (1803) (statement of Rep. Benjamin Huger); *id.* at 493 (statement of Rep. James A. Bayard); *id.* at 497 (statement of Rep. John Bacon); *id.* at 498 (statement of Rep. John Randolph, Jr.); *id.* at 502–03 (statement of Rep. Henry Southard).

126. *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY. L. REV. 11, 30 (1985); Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. AM. PHIL. SOC'Y 261, 265 (1987).

127. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828).

128. *See* U.S. CONST. art. I, § 8, cl. 17; *see also* Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130 (accepting cession of land). A decade later, Judge William Cranch would elaborate that even after the states ceded the land, three events would have to occur before Congress acquired exclusive jurisdiction over the District: "(1) That the cession should be accepted by congress; (2) that it should be located and defined; and (3) that the district so accepted, located, and defined, should become the seat of government of the United States." United States v. Hammond, 26 F. Cas. 96, 97 (C.C.D.C. 1801) (No. 15,293).

129. *See* Ablavsky, *supra* note 97, at 636, 643–44.

Rawle distinguished the acquisition of territory with "civilized inhabitants" from the acquisition of territory without "civilized inhabitants."[130] Over "uninhabited" land (meaning land inhabited only by Native Americans) Congress had "the power . . . to make such regulations for its government as they may [have thought] proper" because residents who later moved to the territory could be forced to "conform to the system which may be thus established."[131] Over inhabited lands, by contrast, Congress had an obligation to respect the rights enjoyed by the inhabitants under the existing "code of laws."[132] Although he did not specifically discuss the District, Rawle did use this principle to explain why citizens in the Northwest Territory and the Louisiana Territory "retain[ed] their ancient laws and usages."[133] At the end of the nineteenth century, other scholars—including Christopher Columbus Langdell, the famous Dean of Harvard Law School—made the same point specifically about the District.[134]

The second important difference between the District and later territories is that, even if Congress and the states could have withheld from the District certain constitutional protections, there is little reason to think that they actually did so. To the contrary, Maryland and Virginia expressly preserved the rights of their local inhabitants in their acts of cession—including, presumably, the right to an Article III tribunal.[135] These acts are important evidence because, as Judge William Cranch would note a decade later, "[a]n act by which a state parts with a portion of its territory and jurisdiction, is one of the most important acts which a state can perform" and thus "the legislature would be peculiarly cautious in the selection of words to express its meaning."[136]

Notably, at the beginning of the twentieth century, the Supreme Court endorsed these two strands of thought: that the Constitution originally applied to

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130. RAWLE, *supra* note 73, at 237.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See* C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 382–83 (1899) (noting that the District of Columbia "is within the limits of a State, was once a part of a State, and, therefore, the Constitution once extended over it; and it may not be easy to show that it has ever ceased to extend over it"); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 162 (1899) (distinguishing "between the territory belonging to the United States at the time of the adoption of the Constitution and that which has been acquired subsequently" and discussing the District of Columbia as an example of the former).

135. *See* Act of Dec. 3, 1789, ch. 32, § 2, *in* 13 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 43, 44 (William Waller Hening ed., Philadelphia, Thomas Desilver 1823) (clarifying that the cession "shall [not] be construed to vest in the United States, any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States"). By comparison, Maryland initially passed a brief law authorizing the cession of land for the District without expressly preserving the rights of the local inhabitants. Md. Act of Dec. 23, 1788, ch. 46, *in* 2 THE LAWS OF MARYLAND (William Kilty ed., Annapolis, Frederick Green 1800). But later, Maryland clarified that it too was ceding land based on the same condition as Virginia: that the residents would retain their property and individual rights. Md. Act of Dec. 19, 1791, ch. 49, § 2, *in* 2 THE LAWS OF MARYLAND, *supra*.

136. United States v. Hammond, 26 F. Cas. 96, 97 (C.C.D.C. 1801) (No. 15,293).

the District and that the states did not waive any constitutional protections during the process of ceding land for the capital. In *Downes v. Bidwell*, Justice Brown observed:

> The Constitution had attached to [the District] irrevocably. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. . . . Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.[137]

Both a concurring opinion in *Downes* and other decisions from the period extended this principle of constitutional attachment to include not just the District of Columbia but also other land ceded by the states.[138] Soon after *Downes*, one scholar stated the point quite directly, noting that there was a potential constitutional difference between federal property acquired directly from a state and "territory subsequently acquired by the United States" from outside of the states.[139] At least as to the District, the scholar reasoned, "no doubt all the general limitations on the power of Congress were intended to apply."[140] By contrast, on some views, whether the Constitution attached to the latter territories was left to congressional discretion.[141] Put another way, Congress could treat territory that had been "outside [the] boundaries [of the United States] as they existed when the constitution was adopted" differently from territories that had at one point been within the constitutional fold.[142]

D. STRUCTURE

The theory of constitutional attachment also reflects broader issues of constitutional structure. At their core, Article III's judicial protections serve a structural purpose. As the Supreme Court has put it, Article III "safeguards the role of the

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137. 182 U.S. 244, 261 (1901) (opinion of Brown, J.).

138. *See id.* 319–22 (White, J., concurring). Contemporary lower court decisions read *Downes* as identifying a "[d]istinction[] . . . in the application of the Constitution [to the territories] depending upon the relation which was borne to the National Government whether by a State or by the territories which belonged to certain States at the time of the adoption of the Constitution, and which were situated within the acknowledged limits of the United States." United States v. Dorr, 2 PHIL. REP. 269, 273 (S.C., May 16, 1903), *reprinted in* Hawaii v. Mankichi, 23 S. Ct. 787, app. at 860 (1903). In an earlier decision, the Supreme Court likewise distinguished the Northwest Territory from other territories because it had "belonged to the United States at the adoption of the Constitution." *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890).

139. Emlin McClain, *The Hawaiian Case*, 17 HARV. L. REV. 386, 393 (1904).

140. *Id.* at 394.

141. *Id.* at 393 ("[A]ny distinctions as to the applicability of constitutional provisions to different portions of [territory subsequently acquired] depend evidently on provisions of treaties or statutes with reference thereto . . . .").

142. *Id.* at 386.

Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."[143]

Recognizing that Article III is a structural safeguard suggests some additional problems with the constitutional case for non-Article III courts in the District. First, it explains why it is a mistake to analogize Congress's power over local courts in the District to state legislatures' power over local courts in the states. In *Palmore*, the Court relied heavily on this analogy in explaining why Congress could create a non-Article III local court system.[144] And in fairness, there is some logic to the comparison: if citizens of states do not have a right to an Article III tribunal for cases arising under local state law, why should citizens of the District have such a right for cases arising under local federal law?[145]

But this analogy misunderstands the structural role of Article III. The structural protections in Article III limit *Congress*, not the states.[146] Thus, although it is true that state legislatures can create courts staffed by judges without life tenure and salary protection, that fact tells us little about whether Congress may also do so within the limits of Article III.

Indeed, viewed through the lens of constitutional structure, the analogy between state courts and local courts in the District begins to unravel. The Founders recognized that state judges who, unlike their federal counterparts, held "their offices during pleasure, or from year to year" might be subject to "local spirit[s]" that would render them insufficiently "independent" to adjudicate certain cases.[147] Yet the Founders still created a system of concurrent jurisdiction between independent federal courts and non-independent state courts. The key to resolving this tension is in recognizing the ways in which federalism serves similar goals as the separation of powers by diffusing power between different institutions.[148] Despite their lack of tenure protections, state judges are in some ways *more* independent from the President and Congress than federal judges because state judges are not subject to the federal appointment process and their offices cannot be abolished by federal legislation. In designing a system of concurrent jurisdiction, the Founders were not creating an exception to judicial independence

143. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (alteration in original) (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

144. Palmore v. United States, 411 U.S. 389, 397, 407–10 (1973).

145. As a practical matter, this discrepancy may have seemed less stark at the Founding because many states had robust structural protections for judges at the time. *See* Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 850–64 (2012).

146. *Cf.* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008 (2011) ("The very words 'federalism' and 'separation of powers' are simply shorthand for the deep truth that the Constitution empowers and restricts different governmental actors in different ways.").

147. THE FEDERALIST NO. 81, *supra* note 109, at 486 (Alexander Hamilton).

148. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1493–95 (1987).

but were actually furthering it. Put another way, the Founders were using judicial federalism to safeguard the separation of powers.[149]

These same principles do not apply to the non-Article III courts in the District. The superficial similarity between state courts and local D.C. courts—the lack of judicial protections—masks the critical difference: courts in the District are subject to congressional and presidential control. The offices of the judges are created (and can be abolished) by Congress; judges' salaries can be altered by statute; and the judges themselves must be appointed by the President with the advice and consent of the Senate.[150] Thus, although on the surface the Court's ruling in *Palmore* may appear to have put citizens of the District on the same footing as citizens of the states, it in fact disadvantages the former in an important constitutional sense by leaving them particularly vulnerable to the influence of the federal government.

Once we clear away the state court analogy, we can better assess whether there is any reason to think that Article III's judicial protections should not apply in the District. That answer, in light of the history discussed in the previous section, is no.[151] Recall how the District became the seat of government: Maryland and Virginia passed statutes ceding land.[152] And Congress in turn passed a statute accepting the land and designating it as the "district."[153] No one appears to question that, before these acts, the entire Constitution applied to the land that would become the seat of government. In other words, immediately after the ratification of the Constitution and before the cession of the District, Congress could not have created a non-Article III court for that land.

The question, then, is how Article III could have stopped applying to the District. The most plausible theory is that—somehow—by ceding the land for the seat of government, Maryland and Virginia authorized Congress to circumvent Article III in the capital. Or perhaps by selling some of their land to the federal government for public buildings, the local residents did something similar. We might, in other words, imagine the cession of the District as a broader act of consent to non-Article III adjudication.

But there are at least three problems with this "consent" theory. First, as a matter of history, there is little evidence that either the states or the future residents of the District consented to a non-Article III tribunal. To the contrary, as just discussed, both Maryland and Virginia preserved the rights of their citizens in their laws ceding land to the District.[154] Second, as a matter of theory, the idea that

149. *Cf.* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (noting that cooperative federalism schemes serve separation-of-powers objectives).

150. *See supra* note 30 and accompanying text.

151. *See supra* Section II.C.1.

152. *See supra* note 135 and accompanying text.

153. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130 (accepting cession of land).

154. *See supra* note 135 and accompanying text.

parties can ever consent to non-Article III adjudication is hotly contested and has divided the Justices and scholars in recent years.[155]

Finally, even assuming that parties can consent to adjudication outside of Article III, the consent exception does not explain the District's non-Article III courts. Most obviously, D.C. litigants in 2018—or in 1973 for that matter—did not consent to a non-Article III tribunal. Even if we think that the original inhabitants of the District in some sense waived their right to an Article III court, we do not typically allow the waiver of constitutional rights to cross generations or to apply to areas of land rather than to individuals. And in a deeper sense, the idea that Maryland and Virginia could consent to adjudication outside of Article III by ceding land to the federal government cuts directly against the Supreme Court's modern separation-of-powers and federalism jurisprudence.[156] Simply put, states cannot waive the basic structural protections created by the Constitution.

E. RIGHTS

The Supreme Court has also understood "Article III's guarantee of an impartial and independent federal adjudication" to be a "personal right."[157] This rights-based theory of Article III helps situate its protections in the history of the District and in the Court's broader approach to rights in the capital.

Recall that during the ratification debates numerous Anti-Federalists expressed concerns that Congress would not abide by certain constitutional protections in the seat of government.[158] Specifically, they mentioned two trial-related rights listed in Article III—the right to a jury trial and the right to be tried for treason in a specific manner.[159] Recall further that the Federalists responded to these attacks by emphasizing that Article III's protections would apply as much in the District as in other parts of the country.[160] This history strongly suggests that the "personal right" to an Article III tribunal would have historically been understood to apply in the District.

Moreover, consider the subsequent development of one particularly important constitutional protection: the right to trial by jury. The Supreme Court's modern jury-right jurisprudence has been described as "convoluted, unpredictable, and

155. *Compare* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (allowing parties to consent to non-Article III adjudication), *and* Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 240–43 (2012) (defending same), *with Sharif*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting) (rejecting consent exception), F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715 (2018) (same), *and* Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1194–1204 (2008) (same).

156. *See* New York v. United States, 505 U.S. 144, 182 (1992) (explaining that state consent cannot ratify unconstitutional action by Congress); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 514 (2012) ("[State] consent cannot enlarge federal power."); *see also* Freytag v. Comm'r, 501 U.S. 868, 878–80 (1991) (explaining that the branches cannot consent to a separation-of-powers violation).

157. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

158. *See supra* Section II.C.1.

159. U.S. CONST. art. III, § 2, cl. 3; *id*. art. III, § 3, cl. 1.

160. *See supra* Section II.C.1.

virtually Byzantine."[161] But to the extent that there is a discernable pattern in the Court's case law, it is in linking the right to a jury trial to the right to an Article III tribunal.[162] For this reason, juries are not required in most cases involving non-Article III courts, such as those tried in territorial courts or military courts and those involving public rights. But there is a notable exception to this pattern: cases tried in the District of Columbia. As early as the 1880s, the Supreme Court held that the jury-trial right applied to the District, observing that "[t]here is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property."[163] And more recently, the Supreme Court has held that, in local cases, Congress may not deprive D.C. residents their right to trial by jury.[164] But under *Palmore*, Congress may deprive D.C. residents of their right to a trial before an Article III judge. This unexplained exception to the jury-trial thesis raises additional reasons to question *Palmore*'s reasoning.[165]

To be sure, there is an important exception to the claim that constitutional rights apply to the District—namely, voting rights. Even today D.C. residents have no voting representatives in Congress.[166] But this disenfranchisement is distinct for at least three reasons. First, nothing in the Constitution guarantees a free-standing right to vote[167]—unlike the express guarantees of Article III. Second, the Constitution (as originally enacted) appears to contemplate the disenfranchisement of D.C. residents by only providing for congressional representation for citizens of the "States" and for presidential electors to be chosen by each "State."[168] Finally, and perhaps most importantly, there is at least some evidence that the Founders and early Congresses accepted the disenfranchisement of D.C. residents—thereby establishing a longstanding historical precedent.[169] And if anything, the express concession by early generations that residents of the

161. Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 410 (1995).

162. *See* FALLON ET AL., *supra* note 63, at 383, 388; Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1041 (1999).

163. Callan v. Wilson, 127 U.S. 540, 550 (1888).

164. *See* Pernell v. Southall Realty, 416 U.S. 363, 368–69, 376 (1974).

165. *See* Vladeck, *supra* note 47, at 982–83.

166. *See* Adams v. Clinton, 90 F. Supp. 2d 35, 65 (D.D.C. 2000) (per curiam) (holding that constitutional provisions providing for congressional voting are inapplicable to D.C. residents), *aff'd mem.*, 531 U.S. 941 (2000).

167. *See* Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 11 (2014) (citing Bush v. Gore, 531 U.S. 98, 104 (2000)).

168. *See* U.S. CONST. art. I, § 2, cl. 1, § 3, cl. 1; *id.* art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII; *see also Adams*, 90 F. Supp. 2d at 45–47; Jamie Raskin, *Democratic Capital: A Voting Rights Surge in Washington Could Strengthen the Constitution for Everyone*, 23 WM. & MARY BILL RTS. J. 47, 51 (2014) (noting that the structural provisions of the Constitution foreclose congressional representation for the district).

169. *See* 14 ANNALS OF CONG. 881 (1805) (statement of Rep. John Dennis); 12 ANNALS OF CONG. 487 (1803) (statement of Rep. John Smilie); *id.* at 489 (statement of Rep. Benjamin Huger); *id.* at 499 (statement of Rep. Joseph Randolph); 10 ANNALS OF CONG. 996 (1801) (statement of Rep. John Bird);

District would lose certain political rights makes the lack of commentary about the loss of trial rights all the more notable.

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To summarize, there are numerous reasons to doubt that the Constitution—as originally understood or later interpreted—authorizes the creation of non-Article III courts in the District. For one thing, the text of the Constitution does not appear to vest Congress with such a power. More importantly, the historical understanding of the Seat of Government Clause and the creation of the District cuts directly against such a power. Finally, broader principles of constitutional structure and individual rights in the District seriously undermine the constitutional case for the District's exceptionalism.

III. PRACTICE AND PRECEDENT

This Part examines the history of the D.C. court system. Specifically, it focuses on the three primary court systems created in 1801, 1863, and 1891 and on related legislative debates, judicial precedents, and scholarly commentaries.[170] It then examines the key pre-*Palmore* Supreme Court decisions on the constitutional status of the D.C. courts. The great weight of this historical evidence and precedent shows that Article III judicial protections should apply to courts in the capital.

A. THE FIRST COURTS

Perhaps the most important evidence about the constitutional status of the D.C. court system comes from the first court bill enacted in 1801.[171] This statute is particularly important because, as others have noted, "[t]he early Congresses were quite conscious of the precedent-setting quality of their work."[172] A careful

id. at 996–97 (statement of Rep. John Smilie); 10 ANNALS OF CONG. 869 (1800) (statement of Rep. John Nicholas); A PRIVATE CITIZEN OF THE DISTRICT, ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA (1800), *reprinted in* 8 RECS. COLUMBIA HIST. SOC'Y 143, 150–57 (1905); *see also Adams*, 90 F. Supp. 2d at 51–53 (collecting and summarizing evidence); EPAMINONDAS, CONSIDERATIONS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA 5–6 (Washington, Samuel Harrison Smith 1801). Scholars disagree about the strength of this historical evidence. *Compare* Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 864–86 (2009) (presenting historical evidence that the original Constitution's failure to provide representation for the District was intentional), *with* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 169–79 (1975) (challenging historical evidence of a "constitutional bar" to voting rights for residents of the District).

170. *See* Bradley & Siegel, *supra* note 9, at 319–21 (describing the role of "historical gloss" in debates about the meaning of Article III); Grove, *supra* note 11, at 1863–66 (discussing the role executive- and legislative-branch practice should play when courts interpret Article III); Pfander, *Article I Tribunals*, *supra* note 66, at 687 (describing how early congressional practice can help us understand the scope of Article III).

171. *See* District of Columbia Organic Act of 1801, ch. 15, 2 Stat. 103.

172. Pfander, *Article I Tribunals*, *supra* note 66, at 685.

examination of the first court bill shows that the first court system was almost certainly created under Article III.

Moreover, this early history helps explain the proper scope of the territorial court exception. As already explained, nineteenth-century courts and commentators distinguished between federal lands that were at one point in time a part of the country (such as the District of Columbia) and those lands acquired from outside the country (such as the Louisiana Territory). This section presents additional historical evidence that supports this constitutional distinction.

1. The District

The District of Columbia became the seat of government on the first Monday of December in 1800.[173] Almost immediately, Congress began to debate the structure of the local government, including the court system.

In the months leading up to the passage of the first court bill in February of 1801, Congress repeatedly discussed the "judiciary" and the "Judicial power" in the District.[174] Indeed, these issues would have been highly salient to members of Congress at the time because Congress was debating a broader Judiciary Bill during the same period.[175] Yet surprisingly, Congress said relatively little about the structure of the D.C. courts—perhaps because everyone assumed that the court system would follow the same model as the earlier Article III courts established by Congress. In December of 1800, only Representative Robert Harper referenced the new court system in the capital. He noted that the Seat of Government Clause was meant "to bestow dignity and independence" on the new capital and that a "competent Legislative, Executive, and Judicial power" was necessary "to protect it from . . . outrages" and "to insure to itself respect."[176] Harper thus "wished the establishment of a Judiciary competent to the carrying into effect the laws now existing."[177]

Later debates indicate little further controversy over the structure of the D.C. court system. It appears that everyone assumed that "the different departments [in the District], Executive, Legislative, and Judicial, [were to be] assembled, according to the Constitution."[178] In fact, the primary challenge to the court bill focused on two features that made it conform with Article III: that the judges would be appointed by the President and that they would serve terms during good behavior—in other words, life tenure.[179] Some members of Congress worried that these features—combined with the broader disenfranchisement of the local residents in the capital—were undemocratic and unjust.[180] But once again, no one

173. Act of July 16, 1790, ch. 28, § 6, 1 Stat. 130; United States v. Hammond, 26 F. Cas. 96, 96 (C.C. D.C. 1801) (No. 15,293).

174. *See, e.g.*, 10 ANNALS OF CONG. 997–1000 (1801); 10 ANNALS OF CONG. 868–73 (1800).

175. *See* Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

176. 10 ANNALS OF CONG. 873 (1800) (statement of Rep. Robert Harper).

177. *Id.* at 872.

178. 10 ANNALS OF CONG. 994 (1801) (statement of Rep. Henry Lee); *see also* 10 ANNALS OF CONG. 873 (1800) (statement of Rep. Robert Harper) (noting that "[t]he establishment of a Judiciary would be very easy, and would require little time").

179. *See* 10 ANNALS OF CONG. 1000 (1801) (statement of Rep. Nathaniel Macon).

180. *See id.* at 997 (statement of Rep. John Smilie); *id.* at 1000 (statement of Rep. Nathaniel Macon).

expressly raised—let alone defended—the claim that Congress could create courts outside of Article III.

Congress passed the final court bill on February 27, 1801.[181] In addition to creating a general system of local government, the law created the first D.C. court system, with a circuit court consisting of three judges who would hold their offices during "good behaviour" and several justices of the peace who would serve for five-year terms.[182]

James Pfander has argued that several features of this Act show that the first court system was created outside of Article III. Specifically, Pfander points to: (1) the omission of the word "establish" from the law; (2) that the D.C. circuit court could not review the decisions of Article III courts; (3) the express inclusion of a "good behaviour" provision in the law (rather than reliance on the "good Behaviour" provision in Article III); and (4) the limited tenures of the justices of peace. Pfander makes a strong initial case for concluding that Congress created the first circuit court outside of Article III. But a closer examination of the court bill—especially in light of earlier and later congressional enactments—shows that none of these factors prove Pfander's argument.

Pfander first notes that, according to the title of the law, Congress did not "establish" the first circuit court in the District.[183] Pfander finds this omission significant because the word "establish" appears both in Article III and in the titles of the two previous Judiciary Acts in 1789 and 1801.[184] But Pfander overlooks other features of the law that cut against this reading. For one thing, Congress *did* describe itself as "establish[ing]" the D.C. court system, just later in the court bill.[185] That Congress did not include the word "establish" in the title of the bill should not be surprising given that the bill created an entire system of local government in D.C., not just a court system. Moreover, the first court bill and the First Judiciary Act of 1789 use remarkably similar language and syntax to create their respective court systems.[186] Thus, if anything, the text of the bill actually shows the similarity between the courts in the District and those in the rest of the country.[187]

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181. District of Columbia Organic Act of 1801, ch. 15, 2 Stat. 103.

182. *See id*. §§ 3, 11, 2 Stat. at 105, 107.

183. Pfander, *Article I Tribunals*, *supra* note 66, at 686 & n.205.

184. *Id*. at 686.

185. District of Columbia Organic Act of 1801, ch. 15, § 15, 2 Stat. 103, 107–08 (describing "the courts hereby *established* within the district" (emphasis added)). Moreover, the editorial summary adjacent to each section in the Session Law describes the "[c]ircuit court *established* in [the District]." § 3, 2 Stat. at 105 (emphasis added).

186. *Compare* District of Columbia Organic Act of 1801, ch. 15, § 3, 2 Stat. 103, 105 ("That there shall be a court in said district, which shall be called the circuit court of the district of Columbia . . . ."), *with* Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73 ("That there be a court called a District Court, in each of the afore mentioned districts . . . .").

187. Relatedly, Pfander observes that Congress did not call the first circuit court a "court[] of the United States" as it had with previous courts. *See* Pfander, *Article I Tribunals*, *supra* note 66, at 686. But this factor is also far from decisive given that later Congresses did refer to the circuit court as a "court of the United States." *See, e.g*., Act of Mar. 3, 1823, ch. 65, § 1, 3 Stat. 785, 785 (authorizing money for the

Second, Pfander observes that Congress did not give the D.C. circuit court the ability to review decisions from the "district of Potomac," an Article III court created in the broader 1801 Judiciary Act.[188] Pfander notes that this structural choice was "apparently in keeping with the understanding that Article I courts . . . lacked power to review the decisions of the courts of the United States."[189] But there are two significant problems with this argument. For one thing, when Congress abolished the district of Potomac in 1802 and replaced it with the district court in the District of Columbia—an Article III "court of the United States"[190]—Congress provided for such appellate review by the D.C. circuit court, thus undermining Pfander's basic claim.[191] In addition, even earlier, in March of 1801, Congress authorized the chief judge of the circuit court of the District of Columbia to "hold the district courts of the United States in and for the district of Potomac."[192] In other words, on Pfander's view, Congress authorized a non-Article III judge to hold an Article III judgeship. Although the Supreme Court has never officially resolved whether Congress can authorize non-Article III judges to hold Article III positions, such an arrangement would at least raise serious constitutional concerns.[193]

Third, Pfander argues that, because Congress specified that judges of the D.C. court would hold their offices "during good behaviour," rather than relied upon the life tenure provision in Article III (as it had in earlier court bills), we can infer that the D.C. courts were not created under Article III.[194] But there is a significant problem with this reading of the good-behavior provision. When Congress created other courts for the District, Congress *did* rely on the Article III provision. For example, in the first court bill in 1801, Congress also created the "orphans' court" and an accompanying judgeship but did not specify the tenure of the judge.[195] Yet, during the existence of the orphans' court, both the President and Congress treated the judge as having life tenure.[196] Indeed, in 1838 a number of members of Congress explicitly argued that the judges of the orphans' court were covered by Article III in rejecting an amendment that would have limited the tenure of the judges.[197] Likewise, in 1838 Congress created a specialized criminal

purchase of buildings for "the circuit court of the United States, for the county of Washington, in the District of Columbia").

188. Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96; Pfander, *Article I Tribunals*, *supra* note 66, at 688 n.209.

189. Pfander, *Article I Tribunals*, *supra* note 66, at 688 n.209.

190. Judiciary Act of 1802, ch. 31, § 24, 2 Stat. 156, 166.

191. *See, e.g.*, United States v. The Schooner Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 443 (1808) (reviewing the D.C. circuit court's reversal of the federal district court).

192. Act of Mar. 3, 1801, ch. 32, § 7, 2 Stat. 123, 124.

193. *See* Nguyen v. United States, 539 U.S. 69, 76 n.9 (2003); Glidden Co. v. Zdanok, 370 U.S. 530, 539–40 (1962).

194. *See* Pfander, *Article I Tribunals*, *supra* note 66, at 686–87, 687 n.206.

195. District of Columbia Organic Act of 1801, ch. 15, § 12, 2 Stat. 103, 107.

196. *See* William Henry Dennis, *Orphans' Court and Register of Wills, District of Columbia*, 3 RECS. COLUMBIA HIST. SOC'Y 210, 212 (1900).

197. *See* CONG. GLOBE, 25th Cong., 2d Sess. 207 (1838); *id.* at 395 (statement of Rep. Charles Mercer); *id.* (statement of Rep. Rice Garland). Others distinguished the orphans' court on the ground

court for the District without a specific good-behavior provision.[198] But once again, later Presidents and Congresses assumed that Article III's good-behavior provision applied.[199] There seems to be little reason why the District's orphans' court and criminal court would be Article III courts, but its circuit court would not. In fact, this structure would violate Pfander's own argument that non-Article III courts cannot review the decisions of Article III courts, as the circuit court had appellate jurisdiction over the orphans' court and the criminal court.[200]

Still, this leaves the question of why Congress included a good-behavior provision for the D.C. circuit court—especially when earlier drafts of the bill did not include such a provision.[201] There are at least two possible explanations, both of which relate to the timing of the 1801 Act, which Congress passed just four days before the end of the Adams Administration.[202] First, as even committed textualists have noted, Congress sometimes includes redundant provisions in statutes out of a sense of "belt-and-suspenders caution."[203] Indeed, just a week before the passage of the 1801 Act, the Federalist Senator Gouverneur Morris wrote about the last-minute appointment of federal judges: "[The Federalist Party is] about to experience a heavy Gale of adverse Wind can they be blamed for casting many

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that "the court was antecedent to the Constitution, having been originally organized under the laws of Maryland, prior to the cession of the District, and Congress, as the local legislature of the District, was not restricted by that clause of the Constitution." *Id*. at 207; *see also id*. at 395 (statement of Rep. William Dawson). Nevertheless, the amendment failed. *See id*. at 396.

198. *See* Act of July 7, 1838, ch. 192, § 1, 5 Stat. 306, 306–07.

199. *See* Brief for Appellant at 34 n.41, Palmore v. United States, 411 U.S. 389 (1973) (No. 72-11), 1972 WL 136499.

200. *See* Act of July 7, 1838, § 5, 5 Stat. 306, 307 (1838); District of Columbia Organic Act of 1801, ch. 15, § 12, 2 Stat. 103, 107.

201. *See* 10 ANNALS OF CONG. 876 (1801).

202. *See* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 517 (1961).

203. Yates v. United States, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting); King v. Burwell, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting); *see also* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 670–71 (2016). This caution was perhaps warranted. Soon after coming into power, President Jefferson and the Democratic Republicans attempted to alter the D.C. court system. *See* 11 ANNALS OF CONG. 463 (1802); Thomas Jefferson, *Draft Bill (Dec. 7, 1801)*, *in* 36 THE PAPERS OF THOMAS JEFFERSON 34, 36–37 (Barbara B. Oberg et al. eds., 2009). Jefferson considered limiting the tenure of the judges to four years, but his final draft bill retained the life tenure provision. *See* Jefferson, *supra*, at 39 nn.30–31. Nevertheless, President Jefferson's bill as well as the House's bill would have made the judges subject to removal by address—that is, by the President after "the application of two successive [D.C.] legislatures between which an election shall have intervened." *Id*. at 36; 11 ANNALS OF CONG. 463 (1802); *see also* Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1500–02 (1970) (describing the history of removal by address). The final law, however, did not include this provision. *See* Act of May 3, 1802, ch. 52, 2 Stat. 193; *see also* Editorial Note, *in* 36 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 33 (noting the local backlash to the original bill). The proposed removal provision—as distinct from impeachment—may suggest that President Jefferson and his colleagues in the House did not view the D.C. judges as protected by Article III. Or it could be that President Jefferson viewed removal by address as consistent with Article III's grant of life tenure. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 428–29 (discussing proposal to allow for removal of judges by address). *But see* Berger, *supra*, at 1501–02 (discussing why the Founders rejected the proposal); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 118 n.175 (2006) (arguing that removal by address would have "create[d] an exception to good-behavior tenure").

Anchors to hold their Ship thro the Storm?"[204] Second, Congress may not have considered the possible implications of including an express good-behavior provision given the time pressures and haste under which it enacted the legislation.[205]

Finally, Pfander notes that the creation of justices of the peace with limited five-year terms "confirm[s] [the District's] non-Article III tradition."[206] But, in fact, this feature of the bill only confirms the important difference between the broad jurisdiction of the District's Article III circuit court and the narrow jurisdiction of the District's non-Article III justices of the peace. Significantly, the justices of the peace only had jurisdiction to hear two types of cases: bankruptcy cases[207] and minor criminal and civil cases.[208] And both bankruptcy cases and petty offenses have been adjudicated by non-judges since before the Founding.[209]

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204. *See* Letter from Gouverneur Morris to Robert R. Livingston (Feb. 20, 1801), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 714, 714 (Maeva Marcus et al. eds., 1992).

205. *See* MORRIS, *supra* note 23, at 13 ("Congress hurriedly cobbled together a legal system for the District in February 1801 . . . ."); diGiacomantonio, *supra* note 92, at 47–55 (describing the establishment of the D.C. government as the last exercise of power by the outgoing Federalists and describing the affair as "a rushed and improvised accommodation to political reality"). Note also that Pfander uses other judicial protections in Article III—such as that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office," U.S. CONST. art. III, § 1—to emphasize the Article III status of other courts. Pfander, *Article I Tribunals*, *supra* note 66, at 685 & n.198. He observes that "in keeping with the constitutional requirement that judges receive a compensation for their services 'at stated Times,'" Congress "carefully specified that judges were to be paid 'at the treasury of the United States in quarterly payments.'" *Id.* at 685. But just as with the good-behavior provision, Congress also ensured that the first court bill complied with Article III's compensation requirement, providing that the circuit judges were "to be paid quarterly, at the treasury of the United States." District of Columbia Organic Act of 1801, ch. 15, § 10, 2 Stat. 103, 107. Likewise, the fact that Congress gave the circuit judges a fixed salary—rather than allowing them to collect fees as it provided for the District's justices of the peace—also supports their Article III status. *See id.* § 11, 2 Stat. at 107 (noting that the justices of the peace "shall be entitled to receive for their services the fees allowed for like services"); *see also* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 14–19 (2008) (arguing that the Constitution forecloses fee-based compensation for Article III judges but not for justices of the peace).

206. Pfander, *Article I Tribunals*, *supra* note 66, at 689 n.212.

207. *See* Act of Mar. 1, 1823, ch. 24, 3 Stat. 743.

208. *See* District of Columbia Organic Act of 1801, ch. 15, §§ 11, 14, 2 Stat. 103, 107. The bill also limited their jurisdiction in civil matters to cases involving less than twenty dollars, just as the Seventh Amendment exempts cases under the same dollar amount from the right to trial by jury. *See* U.S. CONST. amend. VII; *see also* Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1674 (2005).

209. *See* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1167–72 (2015) (explaining that under King Henry VIII in England in the 16th Century, "bankruptcy was handed by 'specified great officials'"); George Cochran Doub & Lionel Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443, 446, 457 (1959) (nothing a "clear and unbroken practice" of trying petty offenses before magistrates or justices of the peace); Vladeck, *Petty Offenses*, *supra* note 68, at 74–75. Scholars often treat the latter exception as applying only to minor criminal cases. But as the Supreme Court noted as early as the nineteenth century, at common law "petty courts" also adjudicated small-dollar civil cases. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 16–17 (1899); *see also* Note, *The Twenty Dollars Clause*, *supra* note 208, at 1673–75 (describing how Congress could "establish a federal small claims court" outside of Article III).

Thus, in establishing the justices of the peace, Congress acted within the existing historical exceptions to Article III.

Later congressional debates further confirm the Article III status of the D.C. circuit court. Both before and after the creation of a local government for the District, members of Congress and other commentators noted that the local residents would lose their *political* rights, such as the right to vote for local or national representatives.[210] Yet, like during the ratification debates, no one suggested that the local residents would lose any of the *legal* rights provided by Article III.

On the contrary, members of Congress expressly noted that these rights did apply to the District. For example, in 1805 Representative John Dennis argued that, although D.C. residents had lost some political rights, they still possessed other core constitutional protections:

> I deny, sir, that the people of this district are in that deplorable state of slavery which some theorists, imagine. They are entitled to, and are in the enjoyment of all the rights secured to the people of this country by the various restrictions on the powers of their governors. No man in this territory can be deprived of life, liberty, or property, but through the medium of the Judiciary department, operating in the same way, and under the same circumstances as in every other part of the Union. The clause relative to the independency of the judicial power, applies itself to the courts here as well as to any other court of the Union.[211]

Dennis was not alone in this view. At the time, other members of Congress also assumed that these constitutional protections applied in the District.[212]

By comparison, the federal judiciary rarely addressed the constitutional status of the District's court system during the first half of the nineteenth century. The primary exception is the D.C. circuit court's 1805 decision in *United States v. More*.[213] In *More*, Judge William Cranch (joined by Chief Justice Marshall sitting as a circuit justice) held that it was unconstitutional for Congress to diminish the salaries of the District's justices of the peace.[214]

In reaching this conclusion, Judge Cranch addressed and rejected two related lines of argument: (1) that the Constitution did not apply to the District and (2) that even if the Constitution applied, Congress could still create non-Article

210. *See supra* note 169 and accompanying text.

211. 14 ANNALS OF CONG. 881 (1805) (statement of Rep. John Dennis).

212. *See id.* at 960 (statement of Rep. Marmaduke Williams) (noting that rights are secured "by a fair and impartial trial by jury, under the Judiciary Establishment in this District. . . . I cannot for my part see, that because Congress have a right to exclusive legislation over a district, they can exceed the express limitation of their powers."); *see also id.* 972–73 (statement of Rep. Ebenezer Elmer) (noting that "[i]t has been again and again shown, that all the restrictions on the powers of the several departments . . . are equally applicable to the people here [in the District] as to any other people in the Union").

213. 7 U.S. (3 Cranch) 159, 160 n.* (1805) (reprinting the 1803 opinion of the D.C. circuit court).

214. *Id.* at 161–62 n.*.

III courts based on its power to exercise exclusive legislation.[215] On the first point, he observed that other provisions of the Constitution—such as the limits on bills of attainder and ex post facto laws, and the right to a jury trial—applied to the District and, thus, one could not say that the Constitution did not apply at all.[216] And on the second point, he noted that Congress's power "to exercise *exclusive* legislation" was not sufficiently "positive and strong" language to justify the power to create non-Article III courts.[217] Instead, "[t]he true construction," according to Cranch, was "that congress may legislate for [the District], in all cases where they are not prohibited by other parts of the constitution."[218] In other words, absent clear constitutional text to the contrary, Article III's judicial protections applied to the capital.[219]

More also helps place later cases in context. Specifically, Chief Justice Marshall, who would write the Court's opinion in *Canter* creating the territorial court exception,[220] concurred in Judge Cranch's opinion in *More*, indicating that he too believed that Article III applied to the District.[221] Indeed, Chief Justice Marshall concurred in Judge Cranch's opinion even though one advocate directly linked the Article III status of the District to that of the Louisiana Territory, which plainly had a non-Article III court.[222] *More* thus suggests that Chief Justice Marshall also viewed the District as distinct from the territories—as the next section will further explore.

2. The Territories

The other territorial court systems established during this period further support the analysis so far—namely, that (1) the District is not an exception to Article III and (2) Article III attaches to land once the area becomes a part of the United States. These two points are illustrated by Congress's different treatment of territories ceded by existing states and territories acquired from outside the

215. *See id.* at 160 n.*.

216. *Id.* at 161 n.*.

217. *Id.* at 160 n.*.

218. *Id.* One might think that Judge Cranch was wrong on the facts of the case given the tradition of assigning petty offenses to non-Article III judges. *See supra* note 209 and accompanying text. But his broader analysis still suggests that the District was not viewed as an exception to Article III.

219. Chief Judge William Kilty dissented, arguing "[t]hat the district of Columbia . . . is not . . . a state . . . and that the provisions of the constitution, which are applicable particularly to the relative situation of the United States and the several states, are not applicable to this district." *More*, 7 U.S. (3 Cranch) at 164 n.*. But Chief Judge Kilty was also careful to acknowledge the many provisions of the Constitution that *did* apply to the District, and as such, limited his opinion to finding that Article III need not limit Congress's ability to reduce the compensation of justices of the peace. *Id.* at 164–65 n.*. It is thus not clear from his opinion that he would have treated a similar congressional attempt to create a non-Article III circuit court in the same way.

220. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 541, 546 (1828).

221. *More*, 7 U.S. (3 Cranch) at 162 n.*.

222. *See id.* at 171 (argument of John T. Mason) ("When legislating over the district of Columbia, congress are bound by no constitution. . . . The same observation will also apply to Louisiana.").

country. Congress established Article III courts in the former (in accord with the principle of constitutional attachment), but not in the latter.[223]

For example, just three years after establishing the D.C. court system, Congress created a court system for the newly acquired Louisiana Territory.[224] Unlike the D.C. courts, though, the Louisiana courts were created outside of Article III, as shown by the limited four-year tenures of their judges.[225] This distinction is notable because it differed from both the D.C. circuit court and from all the previous territorial courts created by Congress. In every previous territory—that is, those carved out of the Northwest Territory or ceded by the states—Congress had given the judges life tenure.[226] In subsequent laws for those territories created out of the Louisiana purchase and other acquisitions, Congress gave the judges limited terms.[227]

This sudden change might seem strange until one recalls the principle of constitutional attachment: the distinction between lands to which the Constitution had once applied and lands that Congress had newly acquired from outside of the United States. Congress appears to have created Article III courts for the District, the Northwest Territory, and territories ceded from existing states on the theory that they were, in a sense, grandfathered into the constitutional system. By contrast, Congress could create non-Article III courts in territories created out of the Louisiana Purchase and later acquisitions because the Constitution had never

223. William Baude has recently argued that Congress may create non-Article III territorial courts because those courts do not exercise the "judicial power of the United States" but rather the judicial power of their respective territories. *See* Baude, *supra* note 107 (manuscript at 12–18). Baude's theory is consistent with my view that the courts in the District of Columbia must comply with Article III. *See id*. (manuscript at 17–18). And the principle of constitutional attachment may explain *why* Congress may sometimes vest "the judicial power" in non-Article III territorial courts.

224. Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284.

225. *See id*. Curiously, on March 2, 1805, Congress appeared to revise its earlier law by establishing a territorial "government in all respects similar, (except as is herein otherwise provided,) to that now exercised in the Mississippi territory." Act of Mar. 2, 1805, ch. 23, 2 Stat. 322, 322. Judges in the Mississippi Territory had good behavior tenure. William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 39, 47, 82 (1962). But a day later, Congress specified that judges in Louisiana would serve four-year terms. Act of Mar. 3, 1805, ch. 31, § 4, 2 Stat. 331, 331.

226. *See* Blume & Brown, *supra* note 225, at 47, 82; Lawson, *supra* note 46, at 880 n.148.

227. *See* Blume & Brown, *supra* note 225, at 47, 82 ("The outline of the judicial systems prior to 1836 . . . shows that prior to 1836 the superior judges of the territories established in the area relinquished by England in 1783 were to serve during good behavior; those of the territories created out of the Louisiana and Florida purchases, to serve four years." (footnote omitted)); Lawson, *supra* note 46, at 880 n.148. The sole exception seems to be the judges of the Territory of Michigan, who originally served during good behavior, but whose tenure was amended by Congress in 1823 to four years. *See* Act of Mar. 3, 1823, ch. 36, § 3, 3 Stat. 769, 769. But this result seems to have been deeply influenced by the local politics of the period. *See* Blume & Brown, *supra* note 225, at 82–83. Subsequently, Congress made the tenure of judges in the Territory of Wisconsin—a part of the Northwest Territory—subject to good behavior, but the tenure of judges in the Territory of Iowa—a part of the Louisiana Purchase—four years. *See id*. at 83; *see also* CONG. GLOBE, 25th Cong., 2d Sess. 424 (1838) (rejecting an amendment to the statute for the Territory of Iowa changing judicial tenure from five years to good behavior); CONG. GLOBE, 24th Cong., 1st Sess. 294 (1836) (rejecting an amendment to the statute for the Territory of Wisconsin changing judicial tenure from good behavior to five years).

"attached" to this land. As further evidence of this being a constitutional distinction rather than just a shift over time, consider that when Congress created a court system for the Alabama Territory in 1817—much of the land for which had been ceded by Georgia—Congress based the court system on the earlier Mississippi Territory where the territorial judges served during good behavior, rather than the more recently created Louisiana Territory, where judges served fixed terms.[228]

This distinction appears—both implicitly and explicitly—in a number of congressional debates during the early nineteenth century. For example, in 1802 when Congress debated its power to abolish the federal judgeships created by the outgoing Federalists, numerous members warned that if Congress decided that it lacked the power to abolish federal courts, then it would be powerless to adjust the courts in the District of Columbia or the various territories, which the members described in the same terms as other "inferior courts."[229] Yet if Congress had viewed either the D.C. or the other territorial courts as non-Article III legislative courts, then this would be an unnecessary concern because Congress could abolish these courts regardless of whether it could abolish Article III judgeships in general.

By contrast, just a year later, a member of the House of Representatives noted during a debate about the composition of the new Louisiana territorial government "that the Constitution of the United States did not extend to this territory any farther than they were bound by the compact between the ceding power and the people," and thus asserted that Congress could give Louisiana "such government as the Government of the United States might think proper, without thereby violating the Constitution."[230] In 1804, Representative Caesar Rodney, the future Attorney General of the United States, made a similar point in defending a proposed system of non-Article III prize courts to adjudicate cases during the Barbary Wars. Rodney compared the prize courts to non-Article III courts in the Louisiana Territory as "both courts [were] erected, or to be erected, out of the original limits of the United States at the time of adopting the Constitution."[231] And according to Rodney, his congressional committee had been unanimous that

228. *See* Act of Mar. 3, 1817, ch. 59, § 3, 3 Stat. 371, 372 (creating a judge to serve in the Alabama territory based off of the judges in the Mississippi territory). Likewise, the day after Congress passed the Louisiana Territory law (which created judicial offices with limited tenures) it created a new judgeship for the Mississippi Territory with no tenure limitation. *See* Act of Mar. 27, 1804, ch. 59, 2 Stat. 301, 301.

229. *See* 11 ANNALS OF CONG. 49–50 (1802) (statement of Sen. James Jackson) (warning that if Congress was "tied down to a system of inferior tribunals once formed, we [could not] even touch the plan of the Judicial system of the little District of Columbia[,] . . . the Northwestern Territory, or . . . the Mississippi Territory"); *id.* at 61 (statement of Sen. Stevens Mason) (noting that the Mississippi Territory had a "court, composed of three judges, which court is as much an inferior court as the circuit or district courts"); *see also id.* at 88–89 (statement of Sen. Gouverneur Morris) (describing courts in the Mississippi Territory as "our inferior courts" and discussing the judicial protections of office).

230. 13 ANNALS OF CONG. 511–12 (1803) (statement of Rep. John Smilie). Later in the debates, a member of Congress argued that the courts in the Louisiana Territory "must be considered as courts of the United States, and of consequence cannot be otherwise constituted than as courts in the States." *See* 14 ANNALS OF CONG. 1129 (1804) (statement of Rep. George Campbell). But it appears that Congress as a whole rejected this argument. *See id.* at 1129–30.

231. *Id.* at 784 (statement of Rep. Caesar Rodney).

"when [the Constitution] declared that the Judges of the Supreme Court and inferior courts should hold their offices during good behaviour, [it] confined itself to the then territory of the Union, and not to judges out of the United States."[232]

Scholarly commentators from the period also distinguished the District from the later territories. Most notably, in his famous *Commentaries on the Constitution of the United States*, Joseph Story documented the many similarities between Congress's power over the District and its power over the territories.[233] But he also noted some important differences. For instance, he made clear that "[t]he inhabitants [of the District] enjoy all their civil, religious, and political rights" and "live substantially under the same laws, as at the time of the cession."[234] By contrast, inhabitants of the territories could receive "the privileges, rights, and immunities of citizens of the United States" if the treaty ceding the territory so provided.[235] But Story doubted whether they would receive these rights "without any express stipulation" in the treaty.[236]

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By the middle of the nineteenth century, most people seem to have assumed that Article III applied to the District of Columbia, but not to certain federal territories. To be sure, there were some exceptions to this view—the most important of which was an opinion by Attorney General John Crittenden in 1853.[237] Crittenden's opinion focused on whether circuit and district courts of the District of Columbia were "Courts of the United States" under a particular statutory provision; Crittenden concluded that they were.[238] But in a passing sentence, he also noted that the courts in the District were "indeed, but *legislative* courts, the creation of the legislative power, in contradistinction to the *constitutional* courts of the United States."[239] Crittenden did not elaborate on or in any way support this claim with legal authority. And as this section has shown, this view cuts against the weight of historical evidence. But still, it is important to acknowledge that the idea that courts in the District of Columbia were legislative courts was not

232. *Id*. Admittedly, later in the debates, Rodney mistakenly argued that "judges or justices of the Territory of Columbia" only served for "term[s] of five years" (apparently confusing the limited tenure of the justices of the peace with the life tenure of the circuit judges). *Id*. at 789. But another representative quickly corrected the mistake. *Id*. at 790 (statement of Rep. Roger Griswold).

233. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 96–108 (Boston, Hilliard, Gray & Co. 1833).

234. *Id*. at 100. This observation was not entirely true. Other commentators noted some ways in which residents of the District were disadvantaged politically and legally. For example, D.C. residents could not sue under diversity jurisdiction because they were not citizens of a state. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 327 (New York, O. Halsted 1826); RAWLE, *supra* note 73, at 113. Likewise, D.C. residents had been disenfranchised in national elections. *See* RAWLE, *supra* note 73, at 113.

235. STORY, *supra* note 233, at 194.

236. *Id*. In addition, Story expressly mentioned Congress's power to create "legislative courts" in the territories, without mentioning a similar power in the District. *Id*. at 196 (citing Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828)).

237. *See* Circuit and District Courts of the District of Columbia, 5 Op. Att'y Gen. 678 (1853).

238. *Id*.

239. *Id*. at 683.

unprecedented before the Civil War.[240] Moreover, Crittenden's claim helpfully previews the types of arguments that would be made by members of Congress in later decades.

B. THE CIVIL WAR

The Civil War sparked a renewed interest in Congress over the status of the circuit court for the District of Columbia. Congress turned its attention to the circuit court because its judges—led at the time by Judge William Merrick—had granted a number of habeas petitions that had impeded Union military efforts.[241] As a result of these rulings, both Congress and the Lincoln Administration viewed Judge Merrick as sympathetic to the Southern cause.[242] The government's initial response was to bar Merrick from going to the courthouse by posting an armed guard at his door, to withhold his pay, and to suspend the writ of habeas corpus in the District.[243] Eventually, the guard was removed and Merrick's pay was restored. But these initial measures did not mark the end of the controversy.[244]

Instead, in 1863 Congress abolished the District's circuit court and the accompanying judgeships and created a new, nearly identical federal court—called the Supreme Court for the District of Columbia—with four new judgeships.[245] The congressional debates from the period make clear that the bill was intended to oust Judge Merrick from his office, which was otherwise protected during good behavior.[246] But in the debates, Congress also returned to the question of whether the District's circuit court was an Article III court.

In the Senate, Senators Lazarus Powell and Garrett Davis led the opposition to the bill, freely comparing the D.C. circuit court to other Article III federal courts. Powell argued that the bill "la[id] [an] ax at the root of the judiciary" and struck a "radical blow."[247]

In response to these arguments, however, one senator asked a deceptively simple question: "How about the territorial judges?"[248] Davis initially replied that "[t]he territorial judges are not constitutional officers, holding their offices during good behavior; but they are created by act of Congress, and are of temporary existence."[249] Yet Davis's response still left the obvious question subsequently posed by another senator: If judges of the territorial court could be removed outside of

240. In addition, in 1854 at least one member of Congress analogized the courts in the District to the courts in the territories. *See* CONG. GLOBE, 33d Cong., 2d Sess. 121–22 (1854) (statement of Rep. Frederick Stanton). But others opposed the analogy. *See id*. at 122 (statement of Rep. Thomas Eliot).

241. *See* Roberts, *supra* note 23, at 382; Howard C. Westwood, *Questioned Loyalty in the District of Columbia Government*, 75 GEO. L.J. 1455, 1458–63 (1987).

242. *See* Roberts, *supra* note 23, at 382–83.

243. *See id*. at 382; Westwood, *supra* note 241, at 1464.

244. *See* Roberts, *supra* note 23, at 383.

245. *See* Act of Mar. 3, 1863, ch. 91, 12 Stat. 762; Roberts, *supra* note 23, at 383.

246. *See* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 555 & n.24 (2002).

247. CONG. GLOBE, 37th Cong., 3d Sess. 1129 (1863) (statement of Sen. Lazarus Powell).

248. *Id*. (statement of Sen. Henry Wilson).

249. *Id*. (statement of Sen. Garrett Davis).

the impeachment process, "why will not that [same] principle apply to the judges of the District of Columbia?"[250] Davis responded more directly this time:

> Here is the difference between the case of the [territorial] judge to which the honorable Senator refers and the case of the judges in this District: the office there was created by a law of Congress, and temporary; it was for four years; the offices of the circuit judges of the United States courts in this District, and in all the districts of the United States, are *constitutional offices*, and their tenure is during good behavior.[251]

The famous Republican Senator Charles Sumner pushed back against Davis's distinction. After quoting a passage from Chief Justice Marshall's opinion in *Canter*, he noted he would "not venture to say how closely this [case] may be applied to the case of the District of Columbia," but continued:

> [A]nd yet I can conceive that it may be very well argued that . . . the jurisdiction invested in the courts of the District of Columbia is not a part of that judicial power which is defined in the third article of the Constitution, but . . . is [that] conferred upon Congress, in the execution of those general powers which that body possesses over the District of Columbia.[252]

Sumner concluded that because "[t]he Constitution confers upon Congress the jurisdiction in all cases over the District of Columbia . . . it would seem to be obviously within the power of Congress to determine what courts should be established."[253]

Davis initially bowed to this point but later in the debates reiterated his view that "the circuit court of the District of Columbia [was] . . . a constitutional court, that its judges hold their offices by the tenure of good behavior," and that the D.C. circuit court was not "analogous to the district court of the Territory of

250. *Id*. at 1130 (statement of Sen. Morton Wilkinson). As one of Minnesota's senators, Wilkinson would have had some familiarity with the removal of territorial judges given that the first chief justice of the Minnesota Territory, Aaron Goodrich, had been removed from office by President Millard Fillmore just a decade earlier. *See id*. at 1129–30; *see also* Robert C. Voight, *Aaron Goodrich: Stormy Petrel of the Territorial Bench*, 39 MINN. HIST. 141 (1964) (describing tenure and removal of Justice Goodrich). President Fillmore removed Chief Justice Goodrich after his Attorney General, John Crittenden, authored an opinion concluding that the President could unilaterally remove judges of legislative courts. *See* Executive Authority to Remove the Chief Justice of Minnesota, 5 Op. Att'y Gen. 288–91 (1851). In addressing the controversy, the Supreme Court dodged the removal question, deciding the case on the grounds that it lacked the mandamus power to order funds from the treasury. *See* United States *ex rel*. Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 303–05 (1854). *But see id*. at 305–14 (McLean, J., dissenting). Thirty years later, however, the Supreme Court would uphold the President's power to unilaterally suspend territorial judges. *See* McAllister v. United States, 141 U.S. 174, 189–90 (1891); *see also* Shurtleff v. United States, 189 U.S. 311, 316 (1903) ("Even judges of the territorial courts may be removed by the President." (citing *McAllister*, 141 U.S. at 174)).

251. CONG. GLOBE, 37th Cong., 3d Sess. 1130 (1863) (statement of Sen. Garrett Davis).

252. *Id*. (statement of Sen. Charles Sumner).

253. *Id*.

Florida."[254] Others in Congress expressed agreement with Davis's general position.[255]

But at this point in the debates, a crucial new argument was introduced. Congress realized that, even if the courts in the District were constitutional courts, it could still abolish them—at least under the historical precedent established by the Democratic Republicans in 1802 when Congress abolished a set of newly created Article III judgeships.[256] As explained by the sponsor of the 1863 bill, Senator Ira Harris, "At one time Congress ordained and established a set of courts in the District of Columbia. They are in one sense constitutional courts; yet they owe their existence not to the Constitution, but to the legislation of Congress."[257] Thus, as "creatures of congressional action," Harris continued, "Congress no doubt has the power to abolish them," just as it could "abolish all the district courts throughout the Union, and to substitute some other tribunal in their place."[258] In other words, Congress could avoid the ultimate question of whether the courts in the District were constitutional courts because it could abolish them regardless of their constitutional status. And indeed, that is exactly what Congress did. It abolished the D.C. circuit court without resolving whether it was an Article III court of the United States.[259]

Over the next thirty years, Congress made additional minor changes to the District's second court system, but it did not further debate its constitutional status. For example, in 1870, Congress transferred the criminal jurisdiction of the justices of the peace to a newly created "Police Court" with judges who served six-year terms.[260] Likewise, a week later, Congress abolished the orphans' court and transferred its jurisdiction to the Supreme Court of the District of Columbia.[261] But both changes were more cosmetic than structural: they kept in place the basic distinction between the District's primary judges, who enjoyed life tenure, and those with limited jurisdiction, who served for fixed terms.

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254. *Id*. at 1136 (statement of Sen. Garrett Davis).

255. *See id*. at 1137 (statement of Sen. James McDougall).

256. *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 477–80 (2018) (recounting this precedent).

257. CONG. GLOBE, 37th Cong., 3d Sess. 1137 (1863) (statement of Sen. Ira Harris).

258. *Id*. Many have questioned this claim. *See, e.g*., David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 662 & n.109 (1982) (noting that numerous Justices, Joseph Story, and St. George Tucker have all doubted Congress's power to abolish federal judgeships); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 671–87 (1969) (noting strong congressional opposition to the Act of 1802 and that every subsequent attempt to abolish an Article III court system has failed). Kurland's article overlooks the D.C. circuit court.

259. Some scholars have viewed these debates as showing that everyone in Congress "assumed that federal courts in the District were Article III courts." *See* Bloch & Ginsburg, *supra* note 246, at 556 n.24. But that seems to make too much of Harris's argument. Instead, it is probably more accurate to say that Congress reached "[n]o clear answer" on the question. CARL B. SWISHER, THE TANEY PERIOD: 1836–64, at 866 (1974); *see also* Westwood, *supra* note 244, at 1469 n.81 ("Sen. Harris' argument, such as it was, would have made the tenure of all federal lower court judges subject to the will of Congress, not distinguishing between the District's judges and the other judges.").

260. Act of June 17, 1870, ch. 133, §§ 1, 19, 16 Stat. 153, 153–54, 156.

261. Act of June 21, 1870, ch. 141, §§ 4, 5, 16 Stat. 160, 161.

C. ANOTHER DEBATE

In 1893, Congress restructured the District's court system a third time. The Act of 1893 followed a similar two-tier court model as the Evarts Act[262] (passed just two years earlier) by creating a new court of appeals for the District of Columbia to review the decisions of the District's supreme court.[263] Congress also created three new judgeships for the appellate court; the new judges would, like their predecessors, "hold office during good behavior."[264] Yet it was not inevitable that the new judges of the court of appeals would have tenure protections. On the contrary, the provision inspired another heated debate in Congress.

Early versions of the bill had the good-behavior provision.[265] But in the midst of the House debates, Representative Joseph Weldon Bailey Sr. asked his colleagues: "[W]hat induced the committee to make the tenure of these judges for life?"[266] Representative William Oates replied "that the district judges have always been treated and considered as United States judges and hence have a life tenure."[267] But Bailey pushed back, confirming that Oates "[did] not, of course, contend that under the Constitution they must have life tenure?"[268] Oates equivocated that it was "perhaps a question for the Supreme Court of the United States" and that he did "not know whether it has been passed upon or not, but there is some doubt possibly as to whether they have a life tenure."[269]

Later in the debates, other members of Congress would indicate their view that the District had a "United States court and United States judges."[270] But Bailey persisted in his challenge. No fewer than three times, he attempted to amend the bill to give the new judges more limited tenures of four, seven, or ten years, respectively.[271] Bailey explained his proposals by noting "that it is well known that the judges in the District of Columbia hold their offices according to the law which creates them and not according to the tenure fixed in the Constitution itself."[272] And he grounded his proposal in two legal comparisons. First, he claimed that Congress had a "plain duty to put the courts in the District of Columbia precisely upon the same footing with the courts in the various Territories."[273] Second, he argued that it was "an indefensible anomaly that State judges, though elected by the people, shall be restricted to a term of years, and yet

262. Evarts Act, ch. 517, 26 Stat. 826 (1891) (creating the federal courts of appeals in the United States).
263. *See* Act of Feb. 9, 1893, ch. 74, §§ 1, 7, 27 Stat. 434, 434–36.
264. *Id.* § 1, 27 Stat. at 435.
265. *See* 24 CONG. REC. 650 (1893).
266. *Id.* at 652 (statement of Rep. Joseph Weldon Bailey, Sr.).
267. *Id.* (statement of Rep. William Oates).
268. *Id.* (statement of Rep. Joseph Weldon Bailey, Sr.).
269. *Id.* (statement of Rep. William Oates).
270. *Id.* at 653 (statement of Rep. Ezra B. Taylor).
271. *See id.* at 653–54, 664 (statements of Rep. Joseph Weldon Bailey, Sr.).
272. *Id.* at 653.
273. *Id.*

judges in this District who hold their places by appointment shall have a life tenure."[274]

But Congress rebuffed Bailey's proposal each time by votes of almost three to one.[275] Notably, however, opponents of the amendment relied primarily on historical tradition and practical concerns rather than on constitutional objections to the proposal. Oates, for instance, argued that Bailey had "not shown any reason for changing the prevailing custom in the appointment of these judges" and warned that the limited terms "would practically make [the Court of Appeals] a political court, the terms of the judges ending and perhaps new ones coming in with each Administration."[276] Another representative similarly worried that the proposal would result in the concerning dynamic of "partisan judges" reviewing the decisions of life-tenured judges on the D.C. supreme court.[277]

In fact, no one raised a constitutional objection to the proposal until the end of the debates. At that point, in a final strange twist, the Chairman of the Committee on the District of Columbia, Representative John Hemphill, asked whether he could "offer a decision of the Supreme Court of the United States to the effect that these judges are 'judges of the United States' under the meaning of the Constitution."[278] House procedure did not allow for further debate at this stage. But Bailey invited the House to give unanimous consent for Hemphill to introduce the opinion, if Hemphill would "agree to open the matter for discussion" more broadly.[279] Hemphill and Bailey went back and forth on whether Hemphill had actually found such a judicial decision, until the House—likely tired of their argument—rejected the motion to reopen debate by a vote of more than two to one.[280] Soon after, Congress passed the bill with the life tenure provision without further comment.

Over the next seventy-five years, Congress continued to make small changes to the District's court system. During the early twentieth century, Congress renamed the justices of the peace "the municipal court of the District of Columbia."[281] And later, it consolidated the police court and the municipal court into a single "Municipal Court for the District of Columbia" and created a separate "Municipal Court of Appeals for the District of Columbia."[282] Yet these organizational changes tell us little about the D.C. court system more broadly because the justices of the peace, the police court, and the municipal court had long been

274. *Id*. at 654.

275. *See id*. at 653–54.

276. *Id*. at 654 (statement of Rep. William Oates).

277. *Id*. at 653 (statement of Rep. Jonathan Dolliver).

278. *Id*. at 665 (statement of Rep. John Hemphill).

279. *Id*. (statement of Rep. Joseph Weldon Bailey, Sr.).

280. *Compare id*. (statement of Rep. John Hemphill) ("The gentleman says I can not present such a decision. I have the decision here."), *with id*. (statement of Rep. Joseph Weldon Bailey, Sr.) ("I undertake to say that no decision can be found in the books to the effect that judges in this District must hold for life.").

281. Act of Feb. 17, 1909, ch. 134, 35 Stat. 623, 623.

282. *See* Act of Apr. 1, 1942, ch. 207, §§ 1, 6, 56 Stat. 190, 190, 194.

viewed as non-Article III courts, distinct from the courts of general jurisdiction in the District.[283]

By contrast, during the late 1890s and the early 1900s, a number of lower courts began to grapple with the constitutional status of the D.C. court system more generally. A split arose on the question, with some judges equating courts in the District to courts in the territories and others distinguishing them.[284] But the majority view was that courts in the District were constitutional courts—as most elaborately explained by the Court of Claims in *James v. United States*.[285]

In *James*, the estate of a former judge on the Supreme Court of the District of Columbia brought suit to recover unpaid retirement benefits.[286] The estate argued both that the D.C. supreme court was a "court of the United States" under the relevant statute and that, if not, the statute violated Article III by reducing the judge's compensation.[287] Addressing the constitutional question, the Court of Claims explained that the District's supreme court was a constitutional court under Article III.[288] Among other things, the court observed that unlike the territorial courts, which were "designed for purposes of temporary government," courts in the District were "permanent judicial bodies."[289] It would therefore be "anomalous" if these courts were not intended to fall within Article III.[290] The court also noted that Congress had long treated the D.C. courts as "permanent tribunals capable of receiving some part of the judicial power."[291] Finally, the court invoked the principle of constitutional attachment.[292]

The case eventually made its way to the Supreme Court. But because the Justices reversed the Court of Claims on statutory grounds, they deemed it unnecessary "to determine whether the Supreme Court of the District of Columbia is an inferior court within the meaning of section 1 of article III of the Constitution."[293]

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283. *See, e.g.*, Moss v. United States, 23 App. D.C. 475, 481–83 (D.C. Cir. 1904) (distinguishing D.C. courts of general jurisdiction from municipal courts); United States *ex rel*. Brightwood Ry. Co. v. O'Neal, 10 App. D.C. 205, 239 (D.C. Cir. 1897) (holding that Article III refers to courts of general jurisdiction, not the "petty tribunals in the District of Columbia").

284. *Compare* United States v. Dana, 68 F. 886, 900 (S.D.N.Y. 1895) (equating D.C. and territorial courts), *with In re* Macfarland, 30 App. D.C. 365, 378–79, 384–85 (D.C. Cir. 1908) (distinguishing the same), *and Moss*, 23 App. D.C. at 482 (same); *see also* United States v. Sampson, 19 App. D.C. 419, 437–38 (D.C. Cir. 1902) (acknowledging the split without taking a position).

285. 38 Ct. Cl. 615 (1903).

286. *Id*. at 625.

287. *Id*. at 625–26.

288. *Id*. at 631.

289. *Id*. at 627.

290. *Id*. at 628.

291. *Id*.

292. *See id*. at 631 (noting that "[t]he District of Columbia had been subject to the Constitution while it was a part of the territory of those States which ceded it to the Federal Government" and that "[t]he Constitution attached to it in the beginning and continued to attach to the District after the cession" (citing Downes v. Bidwell, 182 U.S. 244, 261 (1901)).

293. James v. United States, 202 U.S. 401, 408 (1906).

By the beginning of the twentieth century, the District of Columbia's court system had a long and contested history. To be sure, individuals had challenged its status as a constitutional court at various points throughout the nineteenth century. But even so the weight of historical practice dating back to the first court system shows that the D.C. courts were considered constitutional courts created under Article III. Legal scholars at the turn of the century agreed. Most scholars treated the courts in the District as Article III courts.[294] Perhaps the most accurate description, however, came from a scholar who observed that the courts in the District "are ordinarily spoken of as inferior Federal courts," but that "[i]t does not appear . . . that the Supreme Court has, in unequivocal terms, committed itself to this proposition."[295]

D. DUAL STATUS COURTS

In the 1920s, the Supreme Court finally began to address the constitutional status of the D.C. courts. In a series of decisions, the Court held that the courts could decide issues outside of the jurisdictional limits of Article III because Congress could also vest them with Article I powers under the Seat of Government Clause. Some have read these early decisions as holding that courts in the District were non-Article III legislative courts rather than Article III constitutional courts.[296] But the Supreme Court and commentators would later clarify that just because Congress could vest courts in the District with some non-Article III powers did not mean that it could create courts without the judicial protections mandated by Article III. Instead, these decisions established the unique "dual" status of the D.C. courts, a status which did not necessarily implicate the judicial protections mandated by the Constitution.

Between 1923 and 1933, the Supreme Court issued a number of decisions upholding the power of the D.C. courts to hear claims that fell outside the case-or-controversy requirement of Article III. In the first of these decisions, *Keller v. Potomac Electric Power Co.*, a unanimous Court upheld the jurisdiction of the Court of Appeals of the District of Columbia to advise the D.C. Public Utilities Commission on the valuation of public utilities.[297] The Court recognized that this

294. *See* CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT § 41, at 92 (1922); 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 1066 (1910); WALTER FAIRLEIGH DODD, THE GOVERNMENT OF THE DISTRICT OF COLUMBIA: A STUDY IN FEDERAL AND MUNICIPAL ADMINISTRATION 136 (1909); *see also* Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 900 (1930) (noting that "[u]ntil 1923 it seems to have been generally believed that the superior courts of the District were constitutional courts"). *But see* EMLIN MCCLAIN, CONSTITUTIONAL LAW IN THE UNITED STATES § 165, at 250 (1905) (concluding that the D.C. courts are legislative courts). Justice John Marshall Harlan, who served as a law professor at George Washington Law School from 1889–1910, likewise told his students that the Supreme Court and Court of Appeals of the District of Columbia were created under Article III. *See* Brian L. Frye, et al., *Justice John Marshall Harlan: Lectures on Constitutional Law, 1897–98*, 81 GEO. WASH. L. REV. ARGUENDO 229, 237–38 (2013).

295. 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 789, at 1259 (2d ed. 1929) (citing James v. United States, 202 U.S. 401 (1906)).

296. *See* Katz, *supra* note 294, at 899–900; Pfander, *Article I Tribunals*, *supra* note 66, at 705.

297. 261 U.S. 428, 444–45 (1923).

jurisdiction vested the court of appeals with a "legislative" power.[298] But it affirmed the court's authority to hear these "cases" based on Congress's "dual authority over the District," which empowered Congress to "clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. . . . [s]ubject to the guaranties of personal liberty in the amendments and in the original Constitution."[299] Although *Keller* invoked the Seat of Government Clause as vesting Congress with this "dual authority,"[300] it did not suggest that courts in the District were otherwise created outside of Article III.

Over the next decade, however, the Court's reasoning shifted: The Justices began to treat the courts in the District as legislative courts. For example, in *Postum Cereal Co. v. California Fig Nut Co.*, the Court noted that Congress may "vest courts of the District with administrative or legislative functions which are not properly judicial," but that it could not do the same with "any federal court established under Article III of the Constitution."[301] It thus suggested by implication that courts in the District were not created under Article III. In *Ex parte Bakelite Corp.*, the Court made the point more directly.[302] Although the opinion mainly focused on the constitutional status of the Court of Claims, the Court noted in passing that courts in the District, "created in virtue of the power of Congress 'to exercise exclusive legislation,'" were "legislative rather than constitutional courts."[303] Finally, in *Federal Radio Commission v. General Electric Co.*, the Court surveyed these cases and concluded that it had "recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts."[304]

Some commentators—both at the time and more recently—have read these early decisions as establishing that the D.C. courts were legislative courts.[305] Indeed, in the legislative history for the 1970 D.C. Court Reform Act, Congress would specifically invoke these cases as establishing its constitutional authority to create non-Article III courts in the District.[306] But in the early 1930s, the Supreme Court would expressly reject this reading of its earlier decisions. Instead, in *O'Donoghue* the Court would return to its language in *Keller* by describing the D.C. courts as enjoying a unique dual status—as wielding both Article I and Article III powers.[307] Later commentators would also adopt this

298. *Id.* at 440–42.
299. *Id.* at 442–43.
300. *Id.* at 443.
301. 272 U.S. 693, 700 (1927).
302. *See* 279 U.S. 438 (1929).
303. *Id.* at 450.
304. 281 U.S. 464, 468 (1930).
305. *See* Katz, *supra* note 294, at 899–900; Pfander, *Article I Tribunals*, *supra* note 66, at 705.
306. *See* S. REP. NO. 91-405, at 18 (1969).
307. O'Donoghue v. United States, 289 U.S. 516, 545–47 (1933); *see also* Pitts v. Peak, 50 F.2d 485, 486–87 (D.C. Cir. 1931) (making the same argument based on court's dual status).

reading.[308] And importantly, the dual status of the D.C. courts did not resolve whether the judicial protections of Article III applied to these courts. As a later commentator put it, the Supreme Court would reject the assumption that "the limitations of article III must apply to a court entirely or not at all."[309]

This dual status, however, raises a broader constitutional puzzle: How can an Article III court wield Article I powers? One possibility is that the Seat of Government Clause somehow authorizes this combination of powers, even if the Clause does not authorize Congress to create non-Article III tribunals more generally. This appears to be the theory of those who have embraced the court system's dual status. Another possibility is that the Supreme Court was wrong to uphold the power of the D.C. courts to resolve issues outside the case-or-controversy requirement of Article III. Under this theory, though, the Supreme Court has said that the correct remedy is to eliminate "the particular offensive jurisdiction" rather than treat the courts as non-Article III courts.[310] Indeed, this latter option would not be particularly disruptive because Congress could simply create a non-Article III tribunal in the District to adjudicate issues that fall outside of Article III.[311] In the end, however, this puzzle need not be definitively resolved to answer whether the D.C. courts must receive the judicial protections in Article III.

E. ARTICLE III COURTS

In 1933, the Supreme Court finally held in *O'Donoghue v. United States* that the D.C. courts were constitutional courts with the life tenure and salary protection mandated by Article III.[312] Or, as David Currie would put it a half century later, *O'Donoghue* showed that "there was still life in article III."[313]

O'Donoghue and its companion case *Williams v. United States*[314] arose after Congress passed a law in 1932 lowering the "retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished

308. *See, e.g.*, REDISH, *supra* note 68, at 13–14; Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 553 (1953); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133, 142 (1962) [hereinafter *Judicial Assignment*]; Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 YALE L.J. 979, 985–86 (1962); *see also* Hobson v. Hansen, 265 F. Supp. 902, 907 (D.D.C. 1967) (describing the "dual character" of the D.C. courts).

309. *Judicial Assignment*, *supra* note 308, at 142; *see also* REDISH, *supra* note 68, at 13–14 (describing historical "dual status" of courts in the District of Columbia which had the protections of Article III courts but could decide non-cases like Article I courts); Note, *The Distinction Between Legislative and Constitutional Courts*, 43 YALE L.J. 316, 323 (1933) (arguing that "[t]here is no practical reason" why Article III protections should not coexist with legislative powers in D.C. courts).

310. Glidden Co. v. Zdanok, 370 U.S. 530, 583 (1962) (plurality opinion).

311. *See* Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1447 (2018) (noting that Congress did this when the Court of Claims was later held to be an Article III court).

312. 289 U.S. 516, 551 (1933).

313. David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 516 n.65 (1987).

314. 289 U.S. 553 (1933).

during their continuance in office)."[315] Congress did not resolve which federal judges had constitutionally protected salaries, but the Comptroller General almost immediately issued a ruling that judges of the Court of Appeals of the District of Columbia, the Supreme Court of the District of Columbia, and the Court of Claims were not Article III judges with salary protection.[316] Soon after the ruling, judges from each of these courts sued in the Court of Claims challenging the salary reduction as a violation of the relevant statute and Article III.[317] The Court of Claims, in turn, certified questions in both cases to the United States Supreme Court.[318]

Justice Sutherland wrote the majority opinions in both *O'Donoghue* and *Williams*, concluding in the former that Article III applied to courts in the District and in the latter that Article III did not apply to the Court of Claims.[319] In *O'Donoghue*, Justice Sutherland, joined by five other Justices, began by describing the "basic and vital" importance of the Constitution's system of separated powers and specifically "[t]he anxiety of the framers of the Constitution to preserve the independence especially of the judicial department."[320] From these broad principles, he concluded that judges in the District were "plainly within the spirit and reason of the compensation provision . . . unless there [was] something in the Constitution . . . which precludes that conclusion."[321] Indeed, according to Justice Sutherland, the reasons for an independent federal judiciary "apply with even greater force to the courts of the District . . . because the judges of [those] courts are in closer contact with, and more immediately open to the influences of, the legislative department."[322]

Justice Sutherland then turned to the question of whether the District of Columbia was like the territories where Congress had the power to create non-Article III courts. He distinguished the District and the territories in two ways. First, he contrasted the "transitory" and "ephemeral" status of territorial governments with the permanent nature of the District.[323] The territories were "but political subdivisions of the outlying dominion of the United States," whereas the District was "the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments."[324] Second, he drew upon the principle of constitutional attachment, noting "that the District was made up of portions of two of the original states of the Union, and was not taken

315. *Id.* at 560; Act of June 30, 1932, ch. 314, § 107(a)(5), 47 Stat. 382, 402.
316. *O'Donoghue*, 289 U.S. at 526–27.
317. *Id.* at 527–28.
318. *Id.* at 528–29.
319. *Id.* at 525, 551; Williams v. United States, 289 U.S. 553, 559, 580–81 (1933)
320. *O'Donoghue*, 289 U.S. at 530–31.
321. *Id.* at 534–35.
322. *Id.* at 535.
323. *Id.* at 538–39.
324. *Id.* at 537, 539 (quoting Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879)).

out of the Union by the cession."[325] Prior to the cession, the residents of the District possessed all the rights and privileges of the Constitution, including "the right to have their cases arising under the Constitution heard and determined by federal courts created under . . . Art. III."[326] And therefore it was "not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union."[327]

Finally, Justice Sutherland grounded his ruling in the "continuous and unbroken practice of Congress" between 1801 and the 1930s.[328] He acknowledged that Congress might have treated the courts in the District like constitutional courts "as a matter of legislative discretion," but countered that "a practice so uniform and continuous indicates, with some degree of persuasive force, that Congress entertained the view that the courts of the District" were created under Article III.[329]

By contrast, in *Williams* Justice Sutherland held that Article III did not apply to the Court of Claims.[330] He reiterated the distinction from *O'Donoghue* that "the courts of the territories are legislative courts, while the superior courts of the District of Columbia are constitutional courts," but observed that "[t]he Court of Claims differs so essentially from both, that its status . . . must be determined from an entirely different point of view."[331] After surveying the distinct history and constitutional status of the Court of Claims, Justice Sutherland concluded that it had not been created under Article III.[332]

The Supreme Court's holding in *O'Donoghue* seems clear: Article III's judicial protections apply to the District of Columbia.[333] But in reading the decision,

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325. *Id.* at 540. It is not surprising that he noted this point as it was the opening line of the argument section of Plaintiff's brief. *See* Plaintiffs' Brief at 14–15, O'Donoghue v. United States, 289 U.S. 516 (1933) (No. 729), 1933 WL 31558.

326. *O'Donoghue*, 289 U.S. at 540.

327. *Id.*

328. *See id.* at 548.

329. *Id.* at 549. Chief Justice Hughes joined by Justices Van Devanter and Cardozo issued a brief dissent stating their view that courts in the District were not created under Article III and that Congress had the power to adjust the tenures and salaries of the judges, a power "essentially the same as that which is conferred upon the Congress for the government of territories." *Id.* at 552 (Hughes, C.J., dissenting).

330. Williams v. United States, 289 U.S. 553, 580–81 (1933).

331. *Id.* at 562.

332. *Id.* at 562–65, 580–81.

333. The Supreme Court in *Palmore* attempted to distinguish *O'Donoghue* by reasoning that the new dual-court system did not raise the same constitutional concerns because it left in place Article III courts "to which the citizens of the District . . . may resort for consideration of those constitutional and statutory matters of general concern." Palmore v. United States, 411 U.S. 389, 406–07 (1973). But there are two problems with this distinction. First, the Court has in recent years treated legislative novelty as "a mark against a law's constitutionality." Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415–21 (2017). The whole premise of a *historical* exception to Article III is to prevent new legislative developments from gradually eroding judicial protections. It thus makes little sense for the Court to have upheld non-Article III courts in the District on the grounds that Congress had never before created a dual-court system. Second, the Court's distinction also makes little sense in light of the history of the

it is also worth noting that the author of the decision—Justice Sutherland—had previously expressed the opposite opinion in public. Specifically, twenty years before *O'Donoghue*, then-Senator Sutherland had argued in Congress that the courts in the District of Columbia were legislative courts.[334] He expressed this view during debates over whether Congress could abolish the federal judgeships on the Commerce Court.[335] Senator Sutherland was explaining the distinction between constitutional and legislative courts when another Senator asked, "Was not the court in the District of Columbia which was abolished in March, 1863, a constitutional court?"[336] Senator Sutherland replied:

> Not at all. The judges of the courts of the District of Columbia are not appointed under the judicial clause of the Constitution at all; they are appointed under the provisions of the Constitution which gives Congress authority to govern the District of Columbia, just as the judges in the Territories are appointed under that provision of the Constitution which gives Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.[337]

It is unclear when or why Justice Sutherland changed his mind about the constitutional status of the D.C. courts.[338] But it perhaps should lead us to give special weight to his decision in *O'Donoghue*, as the opinion represented a public change in position.

For the next forty years, neither Congress nor the Court did much to cast doubt on *O'Donoghue*'s holding. To the contrary, both bodies appeared to reaffirm the decision's ruling on numerous occasions. For example, a year after *O'Donoghue*, Congress changed the name of the Court of Appeals of the District of Columbia to "the United States Court of Appeals for the District of Columbia."[339] Two years later, it also renamed the Supreme Court of the District of Columbia as "the district court of the United States for the District of Columbia."[340] Finally, in 1948 during the recodification of the U.S. Code, Congress explicitly made the

territorial court exception. In upholding non-Article III courts in the territories, the Court had never required that Congress also create Article III courts to hear claims of "general concern." Thus, there is no historical precedent for holding that Congress must comply with Article III when it creates a single court system, but that it may deviate from Article III when it creates a dual-court system. As the next Part will elaborate, there are also strong functional reasons to question this distinction. *See infra* Part IV.

334. 48 CONG. REC. 7994 (1912) (statement of Sen. George Sutherland)

335. *Id*. at 7992–8001.

336. *Id*. at 7994 (statement of Sen. Moses Clapp).

337. *Id*. (statement of Sen. George Sutherland).

338. One explanation is that because Senator Sutherland opposed the abolition of the Commerce Court judgeships, he wanted to minimize the legal precedent for such a power. Later in the debates, he argued that the Act of 1802 was "the only piece of legislation that I know of where anything of this sort has ever been attempted." *See id*. at 7995 (statement of Sen. George Sutherland). But this statement would not have been true if Sutherland had acknowledged that Congress had abolished Article III judgeships in the District in 1863. *See* Kurland, *supra* note 258, at 684–86 (describing Sutherland's opposition to the abolition of the Commerce Court).

339. Act of June 7, 1934, ch. 426, 48 Stat. 926.

340. Act of June 25, 1936, ch. 804, 49 Stat. 1921.

D.C. Circuit one of the eleven judicial circuits of the United States.[341] Scholars have pointed to all three of these changes as indicating Congress's acceptance and affirmation of the Article III status of the D.C. courts.[342] Likewise, during this period the Court repeatedly noted its holding in *O'Donoghue* without questioning its validity.[343]

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By 1970, the most straightforward reading of longstanding historical practice and Supreme Court precedent would have foreclosed the creation of non-Article III courts in the District. Recall that for historical practice to carve out an exception to Article III, that practice must be "firmly established."[344] And here, if any practice was "firmly established" during the nineteenth and early twentieth centuries, it was the practice of treating the District as covered by Article III. Indeed, in the immediate aftermath of the passage of the D.C. Court Reform Act, a number of commentators noted the uncertain constitutional fate of the local court system.[345] Yet just three years after the passage of the D.C. Court Reform Act, eight Justices would vote to uphold Congress's power to create non-Article III courts in the District—a topic this Article will return to in the final Part.

IV. FUNCTIONAL CONCERNS

This Part addresses the various functional justifications for non-Article III adjudication in the District. That is, even if the Constitution does not formally authorize Congress to establish a non-Article III court system in the capital (as a matter of constitutional text or historical practice), we may still think that such a court system is functionally permissible under certain conditions.

Specifically, this Part first considers the historical reasons for non-Article III tribunals—such as the logistical challenges of establishing a court system in far-

341. Act of June 25, 1948, ch. 646, §§ 41, 44, 62 Stat. 869, 870, 871.

342. *See* Bloch & Ginsburg, *supra* note 246, at 561. The legislative histories of these bills suggest other reasons for the name change, such as to reduce popular confusion between the Supreme Court of the District of Columbia and the Supreme Court of the United States. *See* 80 CONG. REC. 7071 (1936); *see also* 78 CONG. REC. 8479 (1934) (statement of Sen. Joseph Robinson) (noting that changing the name of the court of appeals was necessary because it "implies that the court is merely an appellate court for matters arising in the District").

343. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 543, 548 (1962); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 592, 601 (1949); O'Malley v. Woodrough, 307 U.S. 277, 297 (1939).

344. Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring); *accord* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 16–18 (2019).

345. *See* Cohn, *supra* note 36, at 50–51; Wesley S. Williams, Jr., *District of Columbia Court Reorganization, 1970: An Introduction to the District of Columbia Court Reform and Criminal Procedure Act of 1970, with a Survey of the Provisions on Court Reorganization*, 59 GEO. L.J. 483, 491–92 (1971); *see also* Joseph D. Tydings, *Foreword: District of Columbia Court Reorganization, 1970: An Introduction to the District of Columbia Court Reform and Criminal Procedure Act of 1970, with a Survey of the Provisions on Court Reorganization*, 59 GEO. L.J. 477, 479 (1971) (noting "that reasonable men may differ as to the constitutionality of some few features [of the bill]" and that "[s]ome of the more perplexing questions posed by the legislation simply cannot be settled satisfactorily without litigation").

away places and of creating life-tenured judges for temporary court systems. It then considers the Supreme Court's modern functional test for non-Article III courts—which includes factors such as the importance of the issue to be adjudicated, the degree of Article III supervision, and Congress's purpose in creating the court system. Finally, this Part considers the future of judicial independence in the capital. In the end, it concludes that neither past nor present functional concerns justify a functional exception for the District. To the contrary, a functional analysis of non-Article III courts in the District reveals the serious constitutional problems raised by the court system—especially as we look to the future of judicial independence in the capital.

A. THE EARLY TERRITORIES

The most detailed explanation of the historical justifications for non-Article III courts in the territories comes from *Glidden Co. v. Zdanok*.[346] In *Glidden*, Justice Harlan II offered three functional justifications for the exception based on "the character of the early territories and some of the practical problems arising from their administration."[347] Specifically, Justice Harlan focused on the challenges created by the geographical distance between the early territories and the federal government and how this distance also insulated the territorial courts from political influence.[348] Yet, as this section will show, none of these historical explanations can justify non-Article III courts in the District. Justice Harlan actually cited the D.C. court system as a counterexample, noting that "[w]hen the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling."[349]

First, Justice Harlan noted the temporary nature of the federal territories and their local courts. With the creation of each new territory, Congress had to create a system of local government, including a court system that would hear cases otherwise heard in state court.[350] But this arrangement was in most cases only temporary because the territories would be admitted as states and state courts would take over cases from the federal territorial courts.[351] Thus, according to Justice Harlan, if all territorial judges had to have life tenure, then "in a time when the size of the federal judiciary was still relatively small," the federal government would have been left "with a significant number of territorial judges on its hands and no place to put them."[352]

This first concern, however, does not apply to the District because the capital is not a temporary system of government. As Justice Sutherland observed in *O'Donoghue*, the District is "the capital—the very heart—of the Union itself, to

346. 370 U.S. 530 (1962) (plurality opinion).
347. *Id.* at 545.
348. *Id.* at 545–48.
349. *Id.* at 548 (citing O'Donoghue v. United States, 289 U.S. 516, 536–39 (1933)).
350. *Id.* at 545.
351. *Id.* at 545–46.
352. *Id.*

be maintained as the 'permanent' abiding place of all its supreme departments."[353] And by contrast to the (relatively) easy process of territorial statehood, full D.C. statehood might require a constitutional amendment.[354] This fact undermines the practical concern that giving all judges in the District life tenure would risk someday flooding the federal government with extra judges.

Second, Justice Harlan observed that "the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III."[355] "[I]n a day of poor roads and slow mails," the territories had to be relatively independent of the national government and needed "greater flexibility . . . to deal with problems arising outside the normal context of a federal system."[356]

But this factor also does not apply because the District is obviously not removed from the seat of government—indeed, it is the seat of government. Even if there were problems today with long-distance communication (which there are not), it is hard to describe the District as an exception to Article III as a result of "problems arising outside the normal context of [the] federal system."[357]

Finally, Justice Harlan emphasized that geographical distance between Congress and the territories "made it less urgent that judges there enjoy the independence from Congress and the President envisioned by [Article III]."[358] In other words, the territories did not need the "protections deemed inherent in a separation of governmental powers."[359]

This final factor not only does not apply to the District but also highlights the serious functional problems with treating the District as an exception to Article III. Although territorial judges may not have needed constitutional protections given their geographic separation from Congress and the President, judges in the District do not enjoy this protective distance. Indeed, as Justice Sutherland observed, the reasons for an independent federal judiciary "apply with even greater force to the courts of the District" because these judges are in "closer contact with, and more immediately open to the influences of, the legislative department" and issue decisions that more directly impact "the operations of the

353. *O'Donoghue*, 289 U.S. at 539; *see also* CONG. GLOBE, 33d Cong., 2d Sess. 121–22 (1854) (statement of Rep. Thomas Eliot) ("The condition of the District of Columbia differs widely from that of the Territories. It is not, as they are, in a state of transition. It has its fixed and permanent *status* under the Constitution. Its judiciary is invested with a portion of the judicial power of the United States under the Constitution, and is clearly within the spirit of [Article III].").

354. *See, e.g.*, R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, 461 HERITAGE LECTURES 1, 3–6 (1993) (citing constitutional barriers to D.C. statehood). Congress could perhaps circumvent this limitation by reducing "the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial" and retroceding the rest of the land to Maryland. Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 370 (2008); *see also* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 163 (1991) (describing a similar proposal).

355. *Glidden*, 370 U.S. at 546.

356. *Id.* at 546–47.

357. *Id.* at 547.

358. *Id.* at 546.

359. *Id.*

general government and its various departments."[360]

In short, none of the historical reasons given for non-Article III adjudication in the territories (the most analogous exception to the District) can justify non-Article III adjudication in the capital.

B. MODERN FACTORS

Even if the District cannot be justified as an exception to Article III based on historical grounds, the exception might be justified based on the functional reasons invoked by the Supreme Court in more recent cases (that is, from the 1970s through the present). In particular, the Justices have considered:

> (1) "the origins and importance of the right to be adjudicated"; (2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court.[361]

Yet none of these factors support non-Article III courts in the District. Instead, many affirmatively weigh in favor of applying Article III judicial protections to the D.C. courts.

Consider first "the origins and importance of the right to be adjudicated."[362] Without specifically addressing that factor, the Court in *Palmore* and some commentators have attempted to justify the non-Article III court system by noting that the D.C. courts only adjudicate cases arising under local law.[363] But this distinction makes little sense. First, as a constitutional matter, the D.C. Code is still federal law. For instance, it can serve as the basis for Article III federal-question jurisdiction.[364] Why should the federal laws in the District be less constitutionally significant than other federal laws—many of which also apply only to specific individuals or places?[365]

In addition, non-Article III courts in the District adjudicate one class of cases that seem especially important: federal crimes. In *Palmore*, Justice White dismissed the claim that felonies were a special class of cases by noting that early

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360. O'Donoghue v. United States, 289 U.S. 516, 535 (1933); *see also* Redish, *supra* note 67, at 222 (noting the "possible dangers of having judges in the District subjected to subtle or unstated pressure from governmental officials living in the very same locale").

361. Stern v. Marshall, 564 U.S. 462, 511–12 (2011) (Breyer, J., dissenting) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849, 851 (1986)).

362. *Id.* at 511.

363. *See* Palmore v. United States, 411 U.S. 389, 407 (1973); Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 310–11 (1982).

364. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 368 (1974) ("Congressional Acts directed toward the District, like other federal laws, admittedly come within this Court's Art. III jurisdiction . . . .").

365. *See* John Copeland Nagle, *Site-Specific Laws*, 88 NOTRE DAME L. REV. 2167 (2013) (documenting federal laws that "target specific places" rather than apply "equally throughout the country").

Congresses left the enforcement of certain federal crimes to state courts.[366] But more recent scholarship has essentially refuted this historical claim and reinforced the special status of federal criminal cases.[367]

Finally, although the non-Article III courts in the District hear cases that "arise under" local federal law, they also routinely adjudicate questions of national federal law.[368] In *Palmore*, for example, the District of Columbia Court of Appeals adjudicated both the Article III issue and a Fourth Amendment question.[369] And *Palmore* is far from unusual. The District of Columbia Court of Appeals regularly must decide constitutional issues. These cases "arise under" local rather than national federal law, but the local court system still adjudicates these national issues on the merits when they arise on appeal or as a counterclaim. And in related Article III cases, the fact that a legal issue arises as a counterclaim or on appeal has not changed the Court's treatment of its importance.[370]

Many of these same arguments also apply to the second functional factor: "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts."[371] Here, too, the local courts in the District seem to fall outside the normal functional exception to Article III. The courts are "not limited to a 'particularized area of the law'" but instead exercise a "substantive jurisdiction reaching any area of the *corpus juris*."[372] And critically, even if we considered the local-national distinction meaningful, courts in the District adjudicate both questions of local and national federal law. Likewise, courts in the District exercise the full array of powers enjoyed by Article III courts, perhaps most importantly, the power to issue final judgments.[373]

The third functional factor—"the extent to which the delegation [of Article III power to a non-Article III tribunal] nonetheless reserves judicial power for exercise by Article III courts"[374]—cuts even more strongly against the non-Article III status of the D.C. courts. This factor basically considers the degree of control or review that Article III courts exercise over the non-Article III courts. Article III courts can exercise direct control by having the power to appoint or remove the non-Article III judges or the power to assign cases to them in the first place—as

366. *Palmore*, 411 U.S. at 402.

367. *See* Collins & Nash, *supra* note 64, at 295; Kurland, *supra* note 64, at 73–74; *see also* Vladeck, *Federal Crimes*, *supra* note 68 (noting that Collins and Nash's article "suggests that the entire foundation of the Court's jurisprudence concerning non-Article III criminal adjudication in civilian territorial courts may be as 'sketchy' as the historical precedents and structural arguments on which the *Palmore* Court relied").

368. *See* FALLON ET AL., *supra* note 63, at 363.

369. *See* Palmore v. United States, 290 A.2d 573, 580, 583–84 (D.C. 1972).

370. *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011) (holding that bankruptcy courts cannot adjudicate tortious interference counterclaims).

371. *Id.* at 511–12 (Breyer, J., dissenting) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849, 851 (1986)).

372. *Id.* at 493–94 (plurality opinion) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

373. *See id.* at 486–87 (quoting *N. Pipeline Constr. Co.*, 458 U.S. at 85–86).

374. *Id.* at 512 (Breyer, J., dissenting) (quoting *Schor*, 478 U.S. at 849, 851).

with magistrate and bankruptcy judges.[375] Or Article III courts can exercise indirect control by reviewing decisions by the non-Article III tribunals de novo.[376]

But Article III courts exercise essentially no control over the D.C. courts. First, they do not appoint and cannot remove these judges. Instead, judges in the District are appointed by the President, confirmed by the Senate, and serve fifteen-year terms subject to a formal removal process.[377] Moreover, even though the current structure of the D.C. court system would suggest that these judges should be protected from unilateral presidential removal, historical precedent suggests otherwise. Since the 1850s, the Executive Branch has concluded that the President may unilaterally remove territorial judges who lack good behavior tenure.[378] And the Supreme Court later affirmed the President's power to do so.[379] Thus, not only are judges in the District not subject to direct Article III control, but they are subject to direct political influence due to the risk of presidential removal.

Likewise, courts in the District are largely immune from Article III review. Like state courts, they cannot be reviewed by Article III lower courts. The only direct review is by writ of certiorari to the Supreme Court,[380] a form of appellate review that has typically been viewed as inadequate for Article III purposes.[381] Moreover, even this limited review is deferential in two senses. First, the Court obviously defers on questions of fact. Second, and more importantly, the Court also defers on questions of local law under a D.C. analogue to *Erie*.[382] Under the District's *Erie* doctrine, Article III courts either adopt the existing interpretations of the D.C. Code by the local courts or they attempt to "predict" how the Court of Appeals for the District of Columbia would interpret local law.[383] Both of these features undermines any claim that appellate review mitigates the Article III concern.

Perhaps most troublingly, though, is that criminal convictions in the D.C. local court system are subject to even less review by Article III courts than equivalent convictions in state courts. At least in theory, Congress has provided for meaningful collateral review of state court convictions by allowing defendants convicted in state court to have their cases subsequently reviewed by Article III federal courts.[384] By contrast, Article III courts can only review D.C. court convictions

375. *See id*. at 514–15 (Breyer, J., dissenting).

376. *See id*. at 515.

377. *District of Columbia Court of Appeals Judges*, D.C. COURTS, https://www.dccourts.gov/court-of-appeals/judges [https://perma.cc/YAD6-ZLF9] (last visited Mar. 6, 2019).

378. *See* sources cited *supra* note 250 (discussing the historical origins of this power and an early episode of presidential removal).

379. *See, e.g*., Mistretta v. United States, 488 U.S. 361, 412 n.35 (1989) ("[W]e already have recognized that the President may remove a judge who serves on an Article I court." (citing McAllister v. United States, 141 U.S. 174, 185 (1891))).

380. *See* 28 U.S.C. § 1257(a) (2012); D.C. CODE § 11-102 (2012).

381. *See* Fallon, *supra* note 63, at 972.

382. Whalen v. United States, 445 U.S. 684, 687 (1980).

383. *See, e.g*., Earle v. District of Columbia, 707 F.3d 299, 310 (D.C. Cir. 2012).

384. *See* 28 U.S.C. § 2254(a) (2012).

when the remedy in D.C. superior court (that is, the normal court for habeas review) is "inadequate or ineffective."[385] This provision has been read "as 'divest[ing] federal courts of jurisdiction to hear habeas petitions by prisoners who could have raised viable claims'" before the Superior Court of the District of Columbia.[386] And other doctrines—such as *Younger* abstention—typically bar defendants from challenging their detainment before the local courts have adjudicated their case.[387] Thus, unlike defendants convicted in state courts, defendants in the District can rarely bring collateral challenges before an Article III judge.[388]

And this structure raises concerns beyond Article III. In the early 1970s, a number of commentators argued that it also violated the Suspension Clause by eliminating essentially all Article III habeas review.[389] Admittedly, in 1977, the Supreme Court upheld this post-collateral review structure in *Swain v. Pressley*,[390] relying heavily on its recent decision in *Palmore*. Yet *Palmore* rests on shaky historical and functional reasoning,[391] and the limited Article III habeas review in the District only aggravates these concerns. Indeed, as Lee Kovarsky has recently argued, the Constitution may entitle federal prisoners to some habeas process before an Article III judge—absent formal suspension—as a matter of Article III judicial power.[392]

The fourth factor—"the presence or 'absence of consent to an initial adjudication before a non-Article III tribunal'"[393]—has already been explored at length.[394]

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385. D.C. CODE § 23-110(g) (2012).

386. Moore v. United States, 253 F. Supp. 3d 131, 132 (D.D.C. 2017) (quoting Williams v. Martinez, 586 F.3d 995, 998 (D.C. Cir. 2009)).

387. *See* JMM Corp. v. District of Columbia, 378 F.3d 1117, 1120 (D.C. Cir. 2004).

388. *But see* Blair-Bey v. Quick, 151 F.3d 1036, 1039–42 (D.C. Cir. 1998) (discussing alternative statutory provisions that allow defendants to seek relief before an Article III court).

389. *See, e.g.*, O'Neal Smalls, *Habeas Corpus in the District of Columbia*, 24 CATH. U. L. REV. 75, 81 (1974); John F. Sherlock III, Note, *Federal Habeas Corpus in the District of Columbia: A Nonexistent Remedy*, 21 CATH. U. L. REV. 173, 179 (1971).

390. 430 U.S. 372, 382–83 (1977).

391. The Court's decision in *Pressley* may not be any better. *See* Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of* Swain v. Pressley, 13 ROGER WILLIAMS U. L. REV. 411, 425–28 (2008) (noting that the Supreme Court announced its constitutional rule "in one sentence" and that the opinion's analysis is "curiously cursory"). For a defense of *Pressley*'s functional approach to the Suspension Clause, see Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 600–11 (2010).

392. *See* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 756 (2013); *see also* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2146–50 (2009) (asking whether there "could ever be a situation where the separation of powers would require the availability of an Article III judicial forum to resolve questions of federal law, at least somewhere along the line?"). This development may seem particularly ironic given that, prior to the 1970s, the Article III courts in the District arguably could have exercised broader habeas powers than their other Article III colleagues. *See* Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71, 77 (2008).

393. Stern v. Marshall, 564 U.S. 462, 512 (2011) (Breyer, J., dissenting) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849, 851 (1986)).

394. *See supra* notes 154–56 and accompanying text.

There is essentially no reason to think that residents of the District have generally consented to the non-Article III court system.

Finally, the fifth factor—"'the concerns that drove Congress to depart from' adjudication in an Article III court"[395]—may cut the most dramatically in favor of holding that the District's local courts violate Article III. In *Palmore*, the majority gave a sympathetic account of the concerns that drove Congress to create a separate non-Article III court system. In Justice White's view, "Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system."[396] But the legislative history of the D.C. Court Reform Act tells a darker story.

The late 1960s and early 1970s—the period during which the D.C. Court Reform Act was drafted and enacted—was the beginning of the "War on Crime." And given the capital's importance and particularly high crime rate, President Nixon "declared a separate 'War on Crime' for Washington, DC."[397] This local War on Crime had a clear influence on the D.C. Court Reform Act. The House Report, for example, explained that "[t]he fundamental reason for reorganization of the District of Columbia courts is the soaring crime rate" with the goal of "swift and sure justice [as] a deterrent to crime."[398] Likewise, in a 1971 speech, President Nixon's Attorney General, John Mitchell, proudly listed the D.C. Court Reform Act as one of a number of "anti-crime" bills called for by Nixon which had "provided the tools for further reducing crime in the one major urban area entirely within the Federal jurisdiction."[399] Both contemporary and later commentaries agree that crime in the District was one of—if not the central—influence on the final law.[400] This influence was so apparent that people at the time referred to the law as the "D.C. crime bill."[401]

The most telling description of the D.C. Court Reform Act appeared in a report from the House Committee on the District of Columbia. The report began by explaining that the bill sought to combat "the ever-growing criminal element

395. *Stern*, 564 U.S. at 512 (Breyer, J. dissenting) (quoting *Schor*, 478 U.S. at 849, 851).

396. Palmore v. United States, 411 U.S. 389, 408 (1973).

397. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 154 (2016); *see also* David F. Musto, *Just Saying 'No' Is Not Enough*, N.Y. TIMES (Oct. 18, 1998), http://www.nytimes.com/books/98/10/18/reviews/981018.18mustot.html [https://perma.cc/JUP3-EX7A] ("In his 1968 campaign Nixon had declared that 'D.C. should not stand for disorder and crime.' . . . By the 1972 election crime had fallen by 50 percent in the District of Columbia, an achievement that was widely broadcast.").

398. H.R. REP. NO. 91-907, at 25 (1970).

399. John N. Mitchell, U.S. Att'y Gen., The War on Crime: The End of the Beginning, Address Before the Attorney General's Conference on Crime Reduction 6 (Sept. 9, 1971), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-09-1971.pdf.

400. *See* MORRIS, *supra* note 23, at 234; John W. Kern, III, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 AM. U. L. REV. 237, 239–40 (1971); Tydings, *supra* note 345, at 479.

401. Tydings, *supra* note 345, at 478.

which too long, outrageously and indefensibly, has been a threat to life, limb and property in the District of Columbia."[402] It continued:

> Your Committee is not aware of any period in the Capital's history when crime was so rampant as now, when the police have been so shackled, when prosecutors because of technicalities, and courts because of unrealistic philosophies, and failure to go full speed ahead, have contributed to a major breakdown of law enforcement . . . . This is a crime infested city; let there be no ignoring that fact!
>
> Congress, police, prosecutors, defense counsel, the courts, and the community, all have a joint as well as an individual responsibility, to assist one another not only to ameliorate crime conditions, but also to eradicate the very festers in society from whence criminal acts originate.[403]

On its face, the report reveals a concern that federal courts in the District had become too protective of criminal defendants—a view that members of Congress had held for over twenty years.[404] And this concern was further displayed in the congressional debates surrounding the bill. Representative Joel Broyhill made the point most directly:

> Another benefit of this proposal is that it will eliminate appellate review by the U.S. Court of Appeals. This court of appeals is notorious. Getting a conviction past Judge Bazelon and Judge Wright is like passing a ship between Scylla and Charybdis. Local offenders in the District are well aware of the proclivities for leniency by men on that court. In the new proposed system, they will appeal convictions to the District of Columbia Court of Appeals.[405]

Other members of Congress made similar observations.[406] In light of these statements, numerous scholars have concluded that the Act was significantly motivated by a desire to take local criminal cases away from the then-liberal D.C. Circuit.[407]

But reading between the lines, we might see an even more troubling feature of the D.C. Court Reform Act. The House Committee report carefully avoids any direct references to race. But it is not hard to imagine who Congress meant when

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402. H.R. REP. NO. 91-907, at 3 (1970).

403. *Id.*

404. *See* KATHLEEN J. FRYDL, THE DRUG WARS IN AMERICA, 1940–1973, at 130–31 (2013).

405. 116 CONG. REC. 8095 (1970) (statement of Rep. Joel Broyhill).

406. *See id.* at 25,566 (statement of Sen. Allen Ellender) (noting that courts "have been all too active and 'helpful' in striking down provisions in the law and procedures in our judicial and law-enforcement systems which in [his] opinion encouraged lawlessness"); *id.* at 8092 (statement of Rep. Thomas Abernethy) (arguing that bypassing the U.S. Court of Appeals means the "elimination of this unnecessary layer of review and the attendant decrease in the opportunity for mischief by that court is more than sufficient grounds to adopt this legislation").

407. *See* CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 28 (1999); MORRIS, *supra* note 23, at 234; Bloch & Ginsburg, *supra* note 246, at 562 n.61; Patricia M. Wald, *Ghosts of Judges Past*, 62 GEO. WASH. L. REV. 675, 681 (1994).

it spoke of the "criminal elements."[408] Others have documented the overlapping politics of crime and race in the District during the 1960s and 1970s.[409] And indeed, even at the time, members of Congress felt the need to defend the bill against the charge that it was "antiblack."[410]

Justice Douglas captured these various concerns—about crime, race, and judicial independence—in early drafts of his dissent in *Palmore*. In an initial, uncirculated draft, he wrote:

> The population of the District is about 70% Black. The problems of "law and order" assume in the minds of a majority of the lawmakers an acute and special problem. A minority sits as overlord over the Blacks, causing tensions to mount. The case of Harry Alexander, a Black judge on the superior court, has become prominent. Great pressures have been put on him to conform—or else. The problem goes not only to the viability of life in the District but to the vitality of the guarantees in Art. III and in the Bill of Rights. Those guarantees run to every "person"—Blacks included . . . .
>
> We take a great step backward today when we deprive the Skelly Wrights of our federal regime in the District the independence that helps insure fearless and evenhanded dispensation of justice.[411]

Before circulating the opinion to his colleagues, Douglas would moderate this language, omitting the references to race and Judge Skelly Wright.[412] But even after the revisions, his final dissent forcefully noted the political consequences of the Court's ruling.[413]

In light of this history, congressional purpose likely weighs against the constitutionality of the D.C. Court Reform Act. Admittedly, there is a much broader debate in federal courts doctrine about whether courts should evaluate congressional motive or purpose in assessing the constitutionality of jurisdictional legislation.[414] But at the very least, this history should lead us—unlike Justice

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408. 116 CONG. REC. 8095 (1970) (statement of Rep. Joel Broyhill) ("I am hoping that the House will . . . pass this bill and let all the criminal elements of this city know that their days are numbered.").

409. *See* FRYDL, *supra* note 404, at 305; JERRY V. WILSON, U.S. DEP'T OF JUST., THE WAR ON CRIME IN THE DISTRICT OF COLUMBIA 1955–1975, at 6–7 (1978).

410. 116 CONG. REC. 25,566 (1970) (statement of Sen. Allen Ellender).

411. Justice William O. Douglas, First Draft Dissent in Palmore v. United States 7 (Apr. 13, 1973) (on file with the William O. Douglas Papers at the Library of Congress). Judge Harry Alexander was a controversial judge on the Superior Court of the District of Columbia who was described by his critics as "capricious" and by his supporters as "a compassionate champion of racial dignity and due process." Adam Bernstein, *Harry T. Alexander, 85; Controversial D.C. Judge, Defense Lawyer*, WASH. POST (July 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072305194_pf.html [https://perma.cc/UXF2-TR6V].

412. *See* Justice William O. Douglas, Second Draft Dissent in Palmore v. United States 7 (Apr. 13, 1973) (on file with the William O. Douglas Papers at the Library of Congress).

413. *See* Palmore v. United States, 411 U.S. 389, 410 (1973) (Douglas, J., dissenting).

414. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1074–83 (2010).

White[415]—to question Congress's purpose in enacting the D.C. Court Reform Act.

C. THE FUTURE OF JUDICIAL INDEPENDENCE

Finally, as we look to the future of judicial independence in the capital, we may need to consider new functional concerns raised by the structure of the D.C. court system. Traditionally, scholars have assumed that Congress has acted with political neutrality when creating non-Article III courts.[416] The prior section identified serious doubts about that claim with respect to the history of the D.C. courts. But even if we accept the assumption as true for the past, it may not hold true in the future. As Tara Leigh Grove has recently argued, many protections related to judicial independence are based less on law than on convention and are thus historically contingent.[417] Indeed, recent political attacks on federal and state judges have only further illustrated the contingent nature of judicial independence and the need for structural protections.[418]

To be concerned about judicial independence in the capital, one need not believe that judges in the District are currently subject to political influence. The separation of powers in general and Article III's judicial protections in particular were not designed to address abuses of power on a case-by-case basis. Rather, "Article III's strictures . . . are structural, prophylactic protections."[419] Federal judges receive Article III protections not after they have been unduly pressured by Congress or the President but to protect against such pressure in the first place. As Justice Gorsuch recently observed, Article III ensures that "the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before."[420] Thus, when we think about the permissibility of non-Article III adjudication in the District, we also should consider the future of judicial independence in the capital.

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415. *See* Redish, *supra* note 67, at 222 ("Justice White gave significant attention to the governmental interest in maintaining judicial flexibility in the District of Columbia . . . [but he] gave no consideration . . . to the possible impact of a public statement by an important Congressman decrying the level of crime in Washington streets on the judges of the District's criminal courts.").

416. *See* Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 216 & n.49 (1983).

417. *See* Grove, *supra* note 256, at 517.

418. *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 488 (2018) (describing recent verbal attacks on federal judiciary); Michael Wines, *Judges Say Throw Out Map. Lawmakers Say Throw Out the Judges.*, N.Y. TIMES (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/pennsylvania-gerrymandering-courts.html [https://nyti.ms/2Br2nGy] (discussing proposals to remove state judges and to reduce their salaries). For a recent symposium on the decline of judicial independence in the modern era, see Johanna Kalb & Alicia Bannon, *Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era*, 93 N.Y.U. ONLINE 1, 2–6 (2018) (introducing essays in the collection).

419. Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1410 (2014).

420. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting).

V. BEYOND *PALMORE*

This Part concludes by looking beyond the Supreme Court's decision in *Palmore*. The Part begins by attempting to explain the decision—outside of the doctrinal analysis presented within the four corners of the opinion—by drawing on the Justices' papers and other sources from the period. This history suggests that *Palmore* may have been motivated by a number of non-doctrinal factors that provide little support for the case's ultimate conclusion. The Part next looks to the practical question of fixing the District's Article III problem. It considers the various difficulties of a judicial solution and the possibility of a congressional solution. Finally, the Part considers some of the potential implications of rethinking *Palmore*.

A. EXPLANATIONS

This section revisits *Palmore* but from a different perspective. It seeks to explain what happened in the case: Where did the eight Justices in the majority go wrong? The prior Parts have attempted to show that the various formal and functional justifications invoked in the majority opinion are either unpersuasive or outright wrong. But as Judith Resnik has observed, "there is no obvious reason to look only to the Supreme Court opinion . . . as the authoritative statement" of the case; rather, we often "need[] to look outside the opinion to read it."[421] Indeed, on occasion, even the Justices have recognized the value of using history to "impeach" prior precedent.[422] Justice Souter put it best:

> The point . . . is not that historical circumstance may undermine an otherwise defensible decision; on the contrary, it is just because [the decision] is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong.[423]

In this spirit, this section looks outside the four corners of the Court's opinion in *Palmore* to consider three potential influences on the Justices' ruling: The War on Crime in the District, the prospect of D.C. "home rule," and the perceived narrowness of a D.C. exception. No one of these factors explains *Palmore*, but they all shed important light on its reasoning.[424]

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421. Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221, 226 (1990).

422. *See* Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1639–43 (2013).

423. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 122–23 n.17 (1996) (Souter, J., dissenting); *see also* Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 714–16 (2018) (describing and defending Justice Souter's use of history in *Seminole Tribe*).

424. In researching this section, I examined the papers in *Palmore*, *Swain*, and *Northern Pipeline* for every Justice whose papers are public. But like others, I relied heavily on Justice Blackmun's and Justice Powell's detailed conference notes as evidence of what various Justices thought. *See, e.g.*, David Scott Louk, Note, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 YALE L.J. 682, 694 n.60 (2016) (describing the value of these notes).

The District's crime problem makes only a small appearance in the majority opinion in *Palmore*. In a footnote, Justice White mentioned the "increase in the number of felonies committed in the District of Columbia" and the "concomitant decrease in the number of felonies prosecuted" to explain why the Justices should defer to Congress's policy choice to establish a non-Article III court system.[425] Nevertheless, it is hard to ignore the potential influence of the War on Crime on the final decision. Justice Douglas certainly thought that "[t]he matter of 'law and order'" lay at the heart of the case.[426]

At the very least, we know that the District's crime problem influenced both President Nixon and Congress in their decision to create a non-Article III court system in the District. And we might find it understandable that the Justices would be reluctant to strike down a key anti-crime measure at the heart of the President's agenda. Indeed, just a month before the Supreme Court issued its decision in *Palmore*, President Nixon announced in a public radio address that "serious crime . . . in the District of Columbia [] ha[d] been cut in half since 1969" as a result of the D.C. Court Reform Act.[427]

A related but somewhat different influence on the Court was the pending prospect of D.C. "home rule." Since its establishment in 1801, the District had been primarily governed by Congress, the President, and federal appointees, with only limited experiments in self-governance.[428] During the middle of the twentieth century, however, there were various attempts to devolve more authority to locally elected officials. These efforts gathered steam and culminated in home-rule legislation at the end of 1973.[429]

In its briefing and oral argument in *Palmore*, the government explicitly linked the District's non-Article III courts and D.C. home rule.[430] And at least some of the Justices may have been swayed by the government's argument. For example, in a memo regarding whether to grant certiorari, Justice Blackmun's law clerk noted that interpreting the D.C. Code as an "Art I statute[]," which could be enforced by non-Article III judges, "will be useful if Congress ever wants to set up home rule legislation."[431] And more notably, at the conference for *Palmore*, Chief Justice Burger linked the D.C. Court Reform Act to "self-[government]" in

425. Palmore v. United States, 411 U.S. 389, 408 n.14 (1973).

426. *Id.* at 419 (Douglas, J., dissenting).

427. President Richard Nixon, Radio Address About the State of the Union Message on Law Enforcement and Drug Abuse Prevention (Mar. 10, 1973), https://www.presidency.ucsb.edu/node/256179 [https://perma.cc/YX5Y-LC7X].

428. *See* Jason I. Newman & Jacques B. DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537, 541–47 (1975).

429. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (granting the District's local government certain powers that originally belonged to Congress).

430. *See* Brief for the United States at 43, Palmore v. United States, 411 U.S. 389 (1973) (No. 72-11), 1973 WL 173798; Transcript of Oral Argument at 54–56, Palmore v. United States, 411 U.S. 389 (1973) (No. 72-11).

431. Certiorari Memo from Ralph I. Miller to Justice Harry A. Blackmun in Palmore v. United States 6a (Sept. 20, 1972) (on file with the Harry A. Blackmun Papers at the Library of Congress).

the District and "even [statehood]."[432] It is thus possible that some Justices voted to uphold non-Article III courts in the District lest a constitutional ruling striking down the new court system dissuade Congress from adopting home-rule legislation.

These two concerns—crime and home rule—link up to a third factor that likely influenced the Justices' thinking: the perceived narrowness of the ruling. In the fifty years prior to the decision, the Supreme Court had been largely deferential to Congress's decision to assign cases to non-Article III tribunals.[433] In light of this history, it makes sense that the Justices hesitated to strike down the new D.C. court system and, instead, chose to make the District a narrow exception to Article III.

We can see this reasoning in the Justices' internal deliberations, both in *Palmore* in which the Court upheld the non-Article III D.C. courts and later in *Northern Pipeline* in which the Court invalidated the non-Article III bankruptcy courts. In *Palmore*, for instance, Justice Blackmun wrote a note to himself concluding that felons could be tried before non-Article III courts in the District, but observing that the Court should be careful of the docket of legislative courts as an "end all" as it would "tend to destroy judicial supremacy."[434] Likewise, at the conference for *Palmore*, both Justices Blackmun and White indicated that they would vote to affirm the constitutionality of the new D.C. court system but emphasized that the opinion should be "writ[ten] narrowly" and confined to the District.[435]

By contrast, a decade later, the Justices took a different view of non-Article III bankruptcy adjudication. While the Justices had accepted a narrow Article III exception for the District, numerous Justices expressed dismay at the potential breadth of a ruling upholding the non-Article III bankruptcy courts. At the conference for *Northern Pipeline*, Justice Rehnquist worried that "[i]f this go[es], Cong [ress] can set up [all courts under] Art[icle] I."[436] Likewise, Justice Stevens described *Northern Pipeline* as the "most imp[ortant] case" since he had joined the Court, and expressed concern that if the Court affirmed the constitutionality of these courts, the "[p]urpose of Art[icle] III will go down the drain."[437] Justice

432. Justice Harry A. Blackmun, Conference Notes in Palmore v. United States (Feb. 23, 1973) (on file with the Harry A. Blackmun Papers at the Library of Congress).

433. *See* Young, *supra* note 63, at 841–46.

434. Justice Harry A. Blackmun, Handwritten Notes in Palmore v. United States (on file with the Harry A. Blackmun Papers at the Library of Congress).

435. Justice Lewis F. Powell, Jr., Conference Notes in Palmore v. United States (Feb. 23, 1973) (on file with the Lewis F. Powell, Jr. Archives at the Washington & Lee University School of Law).

436. *See* Justice Harry A. Blackmun, Conference Notes in N. Pipeline Constr. Co. v. Marathon Pipeline Co. (Apr. 30, 1982) (on file with the Harry A. Blackmun Papers at the Library of Congress).

437. Justice Lewis F. Powell, Jr., Conference Notes in N. Pipeline Constr. Co. v. Marathon Pipeline Co. (Apr. 30, 1982) (on file with the Lewis F. Powell, Jr. Archives at the Washington & Lee University School of Law).

Blackmun may have put the point most succinctly in a handwritten note to himself: "[T]ime to draw the line."[438]

Ultimately, the Justices drew the line to exclude the District of Columbia. Yet there is little reason to think that this was the right line to draw. Indeed, at the conference in *Northern Pipeline*, Justice Stevens (who had not been on the Court for *Palmore*) made a similar point. He believed that the Court could "square *Palmore*" with its decision to strike down the bankruptcy courts but continued that Justice Douglas may have been right in concluding that the District's non-Article III courts were unconstitutional.[439]

In the end, therefore, the best explanation for *Palmore* may be what scholars have called the District's "unique," "anomalous," or even "awkward" constitutional status.[440] The Court simply felt comfortable in *Palmore* creating a new, narrow exception to Article III that would be limited to the District of Columbia.

Others—most notably, Chief Justice Roberts in a lecture about the D.C. Circuit—have likewise noted the District's "unique[] vulnerab[ility]."[441] Reflecting on the abolition of the District's first circuit court, the Chief Justice noted that Lincoln could not have mustered the political support to "abolish[] all the federal courts in the country, replacing them with new courts and his appointees; but he could do that with respect to the District of Columbia Circuit, a small court in his backyard."[442] A century later, Congress would effectively achieve the same end—that is, undermine judicial independence in the District—during the War on Crime. And due to the District's unique vulnerability, the Supreme Court would ultimately (but incorrectly) uphold Congress's conduct.

B. SOLUTIONS

When a branch of government violates the separation of powers, there are two ways to correct the problem. The Supreme Court can intervene to invalidate the conduct. Or the branch whose conduct is at issue can voluntarily remedy its own violation. In theory, any criminal defendant charged with a felony in the Superior Court of the District of Columbia could challenge the constitutionality of the District's court system (as happened in *Palmore*). But in practice, such a challenge would be unlikely to prevail for reasons separate from the merits of the claim.

One problem is that *Palmore* is a forty-year-old opinion joined by eight Justices. In other words, it is exactly the type of case where the Justices might conclude that they should follow the principle of stare decisis, deferring to precedent even if they would have decided the case differently in the first instance. We might think that stare decisis would reverse the burden of proof in the case.

438. Justice Harry A. Blackmun, Handwritten Notes in N. Pipeline Constr. Co. v. Marathon Pipeline Co. (Apr. 26, 1982) (on file with the Harry A. Blackmun Papers at the Library of Congress).

439. Blackmun, *supra* note 436.

440. *See supra* note 10 and accompanying text.

441. Roberts, *supra* note 23, at 383–84.

442. *Id*. at 384.

Whereas at least some Justices have said that non-Article III adjudication is only permissible when there is a "firmly established historical practice,"[443] stare decisis may turn the tables, requiring the *challenger* to show that *Palmore* was "demonstrably erroneous."[444] Of course, stare decisis is not an "inexorable command," especially in constitutional cases.[445] But it is at least a considerable hurdle for any would-be challenger.

The more significant problem, however, may be the remedy—or more specifically, its timing. Striking down the local D.C. court system could potentially invalidate thousands of pending cases. The Court faced a similar problem in *Northern Pipeline* in striking down the newly created bankruptcy court system. It addressed the problem by making its decision purely prospective and by staying its judgment for three months in order to give Congress time to develop a fix.[446] Yet in more recent years, the Supreme Court has been reluctant to issue purely prospective decisions, as many Justices view prospective decisionmaking as inherently in conflict with the judicial power.[447]

Given these problems, it seems more likely that, if anyone is going to fix the District's Article III problem, it will be Congress. Indeed, commentators have long observed that members of Congress have an independent obligation to assess the constitutionality of federal statutes.[448] And the history reviewed in Part III shows that Congress has often thought about its constitutional obligations in structuring the D.C. court system. Moreover, Congress would not be bound by the principle of stare decisis and thus could decide to repeal the D.C. Court Reform Act based on a lesser showing that the law violates Article III.

Congress would also have more flexibility in thinking about how to fix the court system. Article III formalists would likely believe that the only acceptable solution is to grant the courts Article III status.[449] But functionalists might embrace other solutions, such as insulating the local judges from *federal* political

443. Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring).

444. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001).

445. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting).

446. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87–88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring, joined by O'Connor, J.). This solution raised its own problems because Congress did not immediately fix the bankruptcy courts. Even after the Supreme Court extended its stay, Congress missed the Court's deadline, throwing the bankruptcy system into temporary confusion. *See* Tamar Lewin, *Confusion Over Status of Bankruptcy Court*, N.Y. TIMES (Dec. 28, 1982), https://www.nytimes.com/1982/12/28/business/confusion-over-status-of-bankruptcy-court.html?smid=pl-share [https://nyti.ms/2Rh44OW]; Stuart Taylor, Jr., *The Free-for-All on the Bankruptcy Express*, N.Y. TIMES (Mar. 2, 1984), https://www.nytimes.com/1984/03/02/us/the-free-for-all-on-the-bankruptcy-express.html?smid=pl-share [https://nyti.ms/2AhgvkI].

447. *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 45–50 (2014).

448. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587–88 (1975); Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the Senate*, 67 VAND. L. REV. 837 (2014).

449. *See* Lawson, *supra* note 46, at 908 ("According to the formalist . . . . [a]ll judicial proceedings in the territories, whether involving national or local law, must take place before tribunals whose judges

influence. Congress could do this by (among other things) giving D.C. judges for-cause removal protections or by changing the appointment process.[450] At least in theory, Congress could give the Mayor the power to appoint local judges.[451] Alternatively, Congress could establish direct elections of local judges (the model followed in many states). In short, if the goal of Article III is not judicial independence in its own right but rather independence from the central government, then this alternative structure—more closely approximating the state court system—might resolve the constitutional concerns.

C. IMPLICATIONS

So far, this Article has argued that the District of Columbia is not an exception to Article III and that the current D.C. court system thus violates the Constitution. For the nearly seven hundred thousand people living in the District, this conclusion should be significant in its own right. Each year the Superior Court of the District of Columbia disposes of thousands of felony cases and many more civil cases.[452] And as this Article has shown, each of these cases (setting aside those that fall within the "petty" cases exception) involves the violation of a core constitutional right.

But the history of Article III in the capital may also tell us something important about federal courts more broadly. Although many scholars have examined the history and purpose of the various exceptions to Article III, they have overlooked the history of the District and what it can tell us about other areas of our Article III jurisprudence. This final section addresses one potential implication of this history: a new limit on Congress's power to create non-Article III courts on federal land.

Today, the United States owns over one quarter of the country and up to eighty percent of the land in certain states.[453] The federal government's jurisdiction over this public land varies from "exclusive legislative jurisdiction"—in which Congress exercises sole control over the area—to a mere "proprietorial interest"—in which the government has the same rights over the area as a private land

satisfy the tenure and salary provisions of article III. If Congress and the President want to have local judges with temporary appointments, that's just too bad.").

450. These solutions might run into their own problems under the Appointments Clause. But under a functionalist approach to the separation of powers, these revisions would probably not violate the Appointments Clause. Indeed, Congress has long taken a functional approach to the Appointments Clause in the District of Columbia and the territories. *See id.* at 877, 899; *Congressional Restrictions*, *supra* note 30, at 1922–27 (noting potential Appointments Clause violations for the current D.C. judges).

451. Indeed, early versions of the home-rule bill would have done exactly that. But the House later amended the bill to ensure that the President retained the appointment power. *See* David Alpert, *DC Home Rule Almost Had... the Mayor Picking Judges*, GREATER GREATER WASH. (Nov. 20, 2012), https://ggwash.org/view/29436/dc-home-rule-almost-had-the-mayor-picking-judges [https://perma.cc/DX52-9YAP].

452. *See* D.C. COURTS., DISTRICT OF COLUMBIA COURTS: STATISTICAL SUMMARY, *supra* note 38, at 6.

453. VINCENT ET AL., *supra* note 21, at 6–9.

owner.[454] Yet the Supreme Court has construed Congress's authority over all federally owned land quite broadly. As the Court has put it, "[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, . . . '[t]he power over the public land thus entrusted to Congress is without limitations.'"[455]

This understanding of Congress's power over federal lands is significant because it suggests that Congress may create non-Article III tribunals to adjudicate federal cases on public land. Indeed, relying on *Palmore*, some circuit courts have held that Congress can assign all cases arising on land within exclusive federal jurisdiction to non-Article III tribunals.[456] And although these courts have limited their reasoning to areas of "exclusive jurisdiction" acquired under Article I, it is not clear why their reasoning should be limited as such. As a dissenting judge in one of those cases noted, the Supreme Court has recognized Congress's power to acquire exclusive jurisdiction through the Property Clause.[457] And if the Property Clause authorizes Congress to create non-Article III courts in the territories, it is not clear why it would not authorize Congress to do the same on other federally owned land.[458]

Consider one implication of such a power. In 2016, over three hundred million people visited the National Park System.[459] All national parks are federal land subject to the Property Clause, and in many national parks the federal government has acquired exclusive jurisdiction.[460] Thus, under current law, Congress could assign all federal cases arising on this land to non-Article III tribunals. Congress could, for instance, create a "National Park Court" staffed by judges appointed by

454. *See* 1 INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FED. AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 15–22 (1956). Per the Enclave Clause, Congress can only acquire "Exclusive Jurisdiction" over land if the state consents to the acquisition. *See* U.S. CONST. art. I, § 8, cl. 17; Paul v. United States, 371 U.S. 245, 264 (1963).

455. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (second alteration in original) (quoting United States v. City of San Francisco, 310 U.S. 16, 29 (1940)).

456. *See* United States v. Hollingsworth, 783 F.3d 556, 559 (5th Cir. 2015); United States v. Jenkins, 734 F.2d 1322, 1325–26 (9th Cir. 1983); *see also* Vladeck, *supra* note 31, at 754 ("*Hollingsworth* suggests that Congress *could* empower non-Article III judges to hear and decide all disputes arising on federal enclaves, entirely because of Congress's exclusive regulatory authority in such cases.").

457. *See Hollingsworth*, 783 F.3d at 569 n.8 (Higginson, J., dissenting) (citing Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529–30 (1938)).

458. *See* Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 960 (2002) (recognizing such a power).

459. Jennifer Errick, *National Parks Witnessed Record-Breaking Visitation in 2016*, NAT'L PARKS CONSERVATION ASS'N (Feb. 16, 2017), https://www.npca.org/articles/1472-national-parks-witnessed-record-breaking-visitation-in-2016 [https://perma.cc/U3RA-PGHW].

460. *See, e.g.*, 16 U.S.C. § 24 (2012) (Yellowstone National Park); *id.* § 57 (Supp. V 2018) (Yosemite, Sequoia, and General Grant National Parks); *id.* § 95 (2012) (Mount Rainier National Park); *id.* § 117 (Mesa Verde National Park); *id.* § 124 (Crater Lake National Park); *id.* § 157 (Big Bend National Park); *id.* § 163 (Glacier National Park); *id.* § 198 (Rocky Mountain National Park); *id.* § 204 (Lassen Volcanic National Park); *id.* § 256 (Olympic National Park); *id.* § 372 (Hot Springs National Park); *id.* § 395 (Hawaii National Park); *id.* § 403c-1 (Shenandoah National Park); *id.* § 404c-1 (Mammoth Cave National Park); *id.* § 408 (Isle Royale National Park); *id.* § 410a (Everglades National Park).

the President and subject to the President's removal for any reason. Or Congress could assign all such cases to existing magistrate judges.

But the history discussed in this Article—particularly, the principle of constitutional attachment—reveals an important constitutional limitation on Congress's power to assign cases on federal land to non-Article III tribunals. Just as nineteenth century courts and commentators distinguished the District from other territories on the grounds that the District originally belonged to Maryland and Virginia, today we should distinguish between federal land acquired directly from a state and land acquired before statehood. For the former, the Constitution (and specifically Article III) "ha[s] attached . . . irrevocably" and cannot be removed.[461] For the latter, the Constitution has never fully attached. So just as Congress can create non-Article III courts for the territories, Congress should have the power to create non-Article III courts on public lands that have never been part of a state. In other words, Congress can create non-Article III courts on lands that have always been under federal control, but once a state acquires land, Congress cannot remove the land from the protections of Article III simply by reacquiring it.

To see how this limit would work in practice, consider *United States v. Jenkins*.[462] There, the Ninth Circuit held that the Constitution does not require defendants on federal enclaves to be tried before Article III judges.[463] But under the theory presented in this Article, Article III would have attached to the federal enclave in question—Camp Pendleton—because Congress had acquired it from California in the 1940s, long after California had become a state.[464] In short, the principle of constitutional attachment suggests a meaningful limitation on Congress's authority to create or assign cases to non-Article III tribunals. This limitation would have important implications if Congress ever decides to fully flex its authority to assign cases on federal lands to non-Article III tribunals.

CONCLUSION

For the past fifty years, nearly everyone has assumed that the District of Columbia is an exception to Article III. The District's exceptionalism, as the Supreme Court recently observed, is based upon "the Constitution's 'plenary grant [] of power to Congress to legislate with respect to' the national capital" and "the 'historical consensus' supporting congressional latitude over the District's judiciary."[465] Or as Justice Alito explained in dissent, "the founding

461. Downes v. Bidwell, 182 U.S. 244, 261 (1901).

462. 734 F.2d 1322 (9th Cir. 1983).

463. *Id*. at 1326.

464. *See id*. at 1325 n.2. Because the case involved a misdemeanor, a narrower ruling can probably be justified under the petty offenses exception to Article III. *See* Vladeck, *Petty Offenses*, *supra* note 68, at 67.

465. Ortiz v. United States, 138 S. Ct. 2165, 2177 (2018) (alteration in original) (first quoting Palmore v. United States, 411 U.S. 389, 408 (1973); then quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion)).

generation understood—and for more than two centuries, we have recognized—that Congress's power to govern" the District is not bound by Article III.[466]

But these assumptions are incorrect. The Seat of Government Clause does not grant Congress the power to violate express provisions of the Constitution. There is no historical consensus supporting the creation of non-Article III courts in the District. And if anything, many in the Founding generation—as well as later generations—would likely have been surprised to learn that Congress could undermine judicial independence in the nation's capital.

Beyond constitutional text, structure, history, and practice, there are serious functional problems with treating the District as an exception to Article III. In theory, judges located in the capital need more—not less—protection from the political branches. And in practice, Congress has created a non-Article III court system in the District that is particularly vulnerable to political pressure.

Finally, the District's local court system undermines the claim that Congress has generally acted with political neutrality in creating non-Article III courts. Given its centrality and vulnerability, the D.C. court system has long been the target of political attacks. And the establishment of a non-Article III court system in the capital is a case study of how the politics of crime and race can affect judicial independence. The Supreme Court has long said that it would police congressional "effort[s] to aggrandize [Congress] or humble the Judiciary."[467] But it may be time for us to take another look at the court system in the Justices' own backyard.

466. *Id*. at 2196 (Alito, J., dissenting).

467. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1945 (2015) (collecting cases).