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Foreword: Symposium on Federal Judicial Power

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SYMPOSIUM ON FEDERAL JUDICIAL POWER

FOREWORD

Despite its language and position within the Constitution, article III does not clearly define the federal "judicial Power." While articles I and II are specific grants of power to the legislative and executive branches of national government, article III is rather murky. It serves more to structure the federal judicial function than to create it. Article III simply vests the judicial power in a Supreme Court and describes the types of controversies to which the judicial power applies, but does not define that power. This textual omission, coupled with language giving Congress the power to create lower federal courts and regulate the appellate jurisdiction of the Supreme Court, essentially empowers Congress to implement the federal judicial power.[1] Thus, although article III provides for the federal judicial power, congressional legislation is often the true source of specific judicial powers.

Just as it contributes to other areas of substantive law, the federal courts' interpretation of statutes defining judicial powers serves to shape the judicial function. The judiciary's separate view of its own proper constitutional role also has great impact. In *Marbury v. Madison*,[2] the Supreme Court exercised the power of judicial review—a power granted by neither explicit constitutional provision nor federal statute—to prevent Congress from enlarging the jurisdiction of the federal courts. The current Supreme Court, in contrast, has validated attempts by Congress to assign arguably legislative and executive functions to article III judges.[3] Thus, Congress and the federal courts together continue to define the federal judicial power. This Symposium attempts to highlight several insightful examples of that joint effort.

The law of federal appellate jurisdiction is an excellent context in which to examine the interplay between congressional statute and judicial interpretation. In "Toward a Unified Theory of the Jurisdiction of the United States Courts of Appeals," Professor Thomas E. Baker notes Congress' statutory preoccupation with the middle tier of the federal courts. Through interpretation and application, the courts, in turn, have been able to shape the federal appellate power. For example, federal statute allows appellate courts to review "all final decisions of the district courts of the United States

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1. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-5, at 33 (1978). "[O]utside the Supreme Court's original jurisdiction, federal courts cannot *use* their power to review the constitutionality of any government action unless Congress first authorizes the federal courts to exercise jurisdiction." *Id.* (emphasis in original).

2. 5 U.S. (1 Cranch) 137 (1803).

3. Mistretta v. United States, 109 S. Ct. 647 (1989) (rejecting separation of powers challenges to judicial participation on the United States Sentencing Commission); Morrison v. Olson, 108 S. Ct. 2597 (1988) (rejecting separation of powers challenges to article III court established to appoint independent prosecutor).

. . . ."[4] However the finality doctrine, the collateral order doctrine and "the twilight zone" are all equally relevant judicial contributions to defining the appellate review power. Thus, to a large extent, "[i]t is, emphatically, the province and duty of the judicial department, to say"[5] what its powers are.

Professor Baker's article also represents the exercise of an increasingly important judicial function. The article is an adaptation of a primer commissioned by the Federal Judicial Center, an agency within the judicial branch whose purpose is "to further the development and adoption of improved judicial administration in the courts of the United States."[6] The primer is designed as a reference tool for appellate judges on the federal bench. This laudatory goal is less controversial than other "administrative" activities assigned to the federal judiciary. For example, dissension between Chief Justice Rehnquist and other members of the Judicial Conference of the United States recently made headlines. The committee of federal jurists was created by statute to study court procedures and to recommend legislation.[7] Although the full committee voted to delay action on a proposal to limit appeals by death row inmates, the Chief Justice sought immediate congressional approval of the proposal. In response, fourteen senior federal judges issued a letter seeking assurance that Congress consider dissenting judicial voices.[8] Thus, by assigning new powers to the judiciary, Congress alters that branch's political role as well.

Article III may not expressly deny the judiciary such administrative powers, but it does limit the judicial power to "Cases" and "Controversies." This article III separation of powers doctrine serves to define the powers of the courts in relation to the political governmental branches. Because the issue of the courts' proper role usually arises when the judiciary is vested with arguably legislative or executive functions, ensuring the independence of the courts is often a self-assigned function. In his article "Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*," Professor Martin H. Redish criticizes the current Supreme Court's willingness to rationalize breaches of the separation of powers doctrine. Under attack is the Court's *ad hoc* balancing approach used in *Morrison v. Olson*[9] and *Mistretta v. United States*.[10] Professor Redish proposes a rule which limits article III courts and judges to adjudicating cases and controversies, and to performing administrative tasks directly related to that adjudicatory function. Adoption of this rule would not only reverse *Morrison* and *Mistretta*, it would also invalidate a generally well-

4. 28 U.S.C. § 1291 (1982).
5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
6. 28 U.S.C. § 620 (1982 & Supp. V 1987).
7. 28 U.S.C. § 331 (1982 & Supp. V 1987).
8. *See* N.Y. Times, Oct. 6, 1989, at 1, col. 4.
9. 108 S. Ct. 2597 (1988).
10. 109 S. Ct. 647 (1989).

accepted federal judicial power—the promulgation of Federal Rules of Civil Procedure and Federal Rules of Evidence under the Rules Enabling Act. As disruptive as Professor Redish's proposal may be, the potential for locating other nonjudicial functions within the federal courts may be even more troublesome.

A separate student note discussing the *Mistretta* decision suggests the implications of permitting Congress to require the extrajudicial service of article III judges for essentially political purposes. The note details the historical importance placed on a judiciary separate from the political branches and the role of an independent judiciary within the separation of powers framework. The pragmatic reasoning of the *Mistretta* majority is viewed as a dangerous precedent for the further proliferation of "independent agencies" within the counter-majoritarian judicial branch. Moreover, the note explains how the true independence of the federal judiciary, which is so essential to its role, is similarly diminished.

Just as federal courts define the judicial function within the separation of powers constraints of article III, they also define the limit on the "Judicial power" imposed by the eleventh amendment. From *Hans v. Louisiana*,[11] which based an expansive interpretation of the eleventh amendment in part on the common law sovereign immunity doctrine, to *Ex parte Young*,[12] which created an often-criticized fiction allowing federal suit against state officials, the Supreme Court has shaped the contours of the eleventh amendment limit on the federal judicial power. As several Symposium authors note, this judicial contribution has also muddled this area of the law. In several decisions last term the Supreme Court continued to define the federal judicial power over the states. In perhaps the most important of those decisions, the Court held that Congress may abrogate the states' eleventh amendment immunity when it legislates pursuant to the commerce clause. However, before finding that Congress permitted states to be sued in federal court the Court will require Congress to make a "clear statement" of its intent.[13]

Criticism of the Court's clear statement rule is the subject of a colloquy between two eleventh amendment scholars. In "Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term," Professor Erwin Chemerinsky contends that the recent decisions perpetuate an incoherent doctrine based on judicial compromise and irrelevant historical analysis. Professor Chemerinsky points out that the clear statement rule is at odds with the views of eight Supreme Court justices. Moreover, the unprecedented requirement of unequivocal textual support for congressional intent is justified by neither the sovereign immunity nor the diversity jurisdiction theories of the eleventh amendment. Thus, Professor Chemerinsky views the recent decisions as an attempt by some members of

11. 134 U.S. 1 (1890).
12. 209 U.S. 123 (1908).
13. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).

the Court to preclude state liability in federal courts. The author suggests that the Court shift its focus from the intent of the Framers and instead determine the appropriate role of state sovereign immunity in the modern American system of government.

Professor William P. Marshall finds a separate basis of criticism for the clear statement rule. In "The Eleventh Amendment, Process Federalism and the Clear Statement Rule," Professor Marshall contends that the theory of "process federalism" underlies the basis for the recent Supreme Court decisions. That theory presupposes that the states do not need judicial protection from the federal government because Congress is comprised of representatives from the states. This premise supported the Supreme Court's rejection of a tenth amendment challenge in *Garcia v. San Antonio Metropolitan Transit Authority*.[14] Thus, the clear statement rule merely compels Congress to be aware of the states' interests at stake when creating state liability in federal court. However, Professor Marshall notes the inherent inconsistency of permitting Congress to abrogate eleventh amendment immunity because Congress will protect states' interests while also requiring Congress to do so explicitly in order to make it aware of what it is doing. Like Professor Chemerinsky, Professor Marshall suggests that the clear statement rule allows the Court to frustrate congressional intent when it considers state liability improper.

Professor Michael Wells examines the tension between two powers of the federal judiciary which have neither a constitutional nor a statutory basis. In his article "The Unimportance of Precedent in the Law of Federal Courts," Professor Wells first examines the judicial doctrine of stare decisis. Adherence to precedent is the judicial vehicle for effectuating predictable law and efficient decisionmaking. Stare decisis, however, impairs the judicial function of improving the law. Because the duty to reform the law varies according to the type of law involved, Professor Wells argues that judicial reform is most important in the area of federal jurisdiction. The law of federal courts defines the proper role of the judiciary within a system of separation of powers and federalism. Thus, precedent is properly a weak restraint in federal court cases. Supreme Court judicial activism in this area is not surprising, Professor Wells contends, because the Court is a political body with a certain interest and expertise in federal court law. Perhaps the individual jurist ultimately places an imprimatur on federal judicial power.

The interplay of congressional statutes and judicial doctrine is also highlighted in Paul J. Kozacky's article, "Narrow Venue Statutes and Third Party Practice: Some Third Party Defendants Get To Go Home." The author examines case law which applies the narrow venue provisions of substantive statutes to ancillary third party claims. For reasons of judicial economy, the federal courts generally have not required a third party plaintiff to independently satisfy venue requirements when suing a third party defen-

14. 469 U.S. 528 (1985).

dant.[15] However, several courts have held that third party practice must yield to the restrictive venue provisions which apply to particular types of cases. The author contends that such decisions unnecessarily increase litigation costs and the size of federal dockets and thus are inconsistent with the policies underlying third party practice.

This Symposium is not intended to be a comprehensive overview of a narrow topic. The sources of federal judicial power are too many and too diffuse for an exhaustive examination. One aim of this Symposium is to demonstrate the myriad judicial duties and powers which lie outside article III. The articles collected here also offer an anecdotal view of the issues of federal judicial power. What nonadjudicative powers may Congress assign to the judiciary? Under what circumstances may a state be sued in federal court? When does a federal appellate court have jurisdiction? Should a federal court defer to precedent or should it seek to improve the law? Because defining the powers of the federal courts is so important, Professor Wells contends that precedent is appropriately a weak constraint for courts deciding such issues. Congress will undoubtedly assign new rules for the courts in the future, and the judiciary will determine the contours of those new roles. Thus, a clear definition of the federal "judicial Power" is not immediately available. Neither may it be desired. Congress and the courts themselves have combined to define the proper federal judicial powers. This successful joint effort may have been the intent of murky article III.

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15. 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1455 (1971); 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3808 (1986).

* The author was the Symposium Editor of the Volume 38 DePaul Law Review editorial board and solicited the articles for the Symposium on Federal Judicial Power. Mr. O'Neil is now an associate with the Chicago law firm of Keck, Mahin & Cate.